TRIGGERS, TRACKS AND TRENDS:

A BASIC CEAA PRIMER

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For the past twenty years the Federal Government has been legally bound to require that "proposals" or "projects" meeting specified criteria undergo a form of environmental impact assessment. However, as court challenges indicate, there are many issues that remain to be resolved with respect to how the highly contextual and discretionary exercise of environmental impact assessment under the current Canadian Environmental Assessment Act ("CEAA") regime applies to any given project. To provide the foundation for some of that analysis, this paper reviews the basic structure of the Act, including the purpose of the Act, key concepts, understanding the trigger mechanisms and the differences between various CEAA tracks. A general overview of the critical exercise of scoping the project is provided as this component of the environmental assessment process has spawned much of the case law. The paper provides some practical tips for managing projects that trigger the environmental assessment requirements of the federal CEAA process and Alberta's environmental assessment process under the Environmental Protection and Enhancement Act. The author concludes with a discussion of some of the developing trends with the potential to significantly alter CEAA practice and process.

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I. INTRODUCTION

A. WHY DO WE DO ENVIRONMENTAL ASSESSMENTS IN THE FIRST PLACE?

In Canada, environmental impact assessment at the federal level has been both a concept and regulatory goal since the early 1970s.[1] By 1973, Canada's first formal environmental assessment structure was introduced under the auspices of a cabinet policy and an "environmental assessment and review process" ("*EARP*") designed to lead to the public review of significant proposals.[2] In addition, the inquiry process established in 1974 to review the Mackenzie Valley Pipeline by Mr. Justice Thomas Berger clearly recognized the need for an integrated approach to resource development decisions that moved the focus beyond technical regulatory review and into the realm of more fulsome review of the environmental, economic and social impacts of proposed projects. As noted in the "Synopsis Report" of the Berger Inquiry issued in 1977:

> …the problems to be addressed, from the beginning to the end, should not be limited to problems of engineering and construction. Social, economic and environmental considerations should be addressed at this early stage and throughout, with the same intensity and concern as technical and engineering questions.[3]

However, despite the recognition that a more comprehensive and integrated project-based environmental assessment process was warranted, from 1973 to 1984, the *EARP* remained a cabinet policy only, with no compliance or enforcement mechanisms.[4] In 1984, the federal environmental assessment landscape changed considerably when the government developed and

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[1] Rodney Northey, *1995 Annotated Canada Environmental Assessment Act and EARP Guidelines Order*, (Scarborough: Carswell, 1994) (subsequently, "Northey, *1995 Annotated CEAA and EARP*") at pp. 21-22 .

[2] Northey, *1995 Annotated CEAA and EARP*, *ibid.*

[3] Thomas Berger, *Mackenzie Valley Pipeline Inquiry: Synopsis of Volume Two*. Online version made available by the Minister of Public Works and Government Services, (Ottawa: 2002) online: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90463/238336/234849/A0F3S1_-_Berger_Synopsis_-_English_Version.pdf?nodeid=234850&vernum=0> (website last accessed April 29, 2009) at pp. 26-27.

[4] *Essa* v. *Canada (Atomic Energy Control Board)* (1981), 10 C.E.L.R. 142 (F.C. T.D.) at p. 143, rev'd 10 C.E.L.R. 146 *sub. nom. Tosorontio (Township)* v. *Canada (Atomic Energy Control Board)* (F. C.A.) as cited in footnote 9, at p. I-2 of Beverly Hobby, Daniel Ricard, et. al, *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora, ON: Canada Law Book Inc., 2005) (subsequently "Hobby, *CEAA: An Annotated Guide*").

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passed guidelines designed to implement the *EARP* policy under the *Environmental Assessment and Review Process Guidelines Order* ("*EARPGO*"). The Federal Government initially viewed the *EARPGO* as providing direction only. However, in 1989, the courts determined that *EARPGO* constituted legally-binding environmental assessment obligations for federal authorities.[5] As a result, by 2009, the Federal Government has developed twenty years of experience with environmental assessment processes designed to fulfill their legal obligations.

In 1987, the focus of environmental assessment as a planning tool and requirement on the federal stage was broadened when the essential role of environmental assessment in achieving sustainable development was solidified on the global stage with the release of the Brundtland Commission Report, *Our Common Future*.[6] This resulted in the incorporation of principles of sustainable development into the environmental assessment regime that replaced the *EARPGO* in 1992 when the *Canadian Environmental Assessment Act*,[7] was proclaimed in force.

Perhaps reflecting changing federal and global attitudes to environmental management generally, the environmental assessment regime in Canada has changed over time, moving from policy to prescription, and there may be many more changes immediately ahead.[8] However, despite changes in delivery and detail, the fundamental purpose of environmental assessment must be borne in mind when attempting to interpret its requirements in the context of a given

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[5] See the decision arising from the Rafferty-Alameda Dam project in Saskatchewan, *Canadian Wildlife Federation Inc.* v. *Canada (Minister of Environment)* [1989] 3 F.C. 309, 4 W.W.R. 526, 3 C.E.L.R. (N.S.) 287 (F.C. T.D.) aff'd [1990] 2 W.W.R. 69, 4 C.E.L.R. (N.S.) 1 (F. C.A.) and the later decision in the Oldman River Dam project in Alberta, *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 1 F.C. 248, 2 W.W.R. 150, 4 C.E.L.R. (N.S.) 137 (T.D.), rev'd [1990] 2 F.C. 18, [1991] 1 W.W.R. 352, 5 C.E.L.R. (N.S.) 1, aff'd [1992] 1 S.C.R. 3, 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1.

[6] Brundtland World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) Annex 1 to Document A/42/427, available online: <http://www.un-documents.net/wced-ocf.htm> (website last accessed April 29, 2009), as discussed in Northey, *1995 Annotated CEAA and EARP, supra* note 1 at pp. 1 and 2.

[7] S.C. 1992, c. 37 (subsequently "*CEAA*").

[8] See the discussion of some of the changes that may be on the horizon under section IV of this paper that follows.

project. As expressed in the early Supreme Court case dealing with the legal obligations created under the federal environmental assessment regime *EARPGO* in the Oldman Dam case:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, Environmental Approvals in Canada (1989), at p. 1.2, {SS} 1.4; D. P. Emond, Environmental Assessment Law in Canada (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.[9]

When the shift from policy in the *EARPGO* to environmental assessment legislation in *CEAA* occurred, the Act expressly stated the following purposes:

> 4(1) The purposes of the Federal Act are
>
> (*a*) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;
>
> (*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;
>
> (*b*.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;
>
> (*b*.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;
>
> (*b*.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;
>
> (*c*) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

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[9] *Friends of the Oldman River Society* v. *Canada (Minister of Transport),* 1992 CanLII 110 (S.C.C.) online: <http://www.canlii.org/en/ca/scc/doc/1992/1992canlii110/1992canlii110.html>, [1992] 1 S.C.R. 3 at p. 71, (1992), 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193, (1992), 3 Admin. L.R. (2d) 1, (1992), 84 Alta. L.R. (2d) 129, (1992), 48 F.T.R. 160.

> (*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

The key themes apparent in the stated purposes of *CEAA* under s. 4(1), including the incorporation of the precautionary principle, the promotion of sustainable development, the recognition of the need to streamline federal and provincial environmental assessment processes, the express recognition of the role of aboriginal consultation in the environmental assessment process, the need to limit transboundary effects and the desire to ensure the process engages the public are carried throughout its provisions.

When interpreting specific provisions of *CEAA* or reviewing the actions of decision-makers exercising their authority under *CEAA*, these broad purposes may have a significant practical effect. For example the courts have recently considered how the precautionary principle expressed in s. 4(1)(a) must be given effect by a review panel under *CEAA*:

> Accordingly, the scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management. As an early planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.
>
> In sum, the CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of follow-up processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.[10]

As a central feature of *CEAA*, s. 4 provides the foundation for much of the analysis of the *CEAA* framework that follows, and the central themes introduced in this section will be developed in the discussion that follows.

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[10] *Pembina Institute for Appropriate Development* v. *Canada (Attorney General)*, 2008 FC 302 (CanLII) online: <http://www.canlii.org/en/ca/fct/doc/2008/2008fc302/2008fc302.html> (website last accessed April 29, 2009). (2008) 323 F.T.R. 297, 35 C.E.L.R. (3d) 254 (F.C. T.D.) at paras. 32-33.

II. UNDERSTANDING THE FEDERAL REGIME

As cogently summarized by Linden J.A. the environmental assessment process under *CEAA* generally proceeds as follows:

> The basic framework for an environmental assessment is as follows. First, the responsible authority must decide whether the Act applies to the project and if it does, which type of environmental assessment applies. The next step is the conduct of the assessment itself. Following the assessment, the responsible authority makes a decision as to whether or not to allow the project to proceed. The final step is the post-decision activity which includes ensuring that mitigation measures are being implemented and giving public notice concerning the responsible authority's course of action.[11]

However, as with many things, the "devil is in the details", and there are many, many details to be considered when determining if the Act applies to the project and the type of environmental assessment that should be required. The discussion that follows identifies a few of the key concepts that are essential to understanding the *CEAA* environmental assessment process in practice.

A. **KEY CONCEPTS**

1. What is a "Project"?

Fundamentally, *CEAA* applies to require a form of environmental impact assessment to be conducted for all those physical works or activities that meet the definition of a "project" under the Act. *CEAA*, s. 2(1) defines "project" as follows:

> "project" means
>
> (*a*) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
>
> (*b*) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(*b*);

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[11] *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)* (C.A.), 2001 CanLII 22029 (F.C.A.), [2001] 2 F.C. 461, (2001), 27 Admin. L.R. (3d) 229 <http://www.canlii.org/en/ca/fca/doc/2001/2001canlii22029/2001canlii22029.html> (subsequently "*Bow Valley Naturalists,* FCA") at para. 19.

The question of what constitutes a "physical work" is not defined further under *CEAA*, but given the plain meaning of the words, the general view is that the definition requires some form of physical activity by humans that yields a "thing" such as a structure, building, installation, or other form of concrete result.[12] The wording of "construction, operation, modification…or other undertaking" imports the concept that *CEAA* may apply to any phase of the project life cycle from construction to decommissioning and all stages in between in relation to the physical works. The second part of the definition provides for a much narrower category of activities that may not yield a physical work, but that nonetheless may have adverse environmental effects and are expressly prescribed to be "projects" to which *CEAA* applies.[13]

2. *The Category of Excluded Projects*

Assuming that a proposed activity meets the definition of "project" under s. 2(1), the next question becomes whether the project is nonetheless excluded from the requirement to conduct an assessment under *CEAA* by virtue of the exclusions contained in s. 7(1). The first basis for exclusion of the project from the assessment requirements is that the project is listed on the *Exclusion List Regulations, 2007*[14] (basically those projects deemed to pose insignificant adverse effects). There are three schedules under the *Exclusion Regulations* that organize the categories of projects that will be excluded from the ambit of *CEAA*. Schedule 1 lists various projects that are excluded and that would occur in places other than national parks, reserves, historic sites and the like. Schedule 2 consists of excluded projects for national parks, reserves, historic sites and the like, and Schedule 3 is specific to projects associated with historic canals.

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[12] See for example the discussion of this concept in Hobby, *CEAA: An Annotated Guide, supra* note 4 at p. II-19.

[13] See the *Inclusion List Regulations,* SOR/94-637 for examples of the physical activities and classes of physical activities in various categories that are included under this element of the definition of project.

[14] SOR/2007-108 (subsequently the "*Exclusion Regulations*").

It should be noted that the Federal Government has recently proposed amendments to the *Exclusion Regulations* in the form of *Regulations Amending the Exclusion List Regulations*, SOR/2009-88 to exclude another category of projects from the requirement to conduct an environmental assessment under *CEAA*. Although not without controversy,[15] the amendment will add a new Schedule 4, which will consist of projects and classes of projects commenced under the *Building Canada Program* (the federal infrastructure plan). Provided that a project meets the conditions specified in the Schedule,[16] s. 5 of the *Amending Regulations* exempts the project from the requirement to conduct an assessment under *CEAA*. Under the *Amending Regulations*, the exclusion of this category of projects will end on March 31, 2011.

According to the Regulatory Impact Analysis accompanying the proposed amendments, over the next two years this amendment will result in removing more than 2,000 projects from the *CEAA* environmental assessment requirements, yielding a direct cost savings of $100 to $150 million.[17] From the perspective of *CEAA* as a regulatory framework, the proposed amendments considerably expand the range of projects that will be excluded under the *Exclusion Regulation.* There is concern that the new approach signals a move, albeit perhaps a short-term one, beyond excluding projects solely because they pose insignificant risks of adverse impact to excluding

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[15] See Arlene Kwasniak's, recent blog commentary, *The Eviscerating of Federal Environmental Assessment in Canada*, ABLawg (Calgary: University of Calgary, 2009) online: <http://ablawg.ca/wp-content/uploads/2009/03/blog_ak_federal_eaa_march2009.pdf> (website last accessed April 30, 2009) (subsequently "Kwasniak, *Eviscerating Federal EAs"*) .

[16] Conditions include requirements that the project is not carried out within 250 metres of a defined "environmentally sensitive area", the cost does not exceed a threshold value (generally $10 million), or if the project is located in close proximity to environmentally sensitive areas the project is conducted in accordance with an environmental management plan.

[17] See the Regulatory Impact Analysis accompanying the publication of proposed amendments to the *Canadian Environmental Assessment Act,* S.C. 1992, c. 37; *Regulations Amending the Exclusion List Regulations*, SOR/2009-88; and introducing the *Infrastructure Projects Environmental Assessment Adaptation Regulations*, SOR/2009-89 (*Canada Gazette, Part II*, March 19, 2009) online: <http://canadagazette.gc.ca/rppr/p2/2009/2009-03-19-x2/pdf/g2-143x2.pdf> (website last accessed April 29, 2009) (subsequently "Regulatory Impact Analysis, March 2009 Amendments") at p. 6.

projects on the basis of other policy drivers such as encouraging the rapid deployment of some $33 billion in economic stimulus and infrastructure development funding.

Exclusion List aside, projects that are carried out in response to a national or local emergency may also be excluded from the assessment requirements, as set out in s. 7(1)(b) and (c).

3. "Federal Authority" and "Responsible Authority"

Having determined that a project meets the definition of project and is not excluded by virtue of s. 7(1) from the assessment responsibilities, the next question is whether a "federal authority" as defined under s. 2(1) of *CEAA* will be involved in the project.

> "federal authority" means
>
> (a) a Minister of the Crown in right of Canada,
>
> (b) an agency of the Government of Canada, a parent Crown corporation, as defined in subsection 83(1) of the Financial Administration Act, or any other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,
>
> (c) any department or departmental corporation set out in Schedule I or II to the Financial Administration Act, and
>
> (d) any other body that is prescribed pursuant to regulations made under paragraph 59(e),
>
> but does not include the Executive Council of — or a minister, department, agency or body of the government of — Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the Indian Act, Export Development Canada, the Canada Pension Plan Investment Board, a Crown corporation that is a wholly-owned subsidiary, as defined in subsection 83(1) of the Financial Administration Act, The Hamilton Harbour Commissioners as constituted pursuant to The Hamilton Harbour Commissioners' Act, a harbour commission established pursuant to the Harbour Commissions Act, a not-for-profit corporation that enters into an agreement under subsection 80(5) of the Canada Marine Act or a port authority established under that Act;

Although an environmental assessment can be required where specific regulations are made that dictate that a Crown corporation is responsible to conduct an environmental assessment,[18]

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[18] Under *CEAA*, s. 8(1) if regulations under s. 59(j) of the Act have been made in relation to a Crown Corporation that is not a federal authority, the Crown Corporation may be bound to conduct an assessment as required under s. 5(1)(a) to (d) in relation to that project as if they were a federal authority.

in general, if there is no involvement of a federal authority in a project, the requirement to conduct an environmental assessment under *CEAA*, s. 5 is not triggered.

Federal authorities, in the event they are involved with the project as either a sponsor, providing project funding or in various decision-making capacities may become a "responsible authority" under *CEAA*. Under ss. 2(1)[19] and 11[20] a federal authority that becomes a responsible authority has various obligations under the Act, including the following:

- ensuring that the environmental assessment of the project is conducted as early as possible in the planning stages;
- ensuring that the environmental assessment of the project precedes the making of irrevocable decisions;
- ensuring that the environmental assessment of the project is completed (including addressing all deficiencies in the assessment) before the responsible authority exercises their discretion to grant funding, issue approvals, etc.;[21] and
- if at the conclusion of the environmental assessment it is determined that the project's adverse environmental effects are significant and cannot be mitigated and/or justified in the circumstances, the responsible authority must refuse to provide funding, issue approvals, or advance federal support for the project.

In many projects, there is more than one federal authority exercising funding or other decision-making authority over the project, and this can result in several parties becoming responsible authorities. For example, where a project involves road construction in a national park, and will consist of construction of a bridge over a waterway funded in part by a federal infrastructure program, the Minister of Fisheries and Oceans (fish and fish habitat jurisdiction),

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[19] The definition of "responsible authority" under s. 2(1) is as follows: in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted.

[20] Section 11(1) provides that: "Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project. "

[21] *CEAA*, s. 11(2).

the Minister of Canadian Heritage (parks jurisdiction), the Minister of Transport (navigable waters) and the Minister at the helm of the agency providing funding may all be considered to be responsible authorities. Section 12 contemplates this, and provides that where there is more than one responsible authority, the parties will co-operate to conduct a single environmental assessment that meets all the requirements of the various responsible authorities.

In addition, ss. 12.1-12.5 were added to *CEAA* to establish the role, powers and duties of a federal environmental assessment co-ordinator who can co-ordinate the participation of federal authorities in respect of an environmental assessment. Ostensibly, the purpose of this section was to ensure that there was a consistent approach to co-ordinating assessments that did not depend on which of the federal authorities had been chosen to be the lead responsible authority. It is, however, important to note that the role of the federal environmental assessment co-ordinator is an administrative and procedural one only, and the co-ordinator does not assume the decision-making mantle of the responsible authorities for substantive issues such as determining the project scope.

B. **COMMON *CEAA* TRIGGERS**

Having established that there is a “project” that involves a “federal authority”, the next step in the process is to determine whether the project involves the federal authority in a manner that triggers the need for an environmental assessment under *CEAA* (“triggers”), as prescribed under s. 5:

> 5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;
>
> (b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in

> part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;
>
> (c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or
>
> (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Essentially, *CEAA* is triggered where the project involves:

- A federal project proponent;
- The receipt of federal funding in whole or in part;
- The project is being conducted on federal lands; or
- Requires the exercise of decision-making authority by a federal authority (such as the decisions listed under the *Law List Regulations*, SOR/94-636).

In my experience in Alberta, common triggers are the granting of HADD (harmful alteration, disruption, destruction of fish or fish habitat) permits under s. 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14, a permit for works that may interfere with navigation under s. 5 of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, a pipeline system approval under s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7, federal funding, or work being conducted in or near a National Park or First Nations' lands.

In addition to the triggers associated with federal authorities (which account for the vast majority of environmental assessments conducted under the Act), *CEAA* also contains some very specific trigger mechanisms for projects requiring Cabinet approval,[22] projects involving Crown corporations, port authorities, band councils, the Canadian International Development Agency or

[22] *CEAA*, s. 5(2).

other authorities prescribed by the regulations as triggering the Act.[23] In addition, ss. 46-48 provide for triggering environmental assessment requirements if a project may have "transboundary" effects (essentially, the project's effects will be experienced in other jurisdictions, such as inter-provincial, international or on various types of federal or aboriginal lands).

C. DISTINCTIONS BETWEEN *CEAA* TRACKS

Having determined that the *CEAA* requirements for an assessment have been triggered, the next question becomes what kind of environmental assessment (i.e. what assessment "track"). According to recent Federal Government estimates: "Approximately 7,000 federal environmental assessments are conducted annually across the whole federal system."[24] Generally, when you indicate that an environmental assessment must be conducted under *CEAA* most proponents envision a panel review involving public hearings. However, in actual fact, greater than 99% of the assessments conducted under *CEAA* in any given year consist of either a project screening or a class screening.[25] Consequently, understanding the differences between the four types or "tracks" of environmental assessment provided for under s. 14 of the Act is essential for assessing the requirements, processes, timelines and opportunities for public consultation likely to be associated with a given project.

The first and most common level of assessment involves conducting a screening[26] of the project and issuing a report that summarizes the results of the screening ("screening report").[27]

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[23] *CEAA*, ss. 8-10.1 and s. 59.

[24] See the Regulatory Impact Analysis, March 2009 Amendments, supra note 17.

[25] See for example the statistics from the 2007-2008 fiscal year provided in the Canadian Environmental Assessment Agency's *Departmental Performance Report* (Ottawa: Canadian Environmental Assessment Agency, 2008) online: <http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/eaa/eaa-eng.pdf> (website last accessed April 30, 2009) in the table providing the "Statistical Summaries of Environmental Assessments" at p. 50.

[26] Under s. 2(1) "screening" means an environmental assessment that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1).

There are two types of screenings, individual project-specific screenings or "class-screenings"[28] as provided for under s. 19. Under s. 18(3), the responsible authority has the discretion to require public participation in the screening of a project if they are of the opinion that it is appropriate in the circumstances or where required by regulation, but public participation is not mandatory.[29] Once the screening report, addressing the requirements of s. 16(1) has been completed and any public consultation results have been taken into account, the responsible authority makes a project decision[30] under s. 20 of *CEAA*. By virtue of amendments to *CEAA* made in 2003, the responsible authority's project decision must be documented and made available to the public.[31]

The second type of assessment is a comprehensive study.[32] This type of assessment is required for projects or classes of projects that are listed in the Schedule to the *Comprehensive Study List Regulations,* SOR/94-638. The expectation is that projects or classes of projects on the

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[27] *CEAA*, s. 18.

[28] As described by the CEA Agency, a class screening is a special type of environmental assessment for a designated "class" or category of projects that are subject to screenings under the Act. *An Introduction to Class Screenings Under the Canadian Environmental Assessment Act*, (Ottawa: Canadian Environmental Assessment Agency, 2008) online <http://www.ceaa.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Introduction_to_Class_Screenings_e.pdf> (webpage last accessed May 1, 2009).

[29] Despite challenges to a responsible authority's decision not to invite public consultation before a project decision is made, the courts have consistently indicated that there is no right of public participation in respect of screenings. See for example *Union of Nova Scotia Indians* v. *Canada (Attorney General)*, 1996 CanLII 3847 (F.C. T.D.) online: <http://www.canlii.org/en/ca/fct/doc/1996/1996canlii3847/1996canlii3847.html> (website last accessed May 1, 2009), [1997] 1 F.C. 325. There are, however, criteria that have been established to provide guidance to responsible authorities to determine when public participation is appropriate; see *Ministerial Guideline on Assessing the Need for and Level of Public Participation in Screenings under the Canadian Environmental Assessment Act* (Ottawa: Canadian Environmental Assessment Agency, 2006) online: <http://www.ceaa-acee.gc.ca/1FE6A389-4547-4B5C-8DE1-1196B1AE19C9/ministerial_guideline_e.pdf> (website last accessed May 4, 2009).

[30] Basically, three decisions are possible. Where the project is not likely to cause significant adverse environmental effects (taking into account mitigation), the responsible authority can proceed to the next step of exercising their decision-making power in respect of the project by advancing funding, issuing permits, etc. Alternatively, where the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority must refuse to exercise their decision-making power in respect of the project. In the event that the responsible authority is uncertain regarding whether the project will result in significant adverse effects, or public concerns with the project warrant further examination, the responsible authority can refer the project to the Minister to further referral to a mediator or review panel under s. 29.

[31] *CEAA,* s. 16.3.

[32] Defined under s. 2(1) to mean an environmental assessment that is conducted pursuant to sections 21 and 21.1, and that includes a consideration of the factors required to be considered pursuant to subsections 16(1) and (2).

list are more likely to have significant adverse environmental effects, and therefore should be subjected to more rigorous study of the potential environmental effects than required under a screening. Examples of comprehensive study projects relevant to Alberta proponents include: the proposed construction, decommissioning or abandonment of a fossil fuel-fired electrical generating station with a production capacity of 200 MW or more;[33] the proposed construction, decommissioning or abandonment of heavy oil or oil sands processing facility with an oil production capacity of more than 10 000 m3/d;[34] the proposed construction of an oil and gas pipeline more than 75 km in length on a new right of way;[35] and the proposed construction, decommissioning or abandonment of a coal mine with a coal production capacity of 3 000 t/d or more.[36]

Reflecting the expectation that this track will be chosen for projects where there is greater likelihood of significant adverse environmental effects, projects proceeding through a comprehensive study must include in their assessment several additional factors, such as the purpose of the project, alternative means of carrying out the project, a discussion of follow up programs required in respect of the project and a review of effects on renewable resources.[37] In addition, by virtue of s. 21 and 22, the comprehensive study process has mandatory public consultation in the early stages of the assessment, in terms of setting scope and content of the study, as well as public participation while the study is being carried out, and after the comprehensive study report is completed, public comments are also invited. In an effort to support this type of public consultation in respect of comprehensive studies, s. 58(1.1) was also

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[33] *Comprehensive Study List Regulations,* SOR/94-638, Schedule, s. 4(a).
[34] *Ibid*. Schedule, s. 11(b)
[35] *Ibid*. Schedule, s. 14(a).
[36] *Ibid*. Schedule, s. 16(d).
[37] *CEAA*, s. 16(2).

added so that the Minister is required to establish a participant funding program[38] to facilitate the participation of the public in comprehensive studies, mediations and assessment by review panels.

Although the specific requirements associated with the completion of an assessment in accordance with the comprehensive study track will vary depending upon the project as scoped by the responsibility authority, in general, the practical requirements associated with preparing a comprehensive study are discussed in the *Guide to the Preparation of a Comprehensive Study for Proponents and Responsible Authorities.*[39] However, it should be noted that the *Guide to CSR Preparation* reflects the requirements prior to the 2003 amendments that added to the public consultation requirements associated with the preparation of a comprehensive study, so the more recent publication, the *Comprehensive Study Process Guide,*[40] should also be consulted to update the specific public consultation requirements.

The third environmental assessment track is a referral to a mediator. Under this track all or only part of the environmental assessment can be referred to a mediator. As prescribed by s. 29 of *CEAA* an environmental assessment will only be referred to a mediator when the interested parties[41] have been identified and agree to participate in the mediation. The terms of reference

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[38] For a discussion of this program, see the *Guide to Participant Funding Program under the Canadian Environmental Assessment Act* (Ottawa: Her Majesty the Queen in Right of Canada, 2008) online: <http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/FPFGuide_en_Jan2009.pdf> (website last accessed May 1, 2009).

[39] (Ottawa: Canadian Environmental Assessment Agency, 1997), online: <http://www.ceaa.gc.ca/013/0001/0003/comps_e.htm> (website last accessed May 1, 2009) (subsequently, "*Guide to CSR Preparation*").

[40] (Ottawa: Canadian Environmental Assessment Agency, 2008), online: <http://www.ceaa.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Comprehensive_Study_Process_Guide.pdf> (website last accessed May 1, 2009).

[41] Defined under s. 2(1) "interested party" means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious.

for the mediation are as set by the Minister.[42] If the Minister or the mediator form the opinion that a matter is unlikely to be resolved via mediation, the Minister can order that the mediation conclude, and another track for the assessment can be chosen.[43] In any event, the mediation culminates with the issuance of the mediator's report to the Minister and to the responsible authority.[44] The mediator's report has the same status under *CEAA* as a review panel report or comprehensive study report.

The fourth track, assessment conducted by a review panel appointed under s. 33, tends to be the track that most people associate with the concept of conducting an environmental assessment under *CEAA*, despite the fact that this track typically accounts for 1/10 of 1% of all assessments conducted in any given year. The requirements of a review panel assessment are set out in *CEAA* s. 34, but the panel has considerable discretion in determining how they will conduct the assessment. The powers of a review panel during the panel review are established under s. 35, and include the power to summon witnesses and produce documents. As required by s. 34(d), the review panel must ultimately, irrespective of whether the process chosen consists of a public hearing or otherwise, submit a review panel report to the Minister and the responsible authority. It is then the responsibility of the Minister to make the report available to the public in any manner considered appropriate.[45]

[42] *CEAA*, s. 30.

[43] *CEAA*, s. 29(4). It used to be that a failure in mediation resulted in an automatic referral to a review panel, but this section was amended so that a review panel is no longer the only option. See the commentary on this point in Hobby, *CEAA: An Annotated Guide, supra* note 4 at p. II-120.

[44] *CEAA*, s. 31.

[45] *CEAA*, s. 36.

D. **THE "ART" OF PROJECT SCOPING**

Having decided on the track that the environmental assessment is required to take under s. 14, the responsible authority, or Minister (if the project has been referred by the Minister to mediator or review panel) is required under s. 15 to determine the scope of the project (i.e. what activities and/or undertakings will be considered part of the project for the purposes of the environmental assessment). There are significant practical consequences associated with this decision, because the scoping decision decides what is in and what is out of the assessment, so obviously, a narrowly defined project scope can affect the selection of the appropriate track for the environmental assessment, as well as the environmental effects identified and assessed in any given case.

As the Act is silent on the considerations that a responsible authority or the Minister should consider when making their assessment of the appropriate scope for the project, and this decision has such significant ramifications for the entire environmental assessment requirements applicable to a given project, the project scoping exercise has generated a considerable body of case law.[46] Although much remains to be decided, including the interrelationship between the project scoping exercise and the selection of the appropriate assessment track,[47] some guidance has emerged.

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[46] A complete discussion of the decisions attacking the scoping exercise is beyond the scope of this paper; for a good summary of the decisions see the analysis of s. 15 in Hobby, *CEAA: An Annotated Guide, supra* note 4 at pp. II-64 to II-73.

[47] See for example the outcome of the appeal that is currently before the Supreme Court in S.C. Docket#: 32797 *MiningWatch Canada, et al.* v. *Minister of Fisheries and Oceans, et al.*, appeal from the Federal Court of Appeal decision *Canada (Fisheries and Oceans)* v. *MiningWatch Canada*, 2008 FCA 209 (CanLII) online: <http://www.canlii.org/en/ca/fca/doc/2008/2008fca209/2008fca209.html> overturning *MiningWatch Canada* v. *Canada (Fisheries and Oceans)*, 2007 FC 955 (CanLII) online: < http://www.canlii.org/en/ca/fct/doc/2007/2007fc955/2007fc955.html>, [2007] F.C.J. No. 1249, 2007 FC 955.

The starting point is that the courts will show considerable deference to the project scoping decisions made under s. 15. The approach, as stated by the Federal Court of Appeal in the *Bow Valley Naturalists Society* case:

> The Canadian Environmental Assessment Act was not intended to eliminate any and all development in the national parks. One of its stated purposes is to ensure sustainable development. Neither was the Act intended to provide a rigid structure for conducting environmental assessments, as each set of circumstances requires a different type of assessment, different scoping and different factors to be taken into consideration. While the dictates of the law must be followed, the process is a flexible and sometimes confusing one.[48]

Case law and guidance sources such as the *Responsible Authority's Guide*[49] suggest that although the Act is silent on the scoping exercise, the way to draw the lines around the project to be reviewed in the environmental assessment is to ensure firstly that the principal project (e.g. the physical work or undertaking that has triggered *CEAA*) is included. The controversial part of the scoping exercise is usually engaged with respect to the second branch of the test determining what is "accessory" to the principal project. The *Responsible Authority's Guide* suggests that two criteria should be used: interdependence and linkage. If the principal project cannot proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project. In addition, if the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may also be considered as a component of the scoped project.[50]

Given the significance of this decision for the responsible authority, injecting some certainty into and streamlining the process of scoping for major development proposals was considered a

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[48] *Bow Valley Naturalists,* FCA, *supra* note 11 at para. 77.

[49] See specifically the *Responsible Authority's Guide*, Chapter 1.4, Step 1: Scoping. Canadian Environmental Assessment Registry (online publication): <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=3939C665-1&xml=3939C665-FB3D-43E3-9763-5C1E57840A25&offset=14&toc=show> (website last accessed May 4, 2009).

[50] *Bow Valley Naturalists,* FCA*, supra* note 11 at paras. 25-27.

sufficient priority for the federal government to introduce, in late 2005, a *Cabinet Directive on Implementing the Canadian Environmental Assessment Act*.[51] The *Directive* and subsequent guidance regarding its implementation was intended to provide direction regarding how responsible authorities should determine the appropriate scope of major development projects that had specific regulatory triggers. Although responsible authorities reviewing any given project retain their open-ended discretion to determine the scope of the project, under the *Interim Approach for Determining Scope of Project for Major Development Proposals with Specific Regulatory Triggers under the Canadian Environmental Assessment Act* the Federal Environmental Assessment Projects Committee suggested that a general approach become the starting point for the responsibility authority's project-specific scoping exercise.

Under the suggested approach, those aspects of the project that function as triggers under s. 5 must be included in the project scope. Secondly, "non-trigger" components should also be included on the basis of the following assessment:

> Determination of which non-trigger components should be included in the project scope will be based on a balanced, risk-management approach and consideration of three criteria:
>
> - the nature of the federal interests in question and potential environmental risk to them;
>
> - the operational inter-connectedness between the non-trigger components in question and the trigger components; and
>
> - the extent to which the potential adverse environmental effects related to matters within federal jurisdiction to be caused by the component will be considered and mitigated through other regulatory and environmental assessment processes.[52]

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[51] The Directive is available as attachment 6 to the *Compendium of Resource Documents in Support of the Interim Approach for Determining Scope of Project for Major Development Proposals with Specific Regulatory Triggers under the Canadian Environmental Assessment Act*, (Ottawa: Canadian Environmental Assessment Agency, 2008) online: <http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/compendium_e.pdf> (website last accessed on May 1, 2009) (subsequently the "*Major Development Compendium*").

[52] *Interim Approach for Determining Scope of Project for Major Development Proposals with Specific Regulatory Triggers under the Canadian Environmental Assessment Act* attachment 1 to the *Major Development Compendium*, *ibid.* at p. 3.

Just how complex this "streamlined" approach to the project scoping exercise can become in practice is illustrated when you apply the "Scope of Project Determination Worksheet" included in the *Interim Approach*[53] to a specific project. Needless to say, the scope of project assessment is more art than science, and responsible authorities must be prepared to document and defend their scoping decision.

E. CONDUCTING THE ENVIRONMENTAL ASSESSMENT

Once the scope of the project has been decided, the environmental assessment must be completed in compliance with the mandatory requirements of s. 16(1)[54] and if the environmental assessment is conducted under the comprehensive study, mediation or review panel tracks, the requirements of s. 16(2) must also be considered. The scope of the factors considered under s. 16(1) and (2) is to be determined by the responsible authority or the Minister (if it is a referral to a mediator or review panel). Although the responsibility for ensuring the assessment conducted meets the requirements of *CEAA* is on the responsible authority, unless the federal authority is the project proponent, the responsibility for actually conducting the environmental assessment and generating the information required to meet the scope of the environmental assessment is generally met by the project proponent.

III. DANCING WITH THE HYDRA: MANAGING FEDERAL AND PROVINCIAL ENVIRONMENTAL ASSESSMENTS

As noted in the discussion of federal authorities and responsible authorities above, it is not unusual to have several potential federal authorities who could exercise decision-making authority to become a responsible authority under *CEAA*. As one court observed it may be said

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[53] *Major Development Compendium*, *ibid.* at p. 8.

[54] *Friends of the West Country Association* v. *Canada (Minister of Fisheries and Oceans)*, FC (1999) CanLII 93979 online: <http://www.canlii.org/en/ca/fca/doc/1999/1999canlii9379/1999canlii9379.html> (F.C.A.) [2000] 2 F.C. 263 at paras. 25-27.

that environmental assessment can become a "hydra-headed approval and control system where the initiating department may, as the evidence discloses, apply either head to do what ostensibly it is legally authorized to do."[55] The "heads of the hydra" under environmental assessment processes in Canada are not limited to federal authorities. On average, 160 projects are required to proceed through an environmental assessment under both *CEAA* and provincial legislation on an annual basis.[56] Alberta proponents are no stranger to "dancing with the hydra" under these federal and provincial joint review processes, with various oil sands projects,[57] run-of-the-river hydro[58] and a shallow gas infill development program on the Suffield army base[59] all recently proceeding as joint reviews.

Although the structures exist to allow for co-ordinated and co-operative environmental assessment under *CEAA*,[60] Alberta's *Environmental Protection and Enhancement Act*[61] and *Canada-Alberta Agreement on Environmental Assessment Co-operation 2005*[62] both governments are still responsible to meet the differing environmental assessment responsibilities under their current independent frameworks of legislation and policy. The challenge, as noted by

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[55] *Sunshine Village Corp.* v. *Canada (Superintendent of Banff National Park)* (T.D.), 1994 CanLII 3525 (F.C.) online: <http://www.canlii.org/en/ca/fct/doc/1994/1994canlii3525/1994canlii3525.html> (1994), [1995] 1 F.C. 420 • (1994), 28 Admin. L.R. (2d) 300 • (1994), 84 F.T.R. 273

[56] Hobby, *CEAA: An Annotated Guide*, *supra* note 4 at p. II-32.

[57] See for example, the Joint Panel Report, EUB Decision 2007-013, Imperial Oil Resources Ventures Limited Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) Fort McMurray, Alberta (CEAA, Energy Utilities Board, February 27, 2007) online: <http://www.ceaa.gc.ca/050/documents/21349/21349E.pdf> (website last accessed April 30, 2009).

[58] Decision NR 2008-03, Glacier Power Ltd. Dunvegan Hydroelectric Project, Fairview, Alberta (CEAA, Natural Resources Conservation Board, Alberta Utilities Commission, December 19, 2008) online: <http://www.nrcb.gov.ab.ca/Downloads/documentloader.ashx?id=5513> (website last accessed April 30, 2009).

[59] EUB Decision Report 2009-08, CEAA Reference No. 05-07-15620, EnCana Shallow Gas Infill Develo-pment Project, Canadian Forces Base Suffield National Wildlife Area, Alberta (CEAA, EUB, January 27, 2009) online: <http://www.ceaa.gc.ca/050/documents/31401/31401E.pdf> (website last accessed April 30, 2009).

[60] *CEAA*, s. 54.

[61] R.S.A. 2000, c. E-12, s. 57 (subsequently "*EPEA*").

[62] Available online: <http://www.ceaa.gc.ca/010/0001/0003/0001/0001/2005agreement_e.htm> (website last accessed May 4, 2009).

the Canadian Council of Ministers of the Environment ("CCME") in their recent review of how to facilitate "one project-one environmental assessment" is a daunting one.

> The application of multiple and varying EA and regulatory requirements to these types of projects creates procedural and regulatory complexity and uncertainty for proponents, the public and regulators. Historically, provincial, territorial and federal governments have attempted to harmonize the process for completion of a single EA for each project. For example, *Environmental Assessment Cooperation Agreements* exist between the federal government and the governments of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec and the Yukon. However despite these attempts, it has often proven challenging to line up the federal process with more than thirteen different provincial and territorial regimes.
>
> To achieve the mutually held objective of delivering high quality EA in a timely and predictable manner, the federal framework must operate as efficiently as possible with provincial and territorial processes. This requires that EA legislation has the provisions necessary to be able to either incorporate the requirements of other jurisdictions in their process or to be able to satisfy their requirements through another process. Further, once the legislation is in place the federal and provincial jurisdictions must be willing to implement the available tools. This challenge must be addressed by exploring new approaches which improve the coordination and collaboration among all orders of government.[63]

Although the CCME review is intended to result in regulatory changes, in the interim, proponents may be left with the sense that a federal/provincial environmental assessment feels very much like dancing with the hydra, as specific federal and provincial regulators seek to have their individual regulatory requirements met, with little regard to the requirements of other regulatory "heads" on the hydra. In this section of the paper, the framework of Alberta's environmental assessment process is reviewed, and a few practical tips are provided for proponents trying to effectively navigate their way through a joint federal/provincial environmental assessment i.e. how to tame, but not slay the hydra.

A. THE ALBERTA ENVIRONMENTAL ASSESSMENT PROCESS

If the project proposed meets the *EPEA* definition of "proposed activity"[64] the project may not only trigger a federal environmental assessment, it may also trigger the requirement to have a

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[63] One Project-One Assessment Sub-group of the CCME Environmental Assessment Task Group, *Potential Models for a One Project-One Environmental Assessment Approach: Discussion Paper for Public Consultation*. (Ottawa: CCME, 2009).

[64] *EPEA*, ss. 39(*e*) defines a "proposed activity" to mean any activity that has not been commenced, that is being carried on and for which an approval or registration is required.

provincial environmental impact assessment conducted. To determine whether a project fits the definition of proposed activity, one must assess whether the project is an "activity" as defined under s. 1(a) of *EPEA*.[65] Generally, if a project requires an approval or registration under legislation administered by Alberta Environment it may fit within the definition of a "proposed activity" and be required to have a provincial environmental assessment conducted in compliance with *EPEA* and the applicable regulations.

If the project would be considered a "proposed activity", the proponent is required to submit to Alberta Environment's Regional Director what is called a "disclosure document" that describes the activity and outlines the nature of the anticipated environmental impacts associated with the project (in very general terms). [66] The Director then undertakes an initial review of the project proposed and if the Director determines that the proposed activity is a "mandatory activity",[67] the Director must require the proponent to prepare an environmental impact assessment report. If it is not a mandatory activity, the activity is also reviewed to see if it is expressly exempted from the application of the environmental assessment process under the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*.[68]

If the Director determines that the activity is exempted, or that further assessment of the proposed activity is not required, the proponent can proceed to obtain the required approval, registration or amendment to authorize the activity.[69] However, if the activity is not exempted,

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[65] Essentially the question is whether the activity is an activity or part of an activity listed in the Schedule of Activities to the Act.

[66] *EPEA,* s. 44(2).

[67] Essentially, mandatory activities are large scale activities such as oil sands plants, large recreation developments, industrial plant-sites, etc. see Schedule 1 and s. 1 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93 for the listing of mandatory activities.

[68] Alta. Reg. 111/93, Schedule 2—examples of exempted activities are generally smaller types of projects such as individual oil and gas wells, maintenance and rehabilitation of water management structures, etc.

[69] *EPEA,* s. 44(1)(b).

and the Director decides, on the basis of the disclosure document that the potential environmental impacts of the activity warrant further consideration and further assessment under the process, the Director provides the proponent with notice of their decision under s. 44, and the project proponent must provide public notice of the assessment in the form required by the *Environmental Assessment Regulations*.[70] If a proposed activity may have an impact on areas where aboriginal rights or title are asserted, the Director may determine that additional First Nations consultations requirements must also be met.[71]

If the Director determines that an environmental impact assessment is required, the provisions of Part 2 of *EPEA* and the *Environmental Assessment Regulation*[72]dictate that based on terms of reference provided by Alberta Environment (after some public and/or aboriginal consultation), the project proponent is required to prepare and submit an environmental impact assessment report (the "EIA report").[73] Alberta Environment reviews the EIA report, and requests from the proponent any supplemental information they require to complete the environmental assessment. [74]

Once the EIA report is deemed to be complete, the proponent is required to provide public notice that the EIA report is complete,[75] inviting public comment and notifying the public that Alberta Environment will be making a decision regarding the project. The notice usually consists of an advertisement in the newspaper and providing specific notification directly to any persons

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[70] *EPEA*, s. 44(5) and Alta. Reg. 112/93, s. 3.

[71] "Alberta's First Nations Consultation Guidelines on Land Management and Resource Development", Part III : Alberta Environment First Nations Consultation Guidelines (Regulatory Authorizations and Environmental Impact Assessments) issued on November 14, 2007 and may be referenced on-line at: < http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf> (website last accessed May 1, 2009).

[72] Alta. Reg. 112/93.

[73] In addition to compliance with the Terms of Reference, the requirements for the report are set out in *EPEA,* s. 49.

[74] *EPEA,* s. 51.

[75] *Environmental Assessment Regulation*, Alta. Reg. 112/93, s. 8.

who may be "directly affected" by the project, or who participated in setting the terms of reference for the EIA report.

After the notice period for receiving comments on the EIA report has elapsed, the Minister determines whether the project can proceed to the regulatory agencies responsible for issuing an approval, or whether additional steps are required.[76] These additional steps can include conducting a joint panel (federal/provincial) review under *CEAA* and applicable provincial legislation such as *EPEA*, the *Natural Resources Conservation Board Act*,[77] the *Oil and Gas Conservation Act*[78], and the *Hydro and Electric Energy Act.*[79]

Although as this overview indicates, there are many parallels between the *CEAA* process and Alberta's environmental assessment process, differing approaches to public participation, project scope, consideration of cumulative effects and recognition of the constitutional limits on the authority of provincial and federal authorities can result in confusion, overlap, duplication, and sometimes contradictory requirements for project proponents. As a result, some practice pointers aimed at managing a joint federal/provincial environmental assessment process may be useful until a more integrated regulatory framework is introduced.

B. TIPS: PRACTICAL ADVICE FOR TAMING THE HYDRA

The following are some tips that may help streamline a federal/provincial environmental assessment:

- Develop and maintain a regulatory permitting plan that identifies all the regulatory approvals (federal, provincial, and don't forget about municipal or

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[76] *EPEA,* ss. 54, 55, and 57.
[77] R.S.A. 2000, c. N-3.
[78] R.S.A. 2000, c. O-6.
[79] R.S.A. 2000, c. H-16.

local government requirements) that may be required to authorize the project (in all phases of the project's life cycle);

- On the basis of the plan, identify all potential environmental assessment triggers (federal, provincial and municipal);

- On the basis of the triggers identified in the permitting plan, contact all the regulatory authorities that will be involved and make sure you facilitate co-ordination amongst all; very often duplication or contradictory requirements arise because one of the authorities is brought into the process late, and their requirements have not been met;

- Recognize the importance of the documentation that commences the process (the disclosure document for Alberta's process or project description for the *CEAA* process) and spend time on adequately defining the project—these documents provide the foundation for the environmental assessment that follows, so if they are poorly drafted, inaccurate or generic, there will be problems later on;

- In areas where aboriginal consultation will be required, make sure that your specific aboriginal consultation program fulfills the proponent's procedural requirements of consultation;

- Be informed about the varying public consultation requirements associated with the project's environmental assessment and work to the highest standard of public consultation requirements;

- Review the federal and provincial environmental assessment information requirements and specifically identify where inconsistencies or contradictions exist, then work with all agencies to develop an approach to these issues that is acceptable to all; and

- Accept that the completion of an environmental assessment (federal or provincial or both) is a pre-requisite to regulatory permitting action, and that this is a substantive requirement, not merely a matter of form.[80]

[80] In Alberta it has become standard practice for companies to submit their completed EIA Report to Alberta Environment at the same time as they submit their approval application documents. However, given the environmental assessment regulatory framework, this approach is "putting the cart before the horse." Until a compliant EIA is completed, regulatory decision-makers cannot consider the approval application, much less grant an approval. As noted in the case of *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* 1998 CanLII 9122 (F.C.A.) online: < http://www.canlii.org/en/ca/fca/doc/1998/1998canlii9122/1998canlii9122.html> [1999] 1 F.C. 483 a completed environmental assessment carried out in accordance with *CEAA* is a prerequisite to the exercise of Ministerial discretion to issue a permit or authorization. An authorization issued on the basis of a flawed EIA report is a nullity, see *Imperial Oil Resources Ventures Limited* v. *Canada (Fisheries and Oceans)*, 2008 FC 598 (CanLII) online: <http://www.canlii.org/en/ca/fct/doc/2008/2008fc598/2008fc598.html> (2008), 36 C.E.L.R. (3d) 153 (F.C.).

IV. TRENDS

A. CUMULATIVE EFFECTS MANAGEMENT

In Alberta, in the fall of 2007, the Province introduced a new "*Cumulative Effects Management Framework*" approach to environmental regulation. The key difference between the existing command-and-control regulatory approach under Alberta's *Cumulative Effects Management Framework* involves developing specific environmental performance objectives and implementation strategies for an entire planning area (an area to be defined by the Minister such as a landscape, watershed or airshed) rather than facility-by-facility regulation. As stated by Alberta Environment:

> Regional assessments and projections will be addressed over more meaningful geographic scales and time spans. The existing project-based environmental impact assessment process will be streamlined, with more focus on environmental assessments that deal directly with the shared environmental objectives for the region.[81]

Notwithstanding this policy position, it is currently unclear what practical effect the *Framework* will have on environmental impact assessment in Alberta. However, the *Framework* does raise the possibility that new projects may face the prospect of participation in future regional-scale environmental impact assessments involving several developments and that project proponents will need to address how their project contributes to compliance with the regional limits established under the *Framework.*

The need for more effective approaches to assessing cumulative effects in the context of environmental assessment is also being discussed at the federal level. Although the practical question of what a modified process will actually look like remains unclear, the rationale for modifying the existing frameworks to address cumulative effects is convincing:

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[81] Alberta Environment, Cumulative Effects Management website: <http://www.environment.alberta.ca/1930.html> (website last accessed May 4, 2009).

> The need to better assess and manage the cumulative environmental effects of human development activities is well established; however, there are constant and consistent messages that cumulative effects assessment and management in its current form in Canada is simply not working. The traditional approach to environmental assessment in Canada has been to address the symptoms or outcomes of individual project impacts, mitigating them until they are deemed acceptable, rather than also grappling with broader regional environmental change and the cumulative effects on valued ecosystem components.
>
> In those cases where regionally based and cumulative effects assessment initiatives have occurred, they frequently have not occurred explicitly within the context of a strategic framework. As a result, environmental assessment beyond the individual project has often lacked a futures-oriented focus, providing limited direction to subsequent planning and development decision making; defaulted to project-based environmental assessment processes; or focused on describing the current state of the environment, rather than also on trends projection, scenario building, and discerning desirable futures.
>
> After more than thirty-five years of environmental assessment practice in Canada, there is now a shared understanding that an explicitly regional and strategic approach to environmental assessment is required – an approach that addresses the cumulative environmental effects of human development actions and provides direction for planning and development decision making beyond that which is possible in project-based impact assessment. [82]

Undoubtedly, as environmental assessment processes continue to evolve, the existing frameworks will need to adapt to facilitate more fulsome and prospective cumulative effects assessment, but the details of how to accomplish this remain to be introduced.

B. CHANGES TO THE ENVIRONMENTAL ASSESSMENT "ADMINISTRATIVE PROCESS" FOR MAJOR RESOURCE PROJECTS

In 2007, with the stated purpose of "addressing the challenges facing the federal regulatory system for major resource projects in order to help improve Canada's competitiveness and enable more effective examination and mitigation of environmental, human health and social impacts" the Federal Government founded the Major Projects Management Office (the "MPMO").[83] The *Cabinet Directive* establishing the office sets out an "administrative process" intended to improve the efficiency and timeliness of the regulatory approval system, including

[82] Bram Noble and Jill Harriman, *Regional Strategic Environmental Assessment: Principles & Guidance* (working paper) (Ottawa: CCME, 2009) at p.4. This working paper was recently presented as part of the CCME's "Consultation on Canadian Environmental Assessment Processes".

[83] *Cabinet Directive on Improving the Performance of the Regulatory System For Major Resource Projects,* introduced in 2007 available online: <http://www.mpmo-bggp.gc.ca/documents/pdf/directive-eng.pdf>.

CEAA, applicable to "major resource projects."[84] The MPMO was intended to address the regulatory inefficiency associated with reviewing and approving major resource projects that was viewed as compromising Canada's competitiveness. It was part of a larger Regulatory Improvement Initiative designed to address regulatory overlap and duplication, as well as regulatory delays.

Although the MPMO administrative process, as enacted by the *Cabinet Directive,* and implemented by virtue of the *Memorandum of Understanding For the Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects,*[85] does not change the *CEAA* regulatory framework, the administrative process builds in timelines and accountability for timely review that are not otherwise incorporated into *CEAA*. In addition, the MPMO is also charged with implementing the approach to project scoping put forward in the *Interim Approach for Determining Scope of Project for Major Development Proposals with Specific Regulatory Triggers under the Canadian Environmental Assessment Act.*[86]

From a practical standpoint, the difference between an environmental assessment conducted under the auspices of the MPMO and a general *CEAA* project is that the MPMO project begins with the development and adoption, by the federal entities involved, of a "Project Agreement"[87] that is intended to spell out the regulatory path going forward. The contents of a Project Agreement include items clearly expected to establish milestones, timelines and expectations for the regulatory process, such as the inclusion of a work plan for the environmental assessment

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[84] As defined under the *Cabinet Directive*, *ibid.* at p. 2 to mean a "large resource project which is subject to a comprehensive study, a panel review or a large or complex multi-jurisdictional screening as defined under the Canadian Environmental Assessment Act."

[85] http://www.mpmo-bggp.gc.ca/documents/pdf/mou-pe-eng.pdf

[86] See attachment 1 to the *Major Development Compendium*, *supra* note 51.

[87] For an example of the contents of a Project Agreement, see the *Project Agreement For the Bruce Power New Nuclear Power Plant Project at Kincardine, Ontario* online: <http://www.mpmo-bggp.gc.ca/project-projet/pdf/bruceontario-eng.pdf> (website last accessed May 5, 2009).

process, a specific aboriginal consultation and engagement work plan, the identification of the federal entity's respective roles, obligations and commitments, and the establishment of project-specific service standards, including regulatory timelines.

It is expected that by defining the process and timelines under the Project Agreement at the outset, the MPMO regulatory process will be reduced from the current four-year average to two years. In addition, the MPMO itself will become the single, initial point of entry into the regulatory system, so that the project proponent is not required to submit differing documentation to several federal authorities with the potential to become responsible authorities under *CEAA*. The MPMO will also publicly track and report regarding the achievement or failure to achieve milestones set out in the Project Agreement, perhaps furthering public accountability and providing more transparency regarding the activities taking place "behind the scenes" when regulatory approval decisions are made.

There are currently 49 projects in the MPMO registry, 18 of which are in the environmental assessment phase.[88] As a relatively new process (the MPMO only having been in operation since February 2008), it is too soon to tell whether the MPMO's changes to the administrative process will truly deliver on the promise of increased efficiency and timeliness in the regulatory approvals process.

C. STREAMLINING "SHOVEL READY" ASSESSMENT

In addition to the push to streamline the *CEAA* process applicable to significant resource projects, which dates back to the days of the resource-development boom in 2006, with the current economic slowdown, the Federal Government is seeking to streamline the *CEAA* process

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[88] See MPMO regulatory tracker online: <http://www2.mpmo-bggp.gc.ca/MPTracker/search-chercher.aspx> (website last accessed May 5, 2009).

to get “shovel ready” infrastructure projects underway as part of the federal economic stimulus package. In addition to expanding the range of projects excluded from CEAA under the proposed *Regulations Amending the Exclusion List Regulations*, SOR/2009-88,[89] the Federal Government has introduced a regulatory framework aimed at “adapting” the *CEAA* process to projects that do not fit within the exclusion.

Under the proposed *Adaptation Regulations*, projects that would normally trigger *CEAA* under the federal funding trigger of s. 5(1)(b) because they will receive funding under the Building Canada Plan,[90] may substitute provincial environmental impact assessments for federal screening or comprehensive study assessments.[91] The *Adaptation Regulations* also provide that ss. 21-23 of *CEAA* do not apply to these types of projects,[92] with result that the proposed adapted *CEAA* process eliminates the public consultation requirements associated with comprehensive study assessments under s. 21, and also eliminates the ability of a responsible authority, following public consultation, to recommend that a project conducted as a comprehensive study be referred to a mediator or panel review. Similarly, the amendment eliminates the authority of the Minister under s. 21.1 of *CEAA* to order that an assessment initially on the comprehensive study track be referred to a mediator or review panel. Introduced in March, the *Adaptation Regulations* have attracted commentary and criticism already due to the significant retraction of

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[89] For more discussion of the proposed amendments to projects excluded from *CEAA*, see section II.A.2 of this paper.

[90] As specified under the *Adaptation Regulations,* SOR/2009-89, *CEAA* is adapted for “projects for which an environmental assessment is required under paragraph 5(1)(b) of the Act as a result of funding under the Building Canada Plan.”

[91] *Adaptation Regulations, ibid.* Schedule, s. 3.

[92] *Adaptation Regulations, ibid.* s. 2(2)(b) .

public consultation rights under the comprehensive study track, as well as limits on the jurisdiction to change the track of assessment once the assessment has commenced. [93]

In the Regulatory Impact Statement accompanying the proposed *Adaptation Regulations*, the Federal Government described the basis for the amendments as follows:

> The regulations that allow for substitution are consistent with ongoing federal-provincial discussions to improve collaboration between federal and provincial environmental assessment systems, including identifying measures to support the concept of "one project-one assessment." … This regulatory package puts forth targeted adjustments to the federal environmental assessment process for certain infrastructure projects funded under the Building Canada plan through existing regulatory authorities to ensure optimal efficiency. This initiative builds upon and is consistent with ongoing efforts to modernize the current federal environmental assessment process by eliminating assessments for projects posing minimal adverse environmental effects in order to focus on projects with the potential to cause significant adverse environmental effects, and by better integrating federal and provincial assessments. Through this initiative, the federal environmental assessment process will be targeted where it is needed for public infrastructure projects, duplication in federal and provincial environmental assessment processes will be addressed and unnecessary environmental assessments will be eliminated.[94]

Although the proposed amendments have a sunset of March 2011, to the extent that this approach achieves the much sought after streamlining and integration of environmental assessments, the "adapted process" may be a harbinger of things to come.

V. CONCLUDING THOUGHTS

As the preceding discussion suggests, the existing environmental assessment process under *CEAA* can be complex and confusing. Since the early days of environmental assessment in Canada in the 70s, much policy, legislation, process and procedure have developed to achieve its goals. With significant pressure to streamline, integrate and more rigorously address cumulative effects, undoubtedly Canada's environmental assessment framework will continue to evolve, as the public, regulators and project proponents are challenged to fulfill in practice the elusive promise of an integrated and effective environmental assessment process.

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[93] See for example, Kwasniak, *Eviscerating Federal EAs*, *supra* note 15.

[94] Regulatory Impact Analysis, March 2009 Amendments, *supra* note 17 at pp. 6 and 8.