Submission of the Canadian Environmental Law Association on Bill C-19: *An Act to Amend the Canadian Environmental Assessment Act*

Submitted to the House of Commons Standing Committee on Environment and Sustainable Development

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CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

517 COLLEGE STREET • SUITE 401 • TORONTO, ONTARIO • M6G 4A2
TEL: 416/960-2284 • FAX 416/960-9392 • Web site: www.cela.ca

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Introduction

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, representing citizens or citizens' groups who are otherwise unable to afford legal assistance at hearings and in courts.

CELA has a long interest in environmental assessment (EA) at both the provincial and federal levels. CELA was among the public interest interveners in the 1991 *Friends of the Oldman River* case in the Supreme Court of Canada, and recently represented the Friends of Red Hill Valley in the *Red Hill* case in the Federal Court of Appeal. CELA participated in the Canadian Environmental Network's Environmental Planning and Assessment Caucus during the development of the current federal EA law. A current CELA project at the provincial level is a comprehensive review of Ontario's *Environmental Assessment Act*.

Bill C-19, the culmination of the government's five-year review of the *Canadian Environmental Assessment Act* ("CEAA" or "the Act"), is a rare opportunity for Parliamentarians to effect improvements to this most critical federal law. The "five-year review" of the Act, conducted by the Canadian Environmental Assessment Agency (the Agency) included public meetings and consultations, but unlike the five-year review of the *Canadian Environmental Protection Act* (CEPA), there has been no thorough consideration of CEAA by Parliamentarians.

It is now time for careful consideration by Parliament of the operation of CEAA, so that the opportunity for reform is not missed. Otherwise, left in its current form, CEAA will continue to be applied to fewer projects, with little or no opportunity for meaningful public involvement, and subject to the exercise of too many discretionary powers. CELA is advocating that CEAA instead be administered by a centralized Agency that is empowered to enforce the provisions of the Act. Not only would the adverse environmental effects of federal projects be prevented; the Act would also be applied more consistently and fairly – the hallmarks of a good law.

The recommendations in the Table in Part B of this submission represent CELA's views on Bill C-19 and the CEAA as currently structured. It is our intention that the Table should assist in understanding the implications of each clause in C-19. That we have conducted this analysis should not be interpreted, however, as an endorsement of the underlying approach taken by CEAA to environmental assessment. The CELA recommendations found in the Table must be considered in light of Part A of this submission, which comprises our recommendations for a more effective federal EA law.

CELA has argued that the approach of CEAA is fundamentally flawed since it was first developed ten years ago. Part A has been written, therefore, with a view to incorporating all the changes recommended there, into a revamped CEAA. Any of the recommendations from Part A that are adopted individually would improve the Act, but only wholesale rather than selective changes will make CEAA more effective.

CELA has taken a two-stage approach to this submission. Part A is an assessment of the weaknesses of the existing Act and how it might be fundamentally improved, as an

alternative to the minor nature of the changes proposed in Bill C-19. Part A is necessitated by the fundamental weaknesses of the CEAA approach, and as a result of the narrow approach to the five-year review of the Act taken by the government, and to the proposed amendments. In Part B we assess the proposals in the bill, and make recommendations for strengthening these proposals. A “clause-by-clause” analysis is contained in the Table in Part C.

A compendium of most of the proposals found in the text can be found in Appendix B. For some of the specific recommendations concerning Bill C-19, readers should consult the relevant section of the Table. Not all of the recommendations found in the Table are replicated in Appendix B.

Part A – The Need to Reform CEAA

Basic principles

The Environmental Planning and Assessment Caucus of the Canadian Environmental Network has worked since the late 1980s on various elements of the development of federal EA. In 1988 the caucus produced a list of eight "core elements" of Environmental Assessment. Because these elements are just as useful and relevant today, they are listed here in full and referred to throughout this Part.

Essential Elements of Environmental Assessment:[1]

1. Legislation must be utilized to establish a **mandatory EA process** that is reviewed by an **independent agency**, and which results in a final and **binding decision**.
2. The legislation must contain a **broad definition of environment**, and the EA process must **apply universally to** a variety of initiatives, including **governmental policy-making**.
3. The legislation must **minimize** the amount of **discretionary decision-making** within the EA process, and must establish clear criteria to guide the planning and review of proposals in order to **ensure accountability** of decision-makers.
4. The legislation must ensure that proponents justify proposed undertakings by demonstrating:
   - That the **purpose** of the undertaking is legitimate;
   - That there is an environmentally acceptable **need for** the undertaking; and
   - That the preferred undertaking is the best of the "**alternatives to**" and "**alternative means**" considered by the proponent.
5. The legislation must provide for a **significant public role early and often** in the planning process, and thus must contain provisions relating to public notice and comment, access to information, participant funding, and related procedural matters.
6. The legislation must establish an environmental assessment process which **results in a decision** that is **implementable**, **enforceable**, **and subject to terms and conditions** where necessary.
7. The legislation must specifically address **monitoring and** other post-approval [**follow-up**] activities, and must ensure that the environmental impacts of abandoning or discontinuing the undertaking in the future are considered as part of the EA process.
8. The legislation must establish an **efficient** EA process, and must provide for joint federal-provincial reviews where necessary.

Enforceable decision

Environmental assessment decisions must be isolated from political influence as much as possible; for this reason, CELA advocates that CEAA be administered and enforced by a Canadian Environmental Assessment Agency that has exclusive authority over the Act and no conflicting obligations to proponents. Under the current arrangement, "responsible authorities" assess and decide on the vast majority of projects, with only general guidance from the Agency. There is no enforcement regime to ensure that proponents and "responsible authorities" (RAs) comply with the Act.

The Liberal Party of Canada made the following election commitment in 1992:

[1] From CELA Brief #199: "Preliminary Response of CELA to the Legislative Committee on Proposed Amendments to Bill C-13 (CEAA)" by Richard Lindgren, October 23, 1991, pp. 3-4 (emphasis added).

> The gap between rhetoric and action under Conservative rule has been most visible in the area of environmental assessment. All too often, the Conservatives have ignored the solid recommendations for environmental protection offered by public review panels. Under a Liberal government, the Canadian Environmental Assessment Act will be amended to shift decision-making powers to an independent Canadian Environmental Assessment Agency, subject to appeal to Cabinet. The Agency's relationship to government would be roughly similar to that between the CRTC and the Cabinet. [2]

The first of the core elements is at the core of the need for reform: **CELA therefore recommends that *the self-assessment system be replaced by a binding process (including enforceable decisions) administered by an independent, central Agency with the power to compel compliance with the Act***.

Some of the hallmarks of "independence" that should be considered include an "arms-length" relationship with the Minister and Department of Environment, freedom from political influence, competence, sufficient resources to meet responsibilities, and care in selecting the head or Chair of the Agency to ensure his/her independence, competence and experience with EA issues, and lack of bias. The Agency should report directly to Parliament rather than through the Minister.

Coverage: definitions of "environment", "environmental effect", "project"

In order to ensure broad, consistent coverage and minimal discretion, "environment" and "environmental effect" should be defined clearly. Difficulty has arisen because of the difference between these key definitions. In short, the definition of "environment" should expressly include the human and built environments, and "environmental effect" should expressly include the cumulative impact of projects.

The definition of "environmental effect" should include the direct effects of a project on health and socio-economic considerations (it currently includes only the indirect effects). The definition should also include both the short- and long-term effects of projects. The central test in ss. 20 and 37 should favour long-term sustainability over short-term economic considerations (see below) to ensure that project decisions tend towards environmental improvements rather than incremental degradation.

CELA therefore recommends that the definition of "environmental effect" be amended to read as follows:

> "environmental effect" means, in respect of a project,
>
> (a) any change that the project may cause in the environment in the short-term and long-term, including any [ ] change in health and socio-economic conditions, any changes that are likely to result from the project in combination with other projects or activities that have been or will be carried out, and any changes in physical and cultural heritage, in the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and

[2] "Creating Opportunity: The Liberal Plan for Canada" (Red Book I) (Ottawa: Liberal Party of Canada), p. 63.

(b) any change to the project that may be caused by the environment in the short-term and long-term, whether any such change occurs within or outside Canada.

Some practitioners have complained of the lack of clarity in the use of terms like "construction", "operation", "modification", "decommissioning", "abandonment" and "other undertaking" used in the definition of "project". Greater clarity would result if these terms were defined. There is also a grey area arising from the distinction between physical works and physical activities in the definition of "project", as in the case of gravel pit, ski lift and golf course projects.[3]

Another solution would be a simpler, more comprehensive definition of "project".

CELA recommends that the Agency be asked to report to the Committee on possible definitions for terms used in the definition of "project", namely "construction", "operation", "modification", "decommissioning", abandonment" and "other undertaking", and the pros and cons for including such definitions in the Act.

Coverage: Scope of project; scope of assessment; scope of factors to be considered

One of the most contentious matters under CEAA has been the scoping of projects and in particular, the discretion of the RA to determine what projects are properly within the "scope of the project" (s. 15).

CELA wrote in 1991 (re current subs. 16 (3):

> In our view, the scope of factors should ultimately be decided by the Minister [of Environment] rather than the responsible authority so as to avoid self-assessments that circumvent key environmental considerations. In addition, to facilitate consensus-building and public participation in the decision-making process, there should be an opportunity for the public to review and comment upon the scope of factors to be considered and upon the terms of reference for a mediation or a review panel. [4]

Writing the "interdependence" and "linkage" tests (and for combining related projects into one EA, the "proximity" test), referred to in the Agency's Responsible Authority's Guide, into s. 15 of the Act might result in greater certainty about what projects to include in an EA.

Activities related to the project should be included in the assessment (for example, where a proposed mine project triggers the Act, the construction of a smelter to process ore from the mine should be included in the EA). The exercise of discretion currently by many different EAs may prevent greater consistency in determinations of the scope of the project and the scope of the factors to be considered. It may be preferable for the Agency to make these determinations in every case, in order to help ensure consistency.

[3] See Stephen Hazell, "Canada v. the Environment, Federal EA 1984-1998" (1999, CEDF), at p. 108-109.

[4] From CELA Brief #199: "Preliminary Response of CELA to the Legislative Committee on Proposed Amendments to Bill C-13 (CEAA)" by Richard Lindgren, October 23, 1991, p. 19.

Coverage: application to all federal bodies

CELA has long advocated CEAA's application to all undertakings, including those (like Crown corporations) that fall under federal jurisdiction. Bill C-19 would allow these federal bodies to be brought partly under the wing of CEAA, but only in a piecemeal fashion. Federal bodies should all be included in the definition of "federal authority", and thus be required to conduct EAs (not "assessment of the environmental effects" of projects), with a minimum of alternative rules and processes.

CELA wrote in October 1991:

> CELA recognizes that s. 55 (j) to [(k)] of Bill C-13 permits the passage of regulations "respecting the manner of conducting assessments of the environmental effects of projects" by bodies excluded by the definition of "federal authority". In our view, this provides no assurance for two main reasons: first, the passage of such a regulation is by no means mandatory under this section; and secondly, even assuming such a regulation is passed, there is no guarantee that the resulting process will incorporate the essential elements of sound EA … [5]

There are still no such regulations, and amendments are now proposed in Bill C-19 that would allow a different regulation for each different federal body. In ten years only one regulation applying to such bodies has been developed (the Canada Port Authorities Regulation, SOR/99-318). There is little reason for optimism that numerous regulations are likely to be developed now.

The use of the phrase "in accordance with any regulations made under …" in the Act (notably in current section 8 respecting Crown corporations) has been controversial in the past.

This language has been interpreted by the government to mean there is no responsibility to adhere to obligations in the absence of such regulations. While it is proposed to clarify this matter in provisions dealing with Crown corporations (see the Table re proposed amendment in Bill C-19 to ss. 8 (1), 9 (1), 9.1 (1), 10 and 10.1), proposed provisions in Bill C-19 would add the same, controversial language to the law (see proposed ss. 12.2, 12.3 and 12.4 (2)(b)).

CELA recommends that CEAA be amended to include Crowns within the definition of "federal authority", and that para. 59 (j) be amended to require Crowns to do "environmental assessments" rather than "assessments of the environmental effects" (as recommended in the Canadian Environmental Network environmental planning and assessment caucus's Citizens' Briefing Guide to the five-year review).

Otherwise, CELA recommends deleting the words "in accordance with any regulations made under [section no.]" from current ss. 8 (1), 9 (1), 9.1 (1), 10 and 10.1, and deleting the words "in accordance with any regulations made under s. 59 (a.1)" in proposed ss. 12.2, 12.3 and 12.4 (2) (b).

[5] Preliminary Response of CELA to the Legislative Committee on Proposed Amendments to Bill C-13 (CEAA), October 23, 1991

Purposes

The purposes section of the Act should be amended in order to strengthen the thrust of the Act. In particular, paragraphs a) and (c) should be better integrated:

> 4. The purposes of this Act are:
> (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them; …
>
> (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; …

Paragraph (a) should, like paragraph (c), emphasize that projects not only receive "careful consideration", but that they also should "not cause significant adverse environmental effects". The absence of this phrase in para. (a) creates the incorrect impression that the "significant" and "adverse" criteria do not apply to projects wholly within Canada/on federal lands, when these criteria are to be applied to every project assessed under CEAA.

Paragraph (c) would serve the purpose if it did not qualify the "significant/adverse" wording with "outside the jurisdictions …". This wording suggests CEAA is concerned only with environmental effects occurring outside the jurisdiction where the project is located, a conclusion that is justified neither by the definitions of "environment" and "environmental effect", nor by the thrust of the Act as a whole, nor by EA theory.

Paragraph 4. (a) should therefore read:

> 4. The purposes of this Act are:
> (a) to ensure that the environmental effects of projects [optional: that are to be carried out in Canada or on federal lands] receive careful consideration before responsible authorities take actions in connection with them, in order to ensure projects do not cause significant adverse environmental effects; …
>
> (c) [deleted]

Para. 4 (d) should be amended to read "… meaningful public participation early and often throughout the EA process."

Any concern about the constitutional basis for the Act should be put to rest by setting out the constitutional grounding for CEAA[6] in the Preamble, something that CELA has advocated since the original development of the Act.

[6] The specific heads of federal constitutional jurisdiction to which CEAA is grounded include trade and commerce; criminal law; seacoast and inland fisheries; treaty making; Indians and lands reserved for Indians; federal spending; federal property; and peace, order and good government. For further remarks on constitutional authority for CEAA, see Judith Hanebury, "Environmental Impact Assessment and the Constitution: The Never-Ending Story" in (2000) 9 Journal of Environmental Law and Practice, pp. 169-197.

The "central test": sections 20 and 37

The Act's central test of whether a project should be approved appears in sections 20 and 37. The test turns on the following undefined or subjective terms:

- "any mitigation measures that the RA *considers appropriate*"
- "*significant* adverse environmental effects *that can [or cannot] be justified in the circumstances*"

Mitigation plays a central role in the "decisions" in sections 20 and 37 whether to allow the project to proceed. In considering whether the project is likely to cause significant adverse environmental effects, it is open to the RA to allow the project to proceed while "taking into account the implementation of any mitigation measures the RA considers appropriate".

In addition to the problematic level of discretion in the wording, the determination whether to proceed is tied to mitigation in a way that could result in a worsened environment, rather than an improved one, with every project. Gibson argues that this approach is starkly at odds with the purpose of the Act in para. 4 (b).[7] Allowing mitigation to influence the process in this way is contrary to the sustainability direction in that paragraph. Instead of lowering environmental quality, sustainability should "favour a positive shift from continued incremental degradation (unsustainable practices) to gradual [environmental] recovery" (emphasis added). [8]

Put simply, including mitigation in the Act's core determination (whether to allow projects to proceed in s. 20 or 37) runs counter to the sustainable development purpose of the Act.

Gibson refers to positive developments in this respect, namely the inclusion of sustainability criteria in two recent environmental impact statement (EIS) guidelines under CEAA. For example, the Voisey's Bay Mine and Mill EA Panel EIS Guidelines advised the proponent that the panel would consider "the extent to which the [project] may make a positive overall contribution towards the attainment of ecological and community sustainability, both at the local and regional levels". [9] Similar instructions were included in the Red Hill Creek Expressway Review Panel EIS Guidelines.

Significant adverse effects that are justified: By contrast to progressive directives by recent review panels, the Act instructs RAs in screenings and comprehensive studies to allow projects to proceed not only when adverse environmental effects may be significant, but also when they are considered "justified". As Gibson points out, this

[7] Para. 4 (b) reads: "The purposes of this Act are … (b) to encourage RAs to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy."

[8] See Robert B. Gibson, "Favouring the Higher Test: Contribution to sustainability as the central criterion for review and decisions under the CEAA", in (2000) JELP .

[9] See Section 3.3, "EIS Guidelines for the Review of the Voisey's Bay Mine and Mill Undertaking". Voisey's Bay Mine and Mill Environmental Panel, June 30, 1997. The guidelines also required the proponent to indicate how the project would adhere to the precautionary principle, and laid out criteria for that objective as well.

standard is either at distinct cross purposes to section 4 (b) of the Act or, more optimistically, the Voisey's and Red Hill panels attempted to define "justifiable" in a manner more in keeping with section 4 (b): "they have recognized the ambiguity of the law and have chosen the higher test." [10]

CELA agrees with this analysis and **recommends that sections 20 and 37 be amended** to reflect the approach favoured by Gibson and the Voisey's and Red Hill review panels, so that the main test for whether a project should proceed is "maximum durable net gain" rather than the current "minimal or justified damage". CELA has omitted from the proposed amendment the concept of the significant adverse environmental effects being "justifiable in the circumstances" because of its subjective nature.

The substitution of "sustainability" for "contribution to the environment" and "environmental effects" may be preferable to the following proposed wording; there is ample material available to update the criteria for assessing sustainability. [11] The following wording is nevertheless intended to emphasise sustainability rather than tolerating continuing harm to the environment:

> 20 (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18 (3):
>
> (a) subject to paragraph (c) (iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will make a positive overall contribution to the environment in the longer term and is not likely to cause significant adverse environmental effects, the RA may exercise any power or perform any duty or function … [the rest remains the same];
>
> (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive overall contribution to the environment in the longer term, the responsible authority shall not exercise … [the rest remains the same]; or
>
> (c) where
>
> (i) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, will cause significant adverse environmental effects or will make a positive contribution to the environment in the longer term, or
>
> (ii) public concerns warrant a reference to a mediator or review panel, the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.
>
> 37 (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23 (a), the comprehensive study report:
>
> (a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate that the project will make a positive overall contribution to the

[10] See Gibson as above.

[11] See, for example, "Specification of sustainability-based EA decision criteria and implications for determining "significance" in EA" by Robert B. Gibson (September 2001).

environment in the longer term and will not cause significant adverse environmental effects, the responsible authority may exercise any power or perform … [the rest remains the same]; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive contribution to the environment in the longer term, the responsible authority shall not exercise any power or perform … [the rest remains the same].

CELA further recommends that guidance as to the interpretation of positive contribution should be developed as provided in paragraph 58 (1) (a) of the current Act (omitting reference to "justifiable in the circumstances").

Purpose of, need for and alternatives to the project

A preliminary step in EA should be the consideration of some basic questions: what is the purpose of the policy or project? Is it necessary and can it be justified in light of possible environmental impacts? Are there alternatives that will cause fewer impacts?

The "purpose of the project" and "alternative means of carrying out the project" are mandatory considerations in comprehensive studies, mediations and review panels under the current Act (paras. 16 (2) (a) and (b)).

Consideration of "need for" and "alternatives to" the project are now discretionary in every type of assessment (para. 16 (1) (e)).

Consideration of these matters by review panels (and possibly even in comprehensive studies) is too late because

> panels are established long after the proponent has reached its conclusions about needs and alternatives and has developed a more or less detailed specific project proposal. The effect, therefore, is not to encourage timely critical attention to the nature of actual need and the range of potential feasible responses, but to force retroactive justification of decisions already made.
>
> In environmental assessment, need and alternatives requirements are likely to be effective only where proponents know from the outset of their deliberations that they will be required to show how they considered need and alternatives. To accomplish this, CEAA would have to be amended to make consideration of need and alternatives mandatory. [12]

Consideration of purpose, need and alternatives should be mandatory at the earliest stage of every EA. Section 16 of CEAA should be amended as follows:

> 16. (1) …
> (e) the purpose of the project, need for the project and alternatives to the project;
> (f) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel that the responsible authority or, except in the case of a

[12] See Robert B. Gibson, "The major deficiencies remain: A review of the provisions and limitations of Bill C-19, an Act to amend the CEAA" Journal of Environmental Law and Practice (forthcoming).

> screening, the Minister after consulting with the responsible authority, may require to be considered.
> [delete para. 16 (2) (a)]

Policy EA or "Strategic" Environmental Assessment (SEA)

As expressed in the second "essential element" of EA, the EA process must apply universally to a variety of initiatives, including government policy-making. This may be the most important recommendation that can be made for better EA, because it will result in environmental considerations being integrated more often in policies, programs and plans, before physical projects hit the drawing board. As Gibson puts it,

> Inclusion of strategic level undertakings under an amended CEAA would allow a more effective focusing of assessment resources on key matters, provide more practical and timely means of examining broad alternatives and cumulative effects, and establish a clearer base for planning and assessment of individual projects. [13]

Support for legal obligations to conduct policy EA comes from a number of quarters.

- ***The RAC reported "some support by the members of RAC for broader use of assessments of policies, programs and plans, but time did not allow for a more complete discussion of this issue."*** [14]
- A leaked 1989 Cabinet document said "exemption of policy proposals [from CEAA] would be seen as a backward step, as EARPGO can be interpreted as applying to policy initiatives, and [exemption from CEAA] would be seen as weakening the scope of the federal process". [15]
- The National Round Table on the Environment and the Economy promoted SEA in 1990, "making public its advice to the Prime Minister on strengthening EA Reform by opening up policy assessment to public scrutiny". [16]
- "The Environment: A Liberal Vision" (Discussion Paper by Paul Martin, M.P., Critic for the Environment, February 1992) said "Canada's EA legislation needs to be strengthened so the process is made more comprehensive, independent and effective." Citing the Brundtland Commission and Canada's National Task Force on Environment and Economy, the paper continued,

  > governments must be held accountable for their projects, programmes, policies and legislation to ensure they support development that is ecologically sustainable. This view is held strongly by the public. Unless we put in place a tough and effective system to assess the environmental impacts of our decisions, we can be certain that the public will assume this function in a most critical way on our behalf. On the other hand, by showing leadership in EA, we will set a positive example of integrating economic and environmental decision making.

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[13] See Robert B. Gibson, "The major deficiencies remain: A review of the provisions and limitations of Bill C-19, an Act to amend the CEAA", Vol. 1 (Autumn 2001) *Journal of Environmental Law and Practice*, pp. 83-103.

[14] Recommendation 17.1, RAC 5YR Report. Moreover, the RAC said (Recommendation 17.2 [no consensus]): "There should be provision in the Act requiring the Agency to report on the results of the implementation of the Cabinet Directive on Strategic EA."

[15] Cabinet Document titled "FEARO" [Federal Environmental Assessment Review Office], "SECRET" (November 1989). Cited in "Reforming Federal EA: Submission of the EA Caucus on the Canadian Environmental Assessment Act, Bill C-78" (November 1990), at p. 11.

[16] "News Release", NRTEE (October 23, 1990).

> One of our priorities should be to pass legislation that would make Canada a world leader in the field of EA. As Jean Chrétien has noted …, the federal EA agency should "play the same watchdog role with respect to the environmental impact of decisions as the Treasury Board does in regard to spending impacts. This would … provide a cost-effective enhancement of the planning process through minimizing environmental impact and future remedial costs.[17]

The Commissioner of the Environment and Sustainable Development expressed concern in his 1998 report that "without EA of programs and policies, federal departments and agencies may not be able to implement the government's sustainable development objectives". [18] The Commissioner went on to note, based on a study conducted by the Agency, incomplete implementation of the *1999 Cabinet Directive on the EA of Policy, Plan and Program Proposals*. [19] Incredibly, he noted that

> officials preparing these EAs do not necessarily consult other departments with environmental expertise or their own experts in project EA. … In a couple of departments, the senior officials to whom we had been referred as those responsible for the preparation of Cabinet documents either were not aware of the existence of the Cabinet directive or did not know how it was being implemented. [20]

The 1999 Cabinet Directive replaced the original, five-page 1990 directive. The current version is one page long and uses words like "Ministers expect" (replacing "a non-legislated EA process is required"), omits the original document's explanation of the connection between the Directive and the Act, and omits the intention that a public statement describing the results of the strategic EA accompany announcements of policy initiatives "as appropriate".

The 1999 Directive comes with a thirteen-page "guidelines" document and is intended to "clarify" the obligations of departments and agencies, and to "link EA to the implementation of Sustainable Development Strategies", the latter recommendation having been made by the Commissioner.

The 1999 Directive exhorts departments and agencies to "use existing mechanisms to involve the public", but does not require an announcement or disclosure of the results of policy SEAs.

In short, the 1999 version looks like an attempt to downgrade both the obligatory nature and the profile of the directive. That a "directive" should be restructured in this way (downgrading the rules for conducting SEA to a "guideline") demonstrates the resistance of government departments to the implementation of SEA obligations.

The commitment and obligation to conduct SEAs should be clarified and cemented in legislation. Canadians cannot rely on the government's commitment to conduct SEAs if the commitment lacks a legislative base.

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[17] Both quotations from p. 23, "The Environment: A Liberal Vision".
[18] Commissioner's report, at para. 6.95.
[19] Government of Canada, *The 1999 Cabinet Directive on the EA of Policy, Plan and Program Proposals* (Ottawa: Minister of Public Works and Government Services Canada and CEA Agency, 1999) ("the Cabinet Directive").
[20] At para. 6.97.

CELA recommends the inclusion of SEA in federal EA law, in one of three ways:

- Include in CEAA by amending definition of "project" to include "policies, plans and programmes", making necessary changes to CEAA;
- Include SEA in CEAA by appending a parallel SEA process to the current CEAA, with necessary changes to CEAA (see Appendix A for draft provisions); or
- Legislate a parallel SEA process by enacting a Canadian Strategic Environmental Assessment Act (see Appendix A for draft provisions).

This recommendation should be seen as intended to integrate environmental, economic and social decision-making, to which members of Cabinet committed themselves in the 1995 *Guide to Green Government*.[21] The authority necessary to be wielded by the Agency for administration of EA obligations could be compared, on a different scale, to that currently wielded by Treasury Board and the Department of Finance in economic matters.

Cabinet secrecy requirements may make SEA processes less public in some circumstances; this requirement is reflected in a draft law that can be found in the Appendix. However, including public consultation in the earliest stages of policy development need not compromise Cabinet confidences. [22]

Public involvement

The Act is premised on public participation in decision-making:

> … WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing

[21] *A Guide to Green Government* (Government of Canada. Hull, Quebec, 1995). The introduction to the Guide, called "Turning Talk Into Action" and signed by the Prime Minister and every member of Cabinet, cites the government's actions intended to integrate sustainable development into the way government defines its business and makes its decisions, saying "This is why we set up the independent Canadian Environmental Assessment Agency to better integrate environmental considerations into project planning" (see http://www.sdinfo.gc.ca/Eng/Docs/GGG/guide_a.cfm). (The government does not elaborate on why it considers the Agency to be "independent".)
The Guide describes EA as follows (see http://www.sdinfo.gc.ca/Eng/Docs/GGG/guide_II_1.cfm):

> Environmental assessment requires systematic consideration of social, economic and environmental factors in policy, program and project development and decision-making. It allows for the formulation and selection of alternatives which support sustainable development and the introduction of measures to ensure that negative social, economic and environmental impacts are avoided or minimized.
> The federal government has made a significant commitment to environmental assessment. In 1990, the Government directed all departments to address the environmental implications of their new policies and program proposals submitted for Cabinet consideration. Under the *Canadian Environmental Assessment Act*, proclaimed in January 1995, potential environmental effects must be identified early in the project planning process so that alternatives can be considered and mitigative measures introduced.

[22] See "Assessment of Policies and Programs Under the CEAA – Recommendations for Reform". Chris Rolfe, West Coast Environmental Law Association and Robert Gibson, University of Waterloo (April 10, 1994) (Appendix 3 to Joint Submission by West Coast Environmental Law Association and Sierra Legal Defence Fund to the CEAA 5 Year Review, 2000).

> access to the information on which those environmental assessments are based; … [from the Preamble]
>
> 4. The purposes of this Act are: …
> (d) to ensure that there be an opportunity for public participation in the environmental assessment process.

Despite these pronouncements, the Act could be improved greatly in its opportunities for meaningful public involvement.

CELA recommends that the public be given an opportunity for notice and comment at every stage of the EA. See the "public notice and comment" recommendations at the end of this submission.

Public Registry

The fifth "essential element", that "legislation must provide for a significant public role early and often in the planning process, and thus must contain provisions relating to public notice and comment, access to information, participant funding, and related procedural matters," depends on a system of organizing that information in a way that is accessible to the public.

In 1998, in his audit of screening-level EAs conducted the then Commissioner of the Environment and Sustainable Development wrote:

> … fewer than half of the 187 projects we reviewed had been registered in the Index before the assessment was completed and a decision made. More than 10 percent of the projects we reviewed still had not been registered at the time of our review. [23]

While these may be considered administrative problems (the Agency's response to the Commissioner's report was that "an upgraded version of the FEAI will be easier to use by government departments and will encourage more timely data filing"), CELA views this as a compliance problem, and further rationale for legal requirements to give public notice of the various stages of the EA. The Agency should be empowered to enforce this obligation.

The proposals in C-19 would eliminate the current requirement (s. 55) that the RA maintain a "public registry" for each project subject to CEAA. The project registry is usually located at the RA's regional office closest to the proposed project. There is currently no requirement that the registry be "electronic". The Agency keeps a *post-facto*, Internet-based index of projects. This "Federal Environmental Assessment Index"[24] is not to be confused with the registry currently referred to in s. 55, and includes only basic information about project EAs.

In the C-19 proposal, documents relevant to a project would be required (subject to the restrictions set out below) to appear on the proposed electronic Registry administered by the Agency.

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[23] Commissioner's report, at para. 6.62.
[24] http://www.ceaa-acee.gc.ca/0008/index_e.htm.

The proposal to centralize the Registry has merit, and is in keeping with our view that the Agency should have greater authority in implementing the Act generally. However, some provisions may represent a step backwards because they actually have the potential to make project documents less accessible than is currently the case.

For example, there are no timelines for publication of documents, other than the obligation to give notice of "commencement" of an EA (see proposed para. 55 (2) (a)), and the existing requirement in s. 36 to make a mediator's or review panel's report available to the public "in any manner the Minister considers appropriate."

Also, C-19 proposes a list of documents that would have to be listed. The current approach leaves the possible range of documents open-ended, which is preferable in ensuring that all important documents are accessible to the public.

It cannot be assumed that an exclusively electronic registry will provide better public access to EAs. Not all Canadians have access to the Internet, and the proposed Registry would not require all relevant documents to be posted. Current technology easily allows posting of documents through links, or by scanning to "PDF" format. Regional offices of the RA closest to the proposed project should provide hard copies of all documents meeting the criteria in current subs. 55 (3), and these same documents should be available through the proposed electronic registry. **These should be mandatory obligations of every EA**.

Self-assessment

The self-assessment orientation of the Act needs to be rethought, and decision-making centralized. The Commissioner of Environment and Sustainable Development said:

> Most of the federal authorities operate on a decentralized basis. Decisions to authorize projects, provide funding, dispose of land, or issue permits may be made in various regional or district offices rather than at a central headquarters. As a result, EAs are reviewed by a wide variety of officials across the country. They may be dealing with different types of projects, proponents, and environments. They also may be dealing with a variety of different provincial, territorial or municipal governments and Aboriginal groups, whose attitudes may differ about the importance of EA or about what they may view as federal interference in their areas of jurisdiction. [25]

In a country as large and diverse as Canada, decentralized operations and work on EAs by specialized departments should not lightly be rejected. However, if we are serious about effective EA, the authority for oversight of federal EA operations in one agency is required in achieving greater compliance with the Act.

Compliance and Enforcement

> It is important to separate the concept of self-assessment from the need for enforcement of the EA process. Self-assessment is sometimes used as an argument against

[25] Commissioner's report, at para. 6.17.

> enforcement of the process, but this is a fundamental error. It is the enforcement of the self-assessment process that will ensure the long-term goals of this approach are met. [26]

The Commissioner of Environment and Sustainable Development noted

> circumstances where no application is made for a required federal permit because the project's proponent either is not aware of the requirement, or wants to avoid the costs related to the permitting and the EA. Penalties for not obtaining a federal permit can be much lower than the cost of going through the permitting and EA procedures. Canadian Coast Guard officials in one region told us they suspect that more than half the structures that should be requesting licenses under the *Navigable Waters Protection Act* are not. As a result, these structures do not undergo an assessment under the *Canadian Environmental Assessment Act*.

The Commissioner went on to recommend that "Federal authorities should strengthen compliance measures to ensure that all project proponents apply for required permits and licences in the Law List Regulations." [27] CELA supports this recommendation.

Institutional non-compliance with the Act [28] and uneven application of section 35 of the *Fisheries Act*, considered the most important "law list" provision to trigger the Act, were also noted by the Commissioner [29].

CELA is aware of other cases since the Commissioner's report in 1998, in which proponents have neglected to apply for relevant permits in order to avoid conducting an assessment. Non-compliance thus remains a live issue.

Federal agencies should also be given the express authority to require proponents to provide copies of development plans on request.

The Commissioner also wrote:

> The Agency could be more forceful. The Canadian EA Agency does not have the authority to interfere in decisions that are the responsibility of the RAs under the Act. However, we believe that the Agency could be more forceful in expressing its concerns when it observes problems in the way RAs are carrying out their responsibilities under the Act. [30]

Protocol requires the Commissioner generally to refrain from suggesting legislative changes that would change the balance of power in the federal government. **In CELA's view, the only way for the Agency to be more "forceful" in exercising authority is to <u>have</u> greater authority; our recommendations are made in that spirit.**

CELA recommends that a comprehensive regime for mandatory compliance be included in CEAA. A provision should be added after s. 11, making it an offence to proceed with any part of a project until a federal EA has been completed. A new offence

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[26] "Introduction to EA" in "A Citizen's Briefing Kit" (supra).
[27] Commissioner's report, at paragraphs 6.27 and 6.28; underlining added.
[28] For example, by the Atlantic Canada Opportunities Agency: see para. 6.34 of the Commissioner's report.
[29] See paragraphs 6.29 – 6.32 of the Commissioner's report.
[30] Commissioner's report, at para. 6.105.

and penalty Part of the Act should be created, setting out the penalties for violations of s. 11 and other provisions.

Monitoring and follow-up

The need for follow-up to EA is reflected in the sixth and seventh "core elements" of EA. A final decision about a proposed project should include enforceable terms and conditions to ensure that the project does not cause environmental damage. Monitoring is essential not only to prevent environmental harm by the project; it also helps to inform future policy and project planning. The capacity to monitor the performance of past EAs and follow-up programs improves the quality of future assessments and the environment.

RAs are often in a conflict of interest between their industry promotional role and their duty to implement EA, making them less likely to impose stringent requirements as conditions of allowing a project to proceed.

The Commissioner expressed concern in his 1998 report that one-quarter of follow-up measures were not made mandatory by RAs as conditions of approval.

The Act should have more stringent requirements for follow-up and the Agency should be given stronger legislative tools and fiscal capacity to require follow-up.

Effectiveness of review panels

CELA recommends that subs. 35 (1) be amended to empower review panels to hire experts, in order to improve the capacity of panels to assess information.

The Ontario *Environmental Review Tribunal Act, 2000* allows the tribunal to retain any person "having technical or special knowledge of any matter to inquire into and report to the Tribunal and to assist the Tribunal in any capacity". [31]

Projects Outside Canada: *EDC and Bill C-31*

Bill C-31, *An Act to Amend the Export Development Act and to make consequential amendments to other Acts* [32], received Royal Assent on December 18, 2001 without amendment in the Senate. Bill C-31 unfortunately entrenches parts of EDC's "environmental review" (as opposed to EA) process in the *Export Development Act*, thus eliminating the possibility of including the Export Development Corporation (EDC) within the ambit of CEAA. Bill C-31 requires EDC to make a two-part determination (determining first whether a project is likely to have adverse environmental effects despite the implementation of mitigation measures, then deciding whether EDC is justified in entering into the transaction) before entering into a transaction.

Bill C-31 is especially problematic in two respects. First, subs. 10.1 (2) would require the Board of EDC to "issue a directive" setting out criteria for the determination. In effect, these could amount to an exemption of any and all EDC transactions from review or assessment. There will be no further Parliamentary oversight of the development and

[31] S.O. 2000, c. 26, Sched. F, s. 6.
[32] S.C. 2001, c. 33.

implementation of the directive and criteria (other than the requirement that the Auditor General audit the design and implementation of the directive once every five years). Second, Bill C-31 makes no provision for the disclosure of any EAs conducted by EDC, contrary to recommendations contained in separate reports by the Standing Committee on Foreign Affairs and International Trade and the law firm Gowlings. [33] This lack of transparency offends the principles of CEAA and good EA practice.

Because CEAA should impose a comprehensive EA regime on all projects under federal government jurisdiction, CELA recommends that the Committee review the implications of Bill C-31, with a view to repealing Bill C-31 and making EDC subject to CEAA.

Periodic review

Regardless of the changes made to the Act as a result of the five-year review and Bill C-19, Parliament should have further opportunities to review the provisions and operation of the Act.

CELA recommends the following new provision:

> 72 (1.1) A comprehensive review of the provisions and operation of this Act shall be undertaken by Parliament every five years after the review referred to in subsection (1) is completed.
>
> (1.2) The Minister may refer the review referred to in subsection (1.1) to a Committee of the House of Commons as may be designated or established for that purpose, in which case the Committee shall report the results of the review to the House of Commons.

Resources for Implementation

As with any legislative initiative, proposals are only as good as the political and fiscal commitment to their implementation. With the adoption of any proposed change to implementation of CEAA must come a firm funding commitment. Not only is commitment to government-wide EA not likely to be a large one in terms of other government-wide programs, it will also prove to be an investment that saves Canadians billions of dollars over the long-term, and unquantifiable benefits in better health, cleaner air and water, and better overall quality of life.

A specific funding commitment should be made to ensure adequate levels of participant funding in all types of EA.

[33] See "Legislative Summary of Bill C-31" by Blayne Haggart, Economics Division (Library of Parliament, 28 September 2001). The Summary highlights the Bill's "unusual" delegation of Parliament's decision-making authority: the delegation is not subject to any limitations or criteria, making review by Parliament or by the public extremely difficult.

RED HILL CREEK

The recent Red Hill Creek EA case, decided in the Federal Court of Appeal on 14 November 2001, illustrates some of the interpretive difficulties with the Act. In fact, the result can be seen in some ways to conflict directly with the core purposes of the Act, especially as expressed in paragraphs 4 (a), (b) and (d) (environmental effects should receive careful consideration before RAs take action; RAs should take actions promoting sustainable development and thereby maintain a healthy environment and a healthy economy; the need to ensure an opportunity for public participation in the EA process).

The case deals with a proposed construction of an expressway in a sensitive ecosystem in Hamilton, Ontario.

The proponent (the Regional Municipality of Hamilton-Wentworth) asked whether the Act should apply at all, given that earlier expressway proposals were made before 1984 (when the EARPGO took effect). Subsection 74 (4) (the "grandparent clause") provides that "where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984", the Act does not apply unless the work "entails a modification, decommissioning, abandonment or other alteration to the project, in whole or in part" (emphasis added).

Unfortunately, the Federal Court of Appeal cited official plan designation, development charges, land acquisition and other planning activities as relevant to the central question of whether construction of the work was "initiated" before 1984.

The implications of this decision are that proponents across the country will cite long-ago planning steps in arguing that section 74(4) applies, even though no "on-the-ground" construction has commenced. CELA submits that given that the section discusses initiation of construction prior to 1984, section 74(4) is no longer necessary and should be deleted.

In addition to the grandparenting issue, section 11 requires the EA be conducted "as early as practicable in the planning stages of the project and before irrevocable decisions are made". The Court of Appeal also agreed with the Federal Court Trial Division judge that irrevocable decisions had indeed been made (by the proponent) respecting the project, so the Act could not apply. In effect, the Court found it was too late to conduct the assessment, and dismissed the appeal of the federal Ministers of Environment and Fisheries.

In CELA's view, the case also points to a need to clarify sections 5 (2)(b)(i), 8 (1), 9, 10, 11 (1) and 54 (1) and (2) because otherwise proponents will argue that irrevocable decisions have been made by them (the proponents) long ago and that accordingly, CEAA does not apply.

CELA recommends amending these sections to better express their intent as follows. Section 11(1) should be revised to read, "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, and shall be referred to in this Act as the responsible authority in relation to the project." Section 11(2) should remain as it stands. Similar amendments to sections 8(1), 9, 10 and 54(1) and (2) should be made. In other words, the words, "as early as practicable in the planning stages of the project and before irrevocable decisions are made" should be deleted in those sections.

Even more importantly, enforceable provisions ensuring compliance with the Act need to be put in place, as recommended in CELA's submission. An enforcement regime will help ensure that "federal authorities" meet their responsibilities, and that proponents have adequate incentive to comply with the Act.

The Ministers elected not to appeal the judgment to the Supreme Court of Canada.

Part B – Analysis of Bill C-19

This Part of CELA's submission contains an analysis of the provisions in Bill C-19. The bulk of this analysis is contained in the Table of Amendments. For each clause of the bill, we have assessed the impact of the clause as compared to the current Act, along with our recommendation whether to accept or reject that clause, with any further amendments. Where possible, we have cross-referenced related clauses. We have also listed the relevant recommendations of the Minister of Environment's Regulatory Advisory Committee (RAC), a multi-stakeholder group that has advised the Minister on regulatory and policy matters relating to the Act since 1992, and that produced in May 2000 a report on the five-year review of the Act. [34]

Our conclusion, based on the analysis in this Part, is that Bill C-19 would retain and build upon the flawed approach of CEAA in several respects. In the rest of this Part we provide a summary of the flaws.

The decision to remain on the comprehensive study track would be "final" (ss. 21.1 and 23 (1))

Bill C-19 amends s. 21 to require an RA to produce a report to the Minister describing project scope, the factors to be considered in the EA, the nature of any public concerns, the potential for adverse environmental effects and the ability of a comprehensive study to address these issues, and recommending whether to proceed by comprehensive study or by mediation or review panel. There is no mention of this report being made public. The new s. 21 report would not include all key considerations (such as cumulative effects, project purpose, or uncertainties), yet it is likely to result in even fewer review panels being established.

Proposed subs. 21.1 (1) would require the Minister to decide which track the EA should take, and subs. 21.1 (2) would make the Minister's decision "final", if his decision were to maintain the project on the comprehensive study track. As a result, the project could not be referred later to a review panel (see Table re proposed subs. 23 (1)).

This would seriously constrain the Minister's ability in the current Act to require closer scrutiny of a proposed project, where potential adverse environmental effects or public concern warranted it. This would interfere with the Act's purpose in para. 4 (a), namely "to ensure that the environmental effects of projects receive careful consideration before RAs take actions in connection with them". By eliminating the possibility of a review panel, a later opportunity for careful scrutiny of a project with potential significant adverse environmental effects would be eliminated. For these reasons, CELA recommends that subsection 21.1 (2) should be deleted.

As an alternative, we see merit in the proposal of other public interest groups that the comprehensive study list (CSL) become a "review panel list". All projects on the list would automatically be subject to EA by a review panel, increasing the likelihood of thorough EA of projects with possible adverse environmental effects, while also assuring "certainty of process" for proponents.

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[34] "Review of the CEAA: Report to the Minister of Environment" by the Regulatory Advisory Committee, May 2000 ("the RAC 5YR").

Federal EA coordinator (ss. 12.1 – 12.5)

The concept of federal EA coordinator has some merit, but it appears to be directed more to the five-year review's goal of process "certainty" as a benefit for proponents than to the need for better environmental assessments. Coordination of EA would be best achieved by giving the Agency binding decision-making powers, and by giving the Minister of Environment the power to enforce orders against proponents and, if necessary, against RAs.

Class EAs (s. 19)

Class EAs are a potentially valuable but underutilized tool. [35] The use of "class screenings" as a "model" for similar projects is currently provided for in s. 19, and can simplify the EA process for similar projects. With a model class EA, the model is the starting point but each subsequent project subject to the model must still be assessed against local conditions and cumulative effects.

Bill C-19 proposes a second type of class EA, namely a "replacement" class screening. No consideration of local circumstances or cumulative effects would be required, and **CELA therefore recommends** that the amendments be rejected (see table re. s. 19).

Binding, centralized EA decision-making

The Act as amended by Bill C-19 would retain the self-assessment approach, without a system for ensuring mandatory compliance. Many commentators (including the Liberal Party of Canada in its 1993 Red Book election platform) have called for binding, centralized EA decision-making by the Canadian Environmental Assessment Agency, with oversight by Cabinet and/or the Commissioner of Environment and Sustainable Development.

Project scoping

Bill C-19's proposed amendments to sections 20, 37 and 38 are constructive developments that clarify the scope of mitigation measures (subs. 20 (2.1) and 37 (2.1)) and of follow-up programs (subs. 38 (3)).

In keeping with these amendments, **CELA recommends** the addition of new subs. 15 (1.1) and (1.2):

(1.1) For greater certainty, in determining the scope of the project as required by subsection (1), the responsible authority or the Minister, as the case may be, is not limited by the Acts of Parliament that confer the powers exercised or the duties or functions performed by that responsible authority or any other responsible authority in relation to the project.

(1.2) A federal authority shall provide any assistance requested by a responsible authority in providing information related to the determination of the scope of the project.

[35] The Commissioner of Environment and Sustainable Development found that only Parks Canada had developed a class screening, and recommended that RAs take advantage of the class screening process (see paras. 6.75 – 6.79 in "EA – A Critical Tool for Sustainable Development).

It should be noted, however, that Bill C-19 proposes that current subsection 38 (2) respecting public notice be deleted. This important provision should be retained, as it obliges the RA to advise the public of its decision under section 20 or 37, any mitigation measures to be implemented, the extent to which a mediator's or review panel's report has or has not been adopted and why, and any follow-up program adopted and its results.

CELA recommends that current subsection 38 (2) be retained.

Application to federal bodies

CELA has long advocated more universal application of EA law to federal bodies. CEAA's predecessor, the EARPGO, applied to most federal authorities (but not to Crown corporations). The enactment of CEAA in 1995 therefore meant reduced application of federal EA law to federal bodies. Crown corporations, harbour commissions, etc. are not "federal authorities" as defined by CEAA.

The Environment Minister has proposed "to develop regulations for selected Crown corporations, recognizing their unique and diverse circumstances, so that the projects they undertake have the benefit of an EA." [36] The power to make regulations for these bodies has been in place since CEAA came into force in 1995. In fact, it can be argued that the current language of the Act requires these bodies to conduct "assessments of environmental effects" (as opposed to "EAs" as defined by the Act). There is no reason to expect that regulations will be developed any time soon. **CELA therefore recommends** that the Act be amended to oblige all such federal bodies to conduct EAs until alternate, equivalent regulations are developed under CEAA. (See table re ss. 8-10.)

Bill C-19 also proposes regulation-making powers to exempt from EA requirements projects that have a total cost below a prescribed amount and that meet prescribed environmental conditions (see proposed subs. 59 (c)). Similar regulatory exemptions could also be developed for projects by Crown corporations, or CIDA projects (subs. 59 (c.1)). **CELA recommends** that these provisions be rejected. Project cost should not be used to determine the environmental significance of a project.

Need and alternatives

Most fundamentally, Bill C-19 does nothing to require "responsible authorities" (RAs) to ask fundamental questions about projects, such as whether there is a public need for the project, and what are the alternatives to the project. **CELA recommends** mandatory consideration of the need for, alternatives to (or at the very least, the purpose of) every project subject to the Act. CELA further recommends that binding rules for policy and program assessment (also called "strategic EA") be implemented, either in CEAA or in a new law. A draft *Canadian Strategic Environmental Assessment Act* is included as part of this submission.

[36] "Strengthening EA for Canadians: Report of the Minister of the Environment to the Parliament of Canada on the Review of the CEAA", March 2001, at p. 15.

Public involvement

Although C-19 proposes minor improvements to ss. 18 (3) and 55 (2)(a), they are far from satisfactory. Respecting screenings:

> the word "notice" is dropped from subs. 18 (3) (freeing RAs from procedural fairness obligations);
> the opportunity for the public to comment would be completely discretionary and subject to override by the "EA coordinator" proposed in ss. 12.1 – 12.5; and
> proposed para. 55 (2) (a) does not guarantee any opportunity or minimum timeframe in which to offer public input.

Similarly, respecting comprehensive studies, the RA's new obligations proposed in ss. 21and 21.2 do not clarify how public involvement is to occur, and the opportunity in s. 21.1 is again subject to override by the coordinator.

There is an overall lack of binding notice and comment requirements and corresponding minimum timelines in CEAA. This remains unchanged by Bill C-19. See the Table re. ss. 18 (screenings), 19 (class screenings), and 21.2 (comprehensive studies). Also, there is a concern the proposed "electronic Registry" will result in less, not more, public access to EA information and therefore less public involvement see the Table re s. 55).

Extending participant funding to comprehensive studies is a good measure, but **the allocation of participant funding remains wholly discretionary**. See Table re subs. 58 (1.1).

Compliance and enforcement

Along with its self-assessment orientation, CEAA lacks an enforcement regime. The Act currently allows the Minister of Environment to order the proponent not to proceed with any part of the project until the assessment is completed and a decision made respecting whether to allow the project to proceed (current s. 50). This section applies only to projects referred to mediation or review panel for assessment of transboundary environmental effects, and has rarely if ever been used. Current s. 51 allows the Attorney General to apply for an injunction to enforce a s. 50 order.

Bill C-19 takes a small step forward by allowing a Minister to whom an RA is accountable to make an order prohibiting a proponent from doing "any act or thing that carries out the project being assessed in whole or in part and that would alter the environment" (proposed s. 11.1; emphasis added). This provision would apply to all kinds of EA: screenings, comprehensive studies, review panels and mediations.

CELA recommends that the Minister of Environment, not the RA's Minister, be given the exclusive authority to make a s. 11.1 Ministerial order, and that the underlined words above be deleted: no part of a project being assessed should be allowed to proceed until the EA has been completed and a decision has been made. To allow parts of the project to proceed that would not "alter the environment" would defeat the planning purpose of the Act, and would pre-judge the outcome of the EA.

Proposed subsection 11.1 (5) would prevent a minister from making a subsequent order prohibiting the same act or thing. This limitation has no legal and certainly no environmental justification, and **CELA recommends** that subs. (5) should therefore be

deleted. Such an order would expire after fourteen days unless approved by Cabinet, and it would ultimately expire in any case, after the EA has been conducted and a decision made allowing the project to proceed or not to proceed. There is no reason to limit the use of subsequent orders, should the need arise to use them.

Proposed s. 11.2 would allow the Attorney General (the federal Minister of Justice) to apply for and a court to issue an injunction preventing action contrary to the order, until a decision is made respecting the project. **CELA recommends** that the power to apply for an injunction of this nature should be made available to any person, not just the Attorney General.

See Part A for CELA's further recommendations respecting compliance and enforcement.

Harmonization

By amending the "purposes" section of the Act, Bill C-19 continues to formalize and implement the "harmonization" agenda (see clause 2, section 4 (b.2)), an agenda with questionable and unproven environmental merit.

In his 1998 study of screening-level EAs, the Commissioner of Environment and Sustainable Development said:

> The nature of our federal system is such that there can be overlap of federal and provincial responsibilities with respect to a project. Of the 187 projects we reviewed, 25 required provincial EAs. In most of the 25 cases, there was more evidence of federal-provincial co-operation than of duplication of effort. [37]

Greater use of follow-up programs

While the proposal for mandatory follow-up programs for comprehensive studies and review panels is a positive development, they are arguably dependent on the development of regulations under para. 59 (h.1). Proposed amendments in Bill C-19 confirming the broad range of possible follow-up measures that may be ordered by an RA are helpful, but will not guarantee such conditions will be imposed in the first place.

New subs. 38 (1) would allow RAs to "consider" whether a follow-up program is "appropriate in the circumstances" following a screening and if so, requiring the RA to design such a program "in accordance with any regulations made under para. 59 (h.1), and ensure its implementation. The key "trigger" for subs. (1) respecting screening is what the RA "considers" appropriate.

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[37] Report of the Commissioner of the Environment and Sustainable Development, 1998, chapter 6 "Environmental Assessment – A Critical Tool for Sustainable Development" ("the Commissioner's report"), at para. 6.81.
"A Citizen's Briefing Kit for the Five Year Review of the CEAA" (Environmental Planning and Assessment Caucus, CEN, 2000) said: "Given that an estimated 98% of projects subject to the Act are not subject to provincial EA legislation, and only 7.5% of projects subject to provincial EA legislation are also subject to the Act, the potential for federal-provincial EA duplication and overlap is very limited."

Proposed subs. 38 (2) includes the same "in accordance with" language, but without the need to consider whether follow-up is appropriate in the case of comprehensive studies, mediations or review panels: the obligation on RAs is mandatory in these cases.

The **"in accordance with any regulations"** language has been controversial in the past; contrary to government interpretation, critics hold that there is an obligation even where such regulations have not been put in place. [38]

The "in accordance with" controversy should be avoided by **deleting these words in subsections 38 (1) and (2)**. The effect would be to eliminate the prerequisite that regulations be in place before follow-up programs can be required by RAs (either as an option in the case of screenings or on a mandatory basis in the case of comprehensive studies, mediations or review panels). Paragraph 59 (h.1) would remain and there would be nothing to prevent the development of regulations "prescribing the manner of designing a follow-up program." The words "in accordance with any regulations made for that purpose" **should also be deleted from subsection 53 (1)** respecting follow-up programs for EAs of projects having transboundary environmental effects, and from subsection 53 (2) respecting public notice of the Minister's actions following a review panel's report.

Also, CELA is opposed to the proposal in subs. 38 (5) to use follow-up programs "for implementing adaptive management measures," as this could result in the Act having an even greater emphasis on mitigating environmental damage instead of an environmental enhancement mandate. These words should be deleted.

Summary

In summary, it must be said that the approach taken to the review failed to ask questions about the Act's ability to meet the purposes currently set out in s. 4. We refer in particular to the following purposes found in the current Act:

> "to ensure that environmental effects of projects receive careful consideration before RAs take actions in connection with them" (para. 4 (b)), and
>
> "to ensure that there be an opportunity for public participation in the environmental assessment process" in para. 4 (d)).

In CELA's submission, these purposes are not met by the Act in its current form; nor did the review address how the Act might better meet these purposes.

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[38] The most prominent among the provisions using this wording are current subsections 8 (1), 9 and 10 (1) (assessments of environmental effects by Crown corporations, harbour commissions, and native band councils). It may be argued that the wording obliges these bodies to conduct assessments even without "any regulations" having been developed. The government has interpreted there to be no such responsibility in the absence of regulations, but current section 34 requires a review panel to hold hearings, submit a report, etc. "in accordance with any regulations made for that purpose and with its terms of reference". In spite of the fact no such regulations have been made, CEAA review panels have complied with section 34. Unless such panels can be said to have met the section 34 obligations voluntarily, which is unlikely, the wording appears to be interpreted in a manner that is inconsistent with the interpretation given to sections 8 (1), 9 and 10 (1).

It is unlikely that the Bill C-19 proposals, which are intended to meet the Minister's three stated goals for renewing the process (providing greater "certainty, predictability and timeliness for all participants", enhancing the quality of assessments and ensuring more meaningful public participation) will achieve those goals in fact.

Moreover, CELA questions the merits of greater "certainty" and "predictability" in EA. EA is a process of inquiry about the merits of various courses of action and therefore is based on a certain level of uncertainty and unpredictability. While we support the greatest possible level of coordination among departments and decision-makers, we do not support certainty and predictability as ends separate from the use of EA as a planning and decision-making tool to avoid federally-supported initiatives having harmful impacts on the environment.

The Minister's press release of March 20, 2001 claims changes to CEAA in key areas that include "improving compliance with the Act", "strengthening the role of follow-up", "improving the consideration of cumulative effects", "providing convenient, more timely access to reports and other information about assessments", and "expanding opportunities for public participation". For the reasons explained here and in the Table, CELA considers the proposals in Bill C-19 to have little likelihood of achieving these results.

Part C – Table: Bill C-19 Clause-by-Clause

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
1. (1) **2 (1) "comp. study**"	Changes definition of "comprehensive study" to include reference to new s. 21.1.	This amendment is consequential to the addition of new s. 21.1. Current definition refers only to s. 21, which sets out RA's responsibilities when a project is included on CSL.	See proposed s. 21.1 ("Minister's decision"; "Decision final").
2 (1) "exclusion list"	Changes definition of "exclusion list": "a list of projects or classes of projects that have been **exempted from the obligation to conduct an assessment by** regulations made under paragraph 59 (c) or (c.1)"	Language is more explicit than existing definition, making it clear that the listed projects are to be exempted (existing language is " … prescribed pursuant to … "). Also adds reference to proposed para. 59 (c.1).	Accept, subject to recommendations re. proposed paras. 59 (c) and (c.1).
1. (2) **2 (1) "federal authority" (d)**	Changes definition of "federal authority": removes "the Toronto Harbour Commissioners constituted pursuant to the *Toronto Harbour Commissioners' Act, 1911*" from list of authorities **not** to be considered "federal authorities."	The Toronto Harbour Commission is now the Toronto Port Authority. It and other port authorities established under the *Canada Marine Act* are currently excluded from definition of "federal authorities" ("federal authority" does not include " 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.") Port authorities are nevertheless required to conduct "assessments" under the terms of the *Canada Port Authority Environmental Assessment Regulations* (SOR/99-318).	See clause **1. (3)** below re "federal lands".
1. (3) **2 (1) "federal lands" (a)**	Changes the definition of "federal lands". In list of lands exempt from the definition (""federal lands" means lands … other than …"), the following words are deleted: "lands the management of which has been granted to a port authority under the *Canada Marine Act* or a non-profit corporation that	Port authority lands will thus be included implicitly in the definition. However, the *Canada Port Authority EA Regulations*, unlike CEAA, have no "land trigger". Because port authorities are Crown agencies, port authority lands	Accept amendment. Committee should consider recommending addition of a land trigger to *Canada Port Authority EA Regulations*.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	has entered into an agreement under subsection 80 (5) of that Act." The above words exempting such lands from "federal lands" were added to CEAA in 199_ (cite).	should probably be considered "federal lands".	
1. (4) **2 (1) "Registry"** RAC # 1.1 [consensus] but see 1.2 [no consensus]	Adds a new definition: ""Registry" means the Canadian Environmental Assessment Registry established under section 55."	See **clause 26**/section 55.	
2. **4** **Purposes**	Additional purposes of the Act: "(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."	Paragraph 4 (b.2) formalizes Canada's signing the Canada-Wide Accord on Environmental Harmonization.	Reject subs. 4 (b.2). Cooperation and coordinated action should not be considered a "purpose" of federal EA; existing environmental purposes of the Act (e.g. ensuring environmental effects of projects receive careful consideration before action is taken; encouraging actions that promote sustainable development, etc.) should not be diluted by the "harmonization" agenda.
3. (1) **7 (1)** **Exclusions**	Adds section 8 (Crown corporations) and proposed section 10.1 (CIDA) to list of circumstances in which an assessment is <u>not</u> required, provided one of three listed conditions is met: project is listed in exclusion list regulations; **project is response to a statutory emergency; or** project is response to an emergency and prompt action is in the interest of preventing damage to property, environment, or in the interest of public health or safety.	**Section 7 lists "exclusions" from application of the Act where one of three listed conditions is met.** Currently refers to these exceptions in context of s. 5; ss. 8 and 10.1 are added, because proposed changes to these sections would trigger "assessments" by Crown corps (s. 8) and CIDA (s. 10.1) in place of EAs by other federal authorities.	See clauses **5 and 6** (proposed changes to ss. 8-10).
3. (2) **7 (2)** **Exclusions**	Adds to list of sections and situations (listed "for greater certainty") where an assessment is **not** required by a listed "federal authority" or "a person or body".	This provision allows an expanded range of federal bodies to avoid conducting assessments when giving financial support to a project whose "essential details	**RAs should seek details of projects before providing financial assistance.** The range of bodies excluded from the duty to assess when "the essential details of the

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	For the exclusion to apply, the "essential details of the project" must not be "specified before or at the time" a specified power is exercised or the duty or function is performed. In addition to s. 5 (1) (b) (the "funding trigger"), this clause adds new powers to which the exclusion applies: 10.1 (2) (b) (partial or whole payments, financial assistance or loan guarantees by CIDA), 8 (1.1) (b) (same, by a Crown corporation or corporation controlled by it), 9 (2) (b) (a harbour commission, port authority or similar body; see s. 9 (1)), 9.1 (2) (b) (same, by a class of authorities prescribed by regulations made under new para. 59 (k.3)).	are unspecified". No guidance is given as to what comprises "essential details". In the case of para. 9.1 (2)(b), s. 59 (k.3) leaves entirely to regulation the designation of "authorities" that may be required to conduct assessments; it also leaves to regulation the type of assessment that may be required.	project are not specified" should be kept to a minimum rather than expanded. **Do not support.** Subsection 7 (2) defeats the purpose of ensuring "that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them" (s. (4) (a)). **Recommend deleting this subsection entirely.**
4. **(Heading)**	Adds a new heading preceding ss. 8-10: "Assessments of environmental effects" (as distinct from "environmental assessments").	Sections 7-10 currently follow the heading "Excluded projects", which remains above section 7.	
5. **8 (1)** **"Assessments by Crown corporations if regulations in force"**	Section 8 (1) changes the language defining when a Crown corporation or a corporation controlled by it is required to "ensure an assessment of the environmental effects of a project" is conducted. Current wording provides that "before" the Crown "exercises a power or performs a duty or function" referred to in paragraph 5 (1) (a) (b) or (c) (proponent, funding or land trigger), it shall ensure "that an assessment of the environmental effects is conducted in accordance with any regulations made under para. 59 (j) as early as is practicable in the	This change would allow a different type of assessment to be prescribed, by regulation rather than by law, for each different Crown corporation to which it applies. The Act has always distinguished between "environmental assessment" ("in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations") and "an assessment of environmental effects" (undefined); the latter term applies to Crown	Reject. Delete the following words from current s. 8: "in accordance with any regulations made for that purpose under paragraph 59 (j)". Change "an assessment of the environmental effects of the project" to "an environmental assessment", to oblige Crowns to conduct EAs under CEAA.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	planning stages of the project and before irrevocable decisions are made." Proposed wording would impose the requirement to conduct an assessment only "if regulations have been made in relation to [the corporation] under para. 59 (j) and have come into force."	corporations. The current s.8 requires Crown corporations to conduct "an assessment of the environmental effects" of the project, even in the absence of regulations under para. 59 (j). Controversy has surrounded whether current language obliges Crown corporations to conduct assessments in absence of regulations under s. 59 (j), which have never been developed. This amendment would also eliminate that disagreement.	
8 (1.1) Projects	Subsection 8 (1.1) would establish "triggers" (similar to current s. 5) for "assessment of environmental effects of a project" applying to a Crown corporation or corporation controlled by it. The proponent, funding and land triggers for Crowns, proposed by subs. 8 (1.1) are similar to current s. 5. However: The proposed Crown land trigger (8 (1.1) (c)) is restricted to situations where the Crown "sells, leases or otherwise disposes of federal lands or any interest" in them. The proposed "law list"-type trigger (8 (1.1) (d)) would apply only to those provisions listed under regulations to be made under new paragraph 59 (j.2). Paragraph 8 (1.1) (e) proposes an additional land trigger: where "in circumstances prescribed by regulations made under para. 59 (j.3), a project is to be carried out in whole or in part on federal lands that the Crown … holds or	The establishment of special triggers applying to Crown corporations allows the application of different rules for "assessments" by Crown corporations. **A Crown will only have to conduct assessments if the Crown is prescribed by regulation. There will be no opportunity for Parliament to determine the sufficiency of these rules.** Paragraphs 8 (1.1) (c) and (e) divide the current "land trigger" as it would apply to Crowns into two separate categories: (c) applies where the specified interest is sold, etc. for the purpose of enabling the project; (e) applies where the project is to proceed on federal lands the Crown holds, owns, administers or manages, or in which it has any right or interest listed in regulations. Without such regulations, there is no obligation to	Reject. Any assessment conducted under this section would still have to be conducted "as early as is practicable in the planning stages of the project and before irrevocable decisions are made," but only by prescribed Crowns and only in prescribed circumstances. See related sections: proposed paras. 59 (j.2) and (j.3).

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	owns or over which it has administration or management, or in which it has any right or interest specified in those regulations".	conduct the assessment. Para. 8 (1.1) (d) proposes a parallel "law list" for Crowns.	
6. **9 (1) Assessments by harbour commissions and port authorities**	**Changes language (as in subs. 8 (1)) to require a harbour commission, port authority etc. to conduct an assessment <u>only</u> "if regulations have been made under para. 59 (k) and have come into force."** Similar to clause **5** above as applicable to Crown corporations. Applies to Hamilton Harbour Commissioners, other harbour commissions, a not-for-profit corporation that enters into an agreement under subs. 80 (5) (respecting the St. Lawrence Seaway) of the *Canada Marine Act*, or a port authority established under the Canada Marine Act.	Existing *Canada Port Authorities Regulations* are designed to allow port authorities to conduct "assessments" rather than EAs under CEAA. There are currently no such regulations applying to harbour commissions or to agreements under the *Canada Marine Act*.	Reject. Delete "in accordance with any regulations made for that purpose under paragraph 59 (k)". See para. 59 (k).
9 (2) Projects	As with subs. 8 (1.1), this section would establish "triggers" (similar to current s. 5) for "assessment of environmental effects of a project" applying to a harbour commission, port authority, etc. The proponent, funding and land triggers for these authorities, proposed by paragraphs 9 (2) (a), (b) and (c) are essentially the same as current s. 5. However: The proposed land trigger (9 (2) (c)) is restricted to situations where the authority "sells, leases or otherwise disposes of federal lands or any interest" in them. Paragraph 9 (2) (d) proposes a "law list"-type	See subs. 8 (1.1) above.	See para. 59 (k.1), (k.2)

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	trigger where provisions are listed under regulations to be made under new paragraph 59 (k.1). Paragraph 9 (2) (e) proposes an additional land trigger: where "in circumstances prescribed by regulations made under para. 59 (k.2), a project is to be carried out in whole or in part on federal lands over which [the authority] has administration or management". Unlike para. 8 (1.1) (e), additional prescribed triggers for any other prescribed "right or interest" in those lands is not proposed.		
9.1 (1) Prescribed authorities See RAC #34.1 and 35.1 – 35.6 [consensus]	This subsection would oblige "prescribed authorities" to "ensure that an assessment of the environmental effects of a project … is conducted in accordance with" any regulations made under para. 59 (k.3) that have come into force, "as early as is practicable in the planning stages of the project and before irrevocable decisions are made."	Would allow regulations to prescribe further "authorities" (in addition to those subject to the Act or proposed ss. 8 and 9 (1) and (2)) required to conduct an "assessment".	See proposed para. 59 (k.3).
9.1 (2) Projects See RAC #10.1, 10.2, 10.3, 10.4 [consensus]	Lists "triggers" obliging "prescribed authorities" to ensure that "assessments" of projects are conducted where: (a) the project is proposed on federal lands, the authority is the proponent, and "does any act or thing" committing it to carrying out the project; (b) where the project is proposed on federal lands and the authority makes payments, etc. (similar to the general funding trigger); (c) the authority sells or otherwise disposes of lands or an interest in them (similar to the	Similar to proposed ss. 8 (1.1) and 9 (2) (see above).	See proposed para. 59 (k.4), (k.5).

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	general land trigger); (d) the authority issues a permit, etc. (similar to the general law list trigger, but a new "law list" would first have to be developed – see para. 59 (k.4)); or (e) the authority has "administration or management or any right or interest specified in regulations" made under para. 59 (k.5) over federal lands where the project is proposed.		
10. Assessments by band councils under regulations	Similar to subs. 8 (1) and 9 (1); would require a band council for an Indian reserve subject to the *Indian Act* to ensure that an assessment of the environmental effects of a project proposed to be carried out in whole or in part on the reserve be conducted in accordance with regulations made under para. 59 (l), <u>if they apply to the band in question</u> and have come into force.	Current section requires a band council to ensure an assessment is carried out <u>before</u> a "person or body" receives financial assistance from a federal authority for purpose of enabling the project. **Proposed amendment would remove reference to payment; assessment would be required "as early as is practicable in the planning process and before irrevocable decisions are made" (rather than before any payment is received), as long as project is to be carried out in whole or in part on the reserve.** Main proviso would be that regulations that apply to the band have been made and have come into force; current wording is "in accordance with any regs made" (as in current subs. 8 (1)).	See proposed para. 59 (l).
10.1 (1) Assessments – CIDA See RAC #32 & "Principles" 32.1 – 32.7 [consensus]	Similar to above sections, with same provisos; requires CIDA to ensure that an assessment of the environmental effects of a project is conducted.		See comments re ss. 8, 9, 10 above.
10.1 (2) Projects See RAC #32 and	Proposes triggers for assessment by CIDA: where (a) CIDA is proponent; or (b) CIDA	The general triggers would not apply to CIDA if regulations under 59 (l.01) came into force,	Related clauses: see paras. 54 (2) and 59 (l.01).

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
"Principles" 32.1 – 32.7 [consensus]	makes payments or other financial assistance enabling the project to be carried out in whole or in part, "an assessment of the environmental effects of the project under this section is required to be carried out" if regs are made under para. 59 (*l*.01) and have come into force.	even though CIDA is otherwise a "federal authority".	
10.1 (3) Replacement for EA See RAC #32 and "Principles" 32.1 – 32.7 [consensus]	"The application of subsection 5 (1) [general triggers] to the CIDA is suspended while regulations referred to in subsection (1) are in force."	It is unclear why CIDA should not be subject to the proponent or lands trigger (although instances may be rare), whether regs are in place or not.	Do not support.
11 Timing of assessment	**(No amendment proposed)**	Current s. 11 defines the duties of the "responsible authority" (RA), including providing that RA shall not exercise any power or perform any duty or function under s. 5 unless it allows the project to proceed after an EA has been conducted (s. 20 (1)(a) or 37 (1)(a)).	
7. **11.1 Ministerial orders**	11.1 (1) Allows RA's Minister(s) to prohibit a proponent, by order, from doing "any act or thing that carries out the project being assessed in whole or in part <u>and that would alter the environment</u>." 11.1 (2): the order takes effect on the day it is made. 11.1 (3): the order expires 14 days after it is made unless approved by G-I-C. 11.1 (4): exempts the order from ss. 3, 5 and 11 of the *Statutory Instruments Act*. 11.1 (5): prevents a minister from making a subsequent order prohibiting the same act or thing.	Provisions giving government power to enforce compliance with the Act will be more effective if the Registry (see ss. 55 – 55.4, para. 59 (l.02)) allows the public timely notification of the status of projects and EAs. Section 3 of *Statutory Instruments Act* requires Clerk of Privy Council and Deputy Minister of Justice to examine an instrument (such as an order) to ensure its statutory authority, consistency with the *Charter* and other standards; section 5 requires sending it to the Clerk within seven days of making it; and section 11 requires it to be published in *Canada Gazette* within 23 days of making it.	**Delete underlined words. No part of the project should be allowed to proceed while an EA is underway.** Support subs. 11.1 (1) – (4), replacing "The minister through whom the RA is accountable … the ministers together - …" with "The Minister …" (that is, the Minister of Environment). Reject subs. 11.1 (5). Allow the public formal opportunity to apply for an injunction in event of inaction by minister.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
		Preventing subsequent orders may be problematic and have no legal justification, particularly when the order expires when a decision is made following completion of EA.	
11.2 Injunction	(1) Allows Attorney-General to apply for and a court to issue an injunction preventing action contrary to the order, until a decision is made after EA is conducted (s.20 (1)(a) or (b) or 37 (1)). (2) requires 48-hour notice to persons named in application, unless delay not in public interest.	Should also allow for members of public to apply for injunctions in similar circumstances.	
8. **12.1 Federal EA Coordinator - Role**	Introduces "federal EA coordinator" concept. Purpose is to coordinate participation of "federal authorities" where screenings or comprehensive studies might be required.	Enabling only: does not provide "there shall be a coordinator" in any specified circumstances.	Creation of a coordinator could be a positive measure, subject to recommendations below.
12.2 Duties	Coordinator is <u>required</u>, in accordance with any regulations made under s. 59 (a.1), to ensure that potential RAs are identified, that their involvement is coordinated and obligations (under ss. 55.2(1) and 55.3) performed in a timely manner.	Regulations have not been prepared; what will be the practice in absence of regulations? "Coordination of involvement" of RAs is very vague.	Delete "in accordance with any regs made under para. 59 (a.1)", as this language has been interpreted by government in the past to mean there is no responsibility in the absence of regs.
12.3 Powers	Coordinator <u>may</u> a) chair a committee of federal or responsible authorities with respect to the project; b) establish timelines in relation to the assessment; and c) determine timing of <u>any</u> public participation.	S. 12.3 refers to "any regulations made under para. 59 (a.1)".	Delete "in accordance with any regs made under para. 59 (a.1)" (see above).
12.4 (1) Agency as coordinator See RAC #1.1 [consensus] and 1.2 [no consensus]	Designates Agency as coordinator if project is subject to EA process of a province, aboriginal land claims or self-government body, foreign government or international organization; **or** if project is on comprehensive study	Better quality of assessments is likely if the Agency "coordinates" all EAs.	

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	list (subject to (3)).		
12.4 (2) RA as coordinator	Coordinator can be a) the sole RA respecting the project (see s. 11), or b) the RA designated by the Agency if all RAs respecting the project cannot select a coordinator among themselves.	Better quality of assessments is likely if the Agency "coordinates" all EAs. Para. 12.4 (2)(b) refers to "any regulations made under para. 59 (a.1)."	Delete "in accordance with any regs made under para. 59 (a.1)" (see above).
12.4 (3) Coordinator by agreement	RAs may agree that the coordinator will be a) the Agency, or b) one RA (even if subs. (1) applies).		Delete 12.4 (3)(b), to ensure Agency will always be the federal EA coordinator in EAs involving other jurisdictions.
12.5 Obligation to comply with coordinator's requests	Requires every federal authority to comply in a timely manner with requests, determinations made by coordinator in course of its duties or functions.	"Coordinator" role and compliance with Act will be enhanced by giving coordinator greater responsibility in all assessments.	Support.
9. **16.1 Community and aboriginal traditional knowledge** See RAC #37.6 [consensus]	Allows community and aboriginal traditional knowledge to be considered in conducting an assessment.	"Community knowledge" and "aboriginal traditional knowledge" are not defined. Permissive only.	
16.2 Regional studies See RAC #5.6 [consensus]	Allows the results of a regional study of environmental effects outside the scope of CEAA in which a federal authority participates, to be taken into account in an EA in the region, "particularly in considering any cumulative environmental effects …".	Benefits are unclear, in particular because of permissive nature of provision. As to cumulative effects, s. 16 (1)(a) currently requires EAs to consider them. The new provision may assist in meeting this obligation.	
10. (1) **18 (1) Screening**	Clarifies existing provision: in ensuring a project is not listed in the "exclusion list", the list created by regs under s. 59(c), not the proposed 59 (c.1) list, is to be referred to by RA.	A new exclusion list regulation for Crowns and CIDA is proposed under new para. 59 (c.1).	
10. (2) **18 (3) Public participation [in screenings]** Contrary to RAC #5.2, 19.1 [consensus]	Changes the "regulation option" for public participation in screenings from "where required by regulation" to "in prescribed circumstances". Removes provision for public "notice" of the opportunity for participation.	"In prescribed circumstances" is less mandatory language than current "where [public participation is] required by regulation"; the *circumstances* but not necessarily the *requirement* for public participation would be "prescribed".	Reject this amendment. Retain the words "notice and". Retain the words "where required". Support new provision allowing public participation at any stage of the screening.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	Adds possibility that RA will allow other opportunities to participate at any other stage of the screening.	Removes the words [give the public] "notice and" [an opportunity to comment]. "Notice" obligation engages rules of procedural fairness.	See recommendations on proposed para. 55 (2)(a) respecting "notice of the commencement of an EA".
18 (4) Timing of public participation [in screenings]	New subsection: would subject RA's discretion to allow public participation in a screening to decision of EA coordinator under para. 12.3(c).	Consistency in these determinations would be more likely if Agency is always the coordinator: see 12.3 (c) (powers of coordinator).	Reject this amendment. See "recommendations for public notice and comment" in List of Recommendations.
11. **19 (1) Class screening reports**	Amends this subs. to allow Agency to declare a report to be a class screening report "if projects described in the report are not likely, in Agency's opinion, to cause significant adverse environmental effects when the design standards and mitigation measures described" in it are applied. Requirement for a request by RA for a class screening report would be deleted.	"Class screening report" is not defined. The words "class screening report could be used as a model in conducting screenings of other projects within the same class" are deleted (the current "model" option and new "replacement" option are listed in subs. (2)).	Reject amendments to s. 19, except as noted in subs. (3). Other recommendations to s. 19 are secondary. Proper use of model class screenings should be demonstrated before a new "replacement" class screening process is introduced.
19 (2) Use of class screening report	New provision: Requires declaration in (1) to include a statement "that the class screening may be used as (a) a replacement" for a s. 18 screening and a s. 20 decision for projects in the class; or (b) as "a model for streamlining" the s. 18 screening.	No criteria are provided for determining appropriateness of use of class screening as a "replacement", as distinct from use as a "model". Specifically, consideration of cumulative effects and local circumstances would be eliminated from replacement class screenings.	Reject. Eliminating consideration of cumulative effects and local circumstances of projects is likely to result in increased environmental degradation.
19 (3) Public notice, consideration of public comments See RAC #29.1 [consensus]	Allows Agency to publish a notice of proposed subs. (1) declaration. Notice must include date when draft report will be available to public; where it may be obtained; and the deadline for filing comments on its appropriateness.	Current requirement (subs. (2)) is to publish a notice respecting the "screening report", not the "draft report", in Canada Gazette. See (4) for requirement to make draft screening report available.	Notice of declaration, and opportunity to comment on draft report, with deadlines, would be good measures for assuring public involvement in model class screenings. A minimum comment period should be established in the Act.
19 (4) Publication of declaration	Requires declaration to be published in Canada Gazette and Registry; report (or how to obtain report) shall be included in	No minimum time period is specified. The report itself should be required to be made	Add minimum time period for posting of declaration before action taken. Replace "or" (in "or a description of how a copy of

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	Registry.	available on the Registry.	the report may be obtained,") with "and". See para. 55 (2) (d).
19 (5) Use of class screening report as a replacement	Removes requirement for screening (ss. 18, 20) of project that RA is "satisfied" falls in a class covered by a class screening report, as long as RA ensures design and mitigation standards described in report are implemented.	No specific compliance measures are provided to ensure replacement is appropriate, or to ensure that standards are implemented. Adds option of using report as a "replacement" for individual project screening: see subs. (5).	Reject. See subs. (2) above.
19 (6) Use of screening report as a model	Allows RA to use the report and any screening on which it is based "to whatever extent the RA considers appropriate" in complying with s. 18, where RA is "satisfied" that a project or part of a project falls in a class covered by the class screening report.	Substantially the same as current subs. (4).	Accept as long as "replacement class screening" proposal is rejected.
19 (7) Necessary adjustments	Where the report is used as a model for the screening of a project, RA shall make any adjustments necessary to account for local circumstances and any cumulative environmental effects.	Essentially the same as current subs. (5), but tailored to apply to "model" class screenings only, not to "replacement" class screenings.	Reject.
19 (8), (9) Declaration removing class screening report; Publication	(8) Agency may declare report not to be a class screening report when it "is no longer appropriate to be used as a replacement or model"; (9) this declaration must both appear in Canada Gazette, and in the Registry.	19 (7) currently provides that such a declaration be published in the Gazette and that the screening report be removed from the Agency's public registry; it currently allows Agency to determine that the report "can no longer be used as a model".	Support, deleting reference to ("replacement"). Proposed change is more clear than current provision, and publication of declaration in registry is likely to make it more accessible to the public.
12. **20 (2.1) Scope of mitigation measures**	Clarifies that scope of mitigation measures that RA shall see implemented following a screening is not limited by the Act conferring the RA's powers, duties or functions.	May help to ensure a wider range of mitigation measures.	Support. See also para. 37 (2.1) (scope of mitigation measures following comp. study, mediation or review panel) and proposed changes to s. 38.
(2.2) Assistance of other federal authority	Requires a federal authority to assist RA in ensuring implementation of a mitigation measure on which they have agreed,	Should not require that RA and federal authority have "agreed" to measures.	Replace "a mitigation measure on which the federal authority and the responsible authority have agreed" with "any mitigation

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	where RA requests it.		measure referred to in para. (1)(a)."
(3) Prohibitions of actions in furtherance of project	Prohibits exercise or performance of a power, duty or function that would allow the project to go ahead where following screening, RA determines project is likely to cause significant adverse environmental effects that cannot be justified in circumstances.	Subs. (3)(a) currently requires RA to file in public registry a notice of decision not to allow project to proceed. The proposed change would eliminate this requirement at this stage, until after report and recommendation stage (see s. 21).	Notice of progress of, and all changes in stages in an EA should be posted on proposed Registry. Therefore, support this amendment but with words of current subs. 20 (3)(a) inserted: after "… in relation to a project," add "the responsible authority shall publish a notice of that course of action in the Registry and [notwithstanding] …". Prohibitions like the one proposed require meaningful enforcement provisions.
13. Comp. Study **21. Report and recommendation** See RAC #24.1 and 23.1.1 [consensus]	Amends RA's obligations re projects on CSL: RA is to provide an opportunity for public participation, then "as soon as it is of opinion that it has sufficient information to do so," is to <u>report</u> to Minister re project scope, factors to consider in EA, public concerns, potential for adverse environmental effects and ability of comp. study to address these issues; and recommend to continue EA by comp.study or by mediator or review panel.	Imposes two new obligations on RA <u>prior to comp.study</u> report, namely the public participation opportunity, and the report to Minister. Section 21 currently requires RA to see comp. study conducted, then a comp. study report prepared and submitted to Minister and Agency, or to "refer project to Minister for referral to mediator or review panel in accordance with s. 29."	Reject. The nature of the requirement for public participation, and its timing, should be made explicit. Obligation to report to Minister is a new obligation for RA, without clear EA benefit.
21.1 (1), (2) Minister's decision; Decision final See RAC #24.2 [no consensus]	New: (1) Minister shall refer project to RA for comp.study, or to mediator or review panel in accordance with s. 29. (2) If Minister orders comp.study, project may not [later] be referred to mediator or review panel in accordance with s. 29.	See impact of subs. (2) on s. 23 below.	Reject subs. (2). Purpose of EA "to ensure that the environmental effects of projects receive careful consideration before RAs take actions in connection with them" (subs. 4 (a)) is defeated when option to "bump up" to a more intensive level of EA with greater public participation is eliminated.
21.2 Public participation [in comp.studies] Partial implementation of RAC #23.1.2 and 23.1.3 [consensus]	Requires RA to ensure an opportunity for public participation in the comp. study, "subject to a decision with respect to the timing of the participation" by the coordinator (s. 12.3(c)), when Minister refers	This opportunity is expressly distinct from the opportunities set out in s. 21 (prior to report to Minister) and current s. 22 (after Agency receives comp. study report). However, the value of this opportunity	Delete proviso that opportunity for public participation be subject to coordinator's decision. Consistent timelines should not take priority over public participation.

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	project to comp. study under s. 21.1 (1).	is compromised by the proviso that it be subject to coordinator's decision.	
14. **23 (1) Decision of the Minister** Implements a proposal in RAC #24.2 [for which there was no consensus]	a) Limits Minister's options, after receiving the comp. study report, to referral of the project back to RA "for action under s. 37" (i.e. allowing project to proceed with or without imposing mitigation measures, or not allowing it to proceed). b) Adds a new obligation for Minister to issue an "EA decision statement" setting out his opinion whether project, with mitigation or follow-up and taking into account views of RA and federal authorities, is likely to result in sig.adverse effects.	a) Compare to current s. 23: Where it is "uncertain whether the project … is likely to cause significant environmental effects", or if it is likely to do so, or public concerns warrant it, the Minister is currently required to refer the project to a mediator or review panel in accordance with s. 29. This amendment, together with proposed subs. 21.1 (2), would eliminate that option. b) The proposal for an EA decision statement would add to the Minister's obligations, and possibly enhance the quality of decisions.	a) Do not support. Availability of EA options based on new information is essential to effective EA. This limitation on Minister's options is too restrictive. Support b). EA decision statements may enhance factors on which decisions are based. See s. 21 above. If maintaining para. (a), add "including cumulative effects" after "adverse environmental effects".
23 (2) More information required	Requires Minister to request federal authorities or proponent, before issuing statement, for further information, or further action respecting public concerns, if he is of opinion it is necessary.	Mandatory nature of this type of provision is illusory, as Minister's "obligation" to act is based on his state of mind not objective facts.	
15. **29 (4) When mediation fails**	Requires Minister to order the conclusion of a mediation when he or mediator determines mediation is not likely to produce a result satisfactory to all participants.	This clause currently applies to "any issue" subject to the mediation, and requires that the issue be referred to a review panel. Any remaining issue(s) would remain in mediation. The proposal would eliminate the possibility of referral of either "any issue," or the entire project under mediation, to a review panel.	Amend to allow Minister option of sending all or part of EA to a review panel. What would happen once mediation was "concluded" in this way: Would it go to a panel, comp. study or screening? This should be clarified.
16. **32 (1) Rapport du médiateur**	Clarifies in French version that a mediator shall prepare and submit a report to the Minister and RA at the conclusion ("dès la fin") rather than at the completion ("dès l'achèvement") of the mediation.	English version uses the words "at the conclusion".	Support.

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17. (1) **35 (3) Hearings to be public**	Adds "specific harm to the environment" as an exception to general rule that a hearing by a review panel shall be public. In order for exception to take effect, the panel must be satisfied after representations made by a witness that specific harm would be caused by the disclosure of evidence, documents or other things ordered by panel under subs. 35 (1).	Appears to apply only to evidence, documents or things ordered by panel of a witness whom panels compels by summons to appear under subs. 35 (1); no other provision affects this general rule that hearings shall be public. "Specific harm to the environment" is a reasonable exception to this rule.	Support.
17. (2) **35 (4.1) Non-disclosure**	Deems evidence, documents or other things obtained by any person pursuant to the Act to be privileged where panel is satisfied their disclosure would cause specific, direct and substantial harm to the environment. An exception to the privilege can be authorized by the panel.	Current s. 35 (4) provides a similar rule respecting "specific harm to the witness"; exception to the privilege in 35 (4) comes at authorization of the witness, rather than of the panel.	Support.
18. (1) **37 (1) Decision of responsible authority**	Makes RA's action following receipt of panel, mediation or comp. study report subject to new subs. 37 (1.2) and (1.3).	This action is currently subject only to subs. (1.1) (approval of Governor in Council).	
18. (2) **37 (1.2) Federal authority**	Provides that a federal authority recommending to G-I-C that a permit, approval or licence (current para. 5 (2)(b)) be issued or given may also act as RA for the purposes of a response to a mediator or panel report required under current para. 37 (1.1)(a). Provides that this subsection applies to federal authorities or bodies established by Act and accountable through a Minister to Parliament (para. (b), subs. 2 (1) of definition of "federal authority"), if that Minister agrees.	Effectively allows a Crown agency to stand in for an RA in responding to a mediator's or review panel's report submitted under current 37 (1.1)(a). The provision is unclear whether it is intended to apply <u>only</u> to federal authorities in 2 (1) "federal authority" (b).	Agency should be asked the intention of this provision.
37 (1.3) Approval of G-I-C	Prohibits RA from making a decision on a project under s. 37 (1) without G-I-C approval, where Minister has issued an EA		Add "(a)" after "(1)"; requiring approval of G-I-C <u>not</u> to take action (see 37 (1) (b)) cannot be intended here.

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	decision statement that the project is likely to cause significant adverse environmental effects.		See also recommendation re para. 23 (1) (a) (decision of Minister on receipt of comp. study report), which precedes this stage.
18. (3) **37 (2.1) Scope of mitigation measures**	Clarifies that RA is not limited by Act conferring it powers, duties or functions, in determining appropriate mitigation measures and their implementation.	Consistent with proposed s. 20 (2.1) respecting screenings. Will help to ensure a wider range of mitigation measures.	Support. May help to ensure a wider, more appropriate range of mitigation measures.
37 (2.2) Assistance of other federal authority	Requires a federal authority to assist RA in ensuring implementation of a mitigation measure on which they have agreed, where RA requests it.	Should not require that RA and federal authority have "agreed" to measures Consistent with proposed s. 20 (2.2).	Replace "a mitigation measure on which the federal authority and the responsible authority have agreed" with "any mitigation measure referred to in para. 37 (1)(a)."
37 (3) Prohibition: proceeding with project	Prohibits exercise or performance of a power, duty or function that would allow the project to go ahead where following panel review, mediation or comp. study, RA determines project is likely to cause significant adverse environmental effects that cannot be justified in circumstances.	Subs. (3)(a) currently requires RA to file in public registry a notice of decision not to allow project to proceed. The proposed change would eliminate this requirement at this stage, until after report and recommendation stage (see s. 21 (?)). Prohibitions like the one proposed require meaningful enforcement provisions.	For clarity, marginal notes for proposed para. 20 (3) and 37 (3) should be identical (they are identical in the French version). Notice of progress of, and all changes in stages in an EA should be posted on proposed Registry. Therefore, support this amendment but with words of current subs. 37 (3)(a) inserted: after "… in relation to a project," add "the responsible authority shall publish a notice of that course of action in the Registry and [notwithstanding] …".
19. **38 (1) Consideration of follow-up – decision under para. 20 (1)(a) [screenings]** See RAC #15.2 [consensus]	Requires RA to <u>consider</u> whether a follow-up program is appropriate in the circumstances when it allows a project to go ahead following a screening and if so, to design such program "in accordance with any regulations made under para. 59 (h.1)", and <u>ensure</u> its implementation. Changes RA's responsibility in this case from "arranging for" implementation to "ensuring."	Current s. 38 (1) requires RA to design "any follow-up program it considers appropriate" for the project and <u>arrange for</u> its implementation, when it allows a project to go ahead after screening (20 (1)(a)) or after comp. study, panel review or mediation (37 (1)(a)).	Delete "in accordance with any regulations made for that purpose" in current 38 (1). (Reject proposed wording "in accordance with any regulations made under paragraph 59 (h.1).") (See 59 (h.1))
38 (2) Mandatory follow-up –	Requires RA to design a follow-up program "in	Arguably makes design and implementation	Delete "in accordance with any regulations made for

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
decision under para. 37 (1)(a) [comp.studies, mediations, review panels] See RAC #15.2 [consensus]	accordance with any regulations made under para. 59 (h.1)" and ensure its implementation when it allows a project to go ahead following a comp. study, panel review or mediation.	mandatory for these projects, regardless of whether regs have been developed under para. 59 (h.1). Current subs. 38 (2) requires RA to advise public "in accordance with any regulations made for that purpose" of its course of action.	that purpose" in current 38 (2). (Reject proposed wording "in accordance with any regulations made under paragraph 59 (h.1).") Registry should require public notice (as currently in 38(2)) of RA's course of action, any mitigation measures, extent rec'ns have been adopted and reasons why not, any follow-up program designed and their results. See recommendations re subs. 55 (2), 59 (h.1).
38 (3) Scope of follow-up program	Clarifies that RA is not limited by Act conferring it powers, duties or functions, in designing and ensuring implementation of follow-up program.	Consistent with proposed ss. 20 (2.1) and 37 (2.1) re mitigation.	Support. May lead to more widespread use of more effective follow-up programs.
38 (4) Assistance of other federal authority	Requires a federal authority to assist RA in ensuring implementation of a follow-up program on which they have agreed, where RA requests it.	Should not require that RA and federal authority have "agreed" to measures. Consistent with proposed ss. 20 (2.2), 37 (2.2) re mitigation.	Replace "a follow-up program on which the federal authority and the responsible authority have agreed" with "any follow-up program referred to in subs. (2)."
38 (5) Follow-up programs	Allows use of follow-up programs "for implementing adaptive management measures and for improving the quality of future environmental assessments."	"Adaptive management measures" is not defined. Does not specify who may use such programs for this purpose.	Delete the words "for implementing adaptive management measures and".
20. **40 (2) Review panels established jointly with another jurisdiction**	a) Allows Minister to *agree or arrange* with a federal authority, province, federal or provincial agency, or aboriginal land claims or self-government body ("jurisdiction" in s. 40 (1)(a) to (d)) having <u>powers, duties or functions</u> relating to assessment of project, *for a joint review panel* and how it should conduct assessment of the project. b) Requires Minister to "*offer to consult and cooperate" with* a province, provincial agency or aboriginal land	Current section lays out essentially same rules, but in case a) affects those s. 40 (1)(a) to (d) "jurisdictions" having a <u>responsibility or authority</u> to conduct an assessment of a project or any part of it; in case b), does not specify powers of s. 12 (5) "jurisdiction".	

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	claims or self-government body (a "jurisdiction" in s. 12 (5)) having responsibility or authority *respecting the assessment* of environmental effects of project.		
21. **41 (d)**	Provides that joint review panels shall have "immunities" in addition to powers (as in current para. 41 (d)) of review panels under s. 35.	Current subs. 35 (6) provides: "No action or other proceeding lies or shall be commenced against a member of a review panel for or in respect of anything done or omitted to be done, during the course of and for the purposes of the assessment by the review panel."	Support.
Note Re ss. 46-48 [Transboundary and Related Environmental Effects] below	Proposed changes to these sections would clarify when the federal government can refer a project with transboundary implications to a mediator or review panel (in accordance with s. 29). In each case, a project is not subject to a s.5 trigger. Reference to any other legislative power, duty or function that is not a s.5 trigger is removed by this amendment.	Each of the sections currently provides that in order that the government may exercise the discretionary power to refer the project to EA, in addition to no s. 5 trigger, no power, duty or function "conferred by or under any other Act of Parliament or regulation" is to be exercised or performed by a federal authority in relation to the project.	Support. The federal government should be empowered to refer projects for which there is no s. 5 trigger to panel review, even when they have other powers respecting the project. (In fact, having such responsibility respecting the project provides further justification for a federal role in its assessment.)
22. **46 (1) Transboundary and related environmental effects** See RAC #12.1 (12.2, 12.3) [consensus]	Removes the words "or conferred by or under any other Act of Parliament or regulation", thus narrowing the restriction on federal discretion to refer a project to be carried out in a province and Minister is of the opinion it may cause significant adverse environmental effects in another province.	This clause allows the Minister alone to refer the project to review panel or mediation; this remains unchanged.	Support.
23. **47 (1) International environmental effects** See RAC #12.1 (12.2, 12.3) [consensus]	Removes the same words, thus narrowing the restriction on federal discretion to refer a project to be carried out in Canada or on federal lands and Minister is of the opinion it may cause significant adverse environmental effects both outside Canada and outside those federal lands.	This clause allows the Minister and the Minister of Foreign Affairs to refer the project to review panel or mediation; this remains unchanged.	Support, changing "and" to "or" at line 17. Either Minister of Environment or Minister of Foreign Affairs should have this power.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
24. (1) **48 (1) Environmental effects of projects carried out on lands of federal interest** See RAC #12.1 (12.2, 12.3) [consensus] RAC #37.5 not implemented [consensus]	Removes the same words, thus narrowing the restriction on federal discretion to refer a project to be carried out in Canada and Minister is of the opinion it may cause significant adverse environmental effects on Indian reserve or other prescribed aboriginal lands, other federal lands, or "lands in respect of which Indians have interests".	This clause allows the Minister alone to refer the project to review panel or mediation; this remains unchanged. Note that it relates to effects on the lands listed.	Support.
24. (2) **48 (2) Environmental effects of projects carried out on reserve lands, etc.** See RAC #12.1 (12.2, 12.3) [consensus]	Removes the same words, thus narrowing the restriction on federal discretion to refer a project on Indian reserve or other prescribed aboriginal lands, and Minister is of opinion it may cause significant adverse environmental effects outside those lands.	This clause allows the Minister alone to refer project to review panel or mediation; this remains unchanged. Note that it relates to effects outside the lands listed.	Support.
24. (3) **48 (5) Notice**	Adds to current list of parties to whom Minister must give notice of intention to refer a project to review panel or mediation, if that party's lands may be affected by the project: the band council of a reserve, the party representing aboriginal people in an agreement or claim, the governing body respecting lands set aside by legislation for the use and benefit of Indians.	Notice must currently be given to the project proponent, governments of "all interested provinces", a petitioner (subs. (4)), and the federal authority where reference concerns "other federal lands" in para. (1) (b). Notice must be given at least ten days before reference is made.	
25. **54 (2) International agreement or arrangement** See RAC #36 ["no consensus but further work required"]	Adds exercise of a power or performance of a duty or function referred to in proposed "CIDA funding trigger" (new para. 10.1 (2)(b)) to this subsection.	Consequence of para. 10.1 (2)(b). This section requires a federal authority entering into an agreement or arrangement whereby the authority funds a project, where the essential details of the project to be carried out outside both Canada and federal lands are not specified, to ensure that an assessment meeting certain criteria is carried out.	Delete qualifying words "in so far as is practicable" from this clause, as they could allow any number of exceptions to this requirement. See related paras. 10.1 (2)(b) and 59 (l.01).

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
(3) Exception	Adds reference to new para. 10.1 (2)(b) to this subsection, establishing an exception to subs. (2): where the agreement also requires the authority to provide funding after the essential details of the project are known, the authority is not obliged to conduct an assessment because an EA will be required at that later time.	This subsection is sensible so long as the assessment must be conducted as soon as possible once the essential details of project are known. If the assessment is deferred until the later financial support is given, the core purpose of the Act (para. 4 (a)) is defeated.	Replace with language requiring that where financial assistance will be provided after essential details are specified, assessment shall be conducted forthwith. Also recommend a new subs. 11 (3) adding, for greater clarity, the same obligation.
26. **55 (1) Establishment and maintenance [of Registry]**	New: Requires Agency to establish and maintain an electronic registry to be called the Canadian Environmental Assessment Registry, "for the purposes of providing notice in a timely manner of EAs and of facilitating public access to records relating to them …".	CEAA currently requires each RA to maintain its own (not necessarily electronic) "public registry", and in the case of a mediation or panel review, by the Agency, for each project. Fundamental change: Agency is now to maintain Registry.	Must include clear requirements for Agency in maintaining Registry.
55 (2) Contents See RAC #30.1 [consensus]: implemented in part by para. 55 (2) (p) RAC #7.1, 7.3 [consensus]	Lists required contents of Registry, including a) notice of "commencement" of an EA; b) s. 12.4(3) agreements respecting coordination of an EA; * c) statement of which projects are subject to a given class screening (subs. 19(5), (6)); d) declaration of class screening (19 (4)) or that a class screening is no longer appropriate (19 (9)); * e), f) notice of termination of an EA by RA (s.26) or by Minister (s. 27); [** (f)] g) any public notices issued by RAs or Agency to request public input into an EA; ** h) notice of ["final"] dec'n by Minister to refer project to comp.study (para. 21.1(a)); * i) report considered by RA for a decision under s. 20 or 37, or how a copy of it may be obtained (except in case of class screening); j) an "EA decision statement" (23 (1)) or	[* denotes records Agency is required to ensure are posted: see s. 55.1 (1) below.] [** denotes records or info relating to mediation, panel review that Agency is required to ensure are posted (see s. 55.1 (2) below.]	Primary recommendations: Require a standard (10, 20 or 30 day) notice and comment period after the date of each decision. See g) below. See "Recommendations for public notice and comment" in List of Recommendations Retain current 55 (3) – (7) re contents; reject proposed subs. (2): The current general requirement to include all records produced, collected or submitted with respect the assessment is preferable to a finite list of decisions proposed here. Secondary recommendations: Re a): Provide details of the nature, location, etc. of proposed project. Provide opportunity to comment for x days following this notice. Re b): Should list notice of draft agreements for public comment before making agreements. Amend c) to read "a statement of the projects in respect of which a class screening report is

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	request by Minister for more info (23 (2)); * k) notice of referral of project to mediator or review panel; ** l) notice of order where Minister has ordered end of mediation (29 (4)); ** m) report (or summary) of a mediator or review panel; ** n) s. 37 (1.1)(a) response by RA or s. 37 (1.2) by federal authority to mediator or review panel report; ** o) RA's s. 20 or 37 EA decision (except in case of class screening); p) summary description of any follow-up program and its results, or how same may be obtained; ** q) any other info RA or Agency "considers appropriate", including list of relevant documents and a description where they may be obtained; ** r) any other record or information prescribed under para. 59 (h).		proposed to be used under …"; provide a comment period of x days. Re g): Delete "any": "Public notices issued by RAs or Agency to request public input into an EA, as required by paras. a)", etc. Re i), p), q): change to "and how a copy of it may be obtained …" Re p): delete "summary". Re q): Links to the documents themselves, and a method of obtaining them otherwise should be provided. Re m): delete "or summary". Re r): Note that 59 (h) enables regs prescribing the "charging of fees for providing copies of documents contained either in a list of relevant documents contained in the Registry or in the Registry itself". Links to millions of documents are provided on the Internet for free, yet this provision seems to contemplate charging for access to information about public projects. " Is this "cost recovery" to be applied to public information about EAs? Related provisions: subs. 18 (3), para. 59 (h).
55 (3) Form and manner of Registry	Allows Agency to determine form of Registry and how it is to be kept; contents of records in Registry; when they must appear and when removed; and how access is to be provided.	Greater precision in this or other sections, clarifying the contents of the Registry, would ensure consistency and better assure public that relevant information will be available.	See for example recommendations for subs. 55 (2).
55.1 – 55.2 Duty to contribute records – Agency; RAs	55.1 Requires Agency to ensure certain records are included in Registry. 55.2 Requires Agency to ensure certain records related to mediation or review panel are included in Registry.	The required records are denoted by * (subs. (1)) and ** (subs. (2)) above.	
55.3 Third party information; Applicability of [certain sections]	(1) Requires Agency and RA to ensure that no info is included in the Registry if its disclosure would be	S. 20 of *Access to Info Act* protects "trade secrets"; "financial, commercial, scientific or	Library of Parliament's Legislative Summary calls this proposal a "non-disclosure" rule compared

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of Access to Info Act to third party info	prohibited under s. 20 of *Access to Info Act*. (2) Provides that ss. 27, 28 and 44 of *Access to Info Act* apply to info described in subs. 27 (1) … that Agency or RA intends to include in Registry	technical information" generally treated as confidential; info whose disclosure could result in change in financial or competitive positions; or info whose disclosure could interfere with "contractual or other negotiations". ss. 27, 28 and 44 of *Access to Info Act* require RA or Agency to give notice of intention to disclose prescribed third party info; provide the party with chance to make representations; inform third party of right to apply for judicial review in case of release of info. S. 55.3 replaces helpful rules in determining disclosure found in current subs. 55 (4).	to current "pro-disclosure" approach.
55.4 Protection from civil proceeding or prosecution	Provides that no civil or criminal proceedings lie against RA, Agency or Minister or those acting for them, or against Crown, for disclosure in good faith of any record, or for failing to give notice required under ss. 27-28, *Access to Info Act*, provided reasonable care is taken to give the notice.	Ss. 27 and 28 of *Access to Info Act* require RA or Agency to give notice of intention to disclose prescribed third party info; provide the party with chance to make representations.	Support.
27. **(Heading)**	Adds a new heading preceding s. 56: "Relevant Information"	Current heading reads "Statistical summary"	
28. **56.1 Info required in support of quality assurance program** See RAC #1.5, 7.1, 7.3 [consensus]	Requires federal authorities and persons, bodies referred to in ss. 8-10 to provide Agency with info respecting assessments they conduct and that Agency "considers necessary in support of a quality assurance program that it establishes".	Wording ("a quality assurance program that it establishes") is ambiguous as to whether establishment by Agency is mandatory or discretionary.	See recommendation under clause 32. (1), amending CEAA para. 63 (1)(d).
29. **58 (1.1) Participant funding**	Adds comprehensive studies to list of EAs for which Minister shall establish a participant funding program (along with mediations and review panels in current Act); establishes that	Participant funding must be adequate to ensure meaningful public participation at all stages of EA. Extending participant funding to comp. study is a positive measure, subject to this	Support. Report to Parliament respecting the need for sustained funding of a participant funding that ensures meaningful public participation at all stages of

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	requirement applies [only?] to review panels "established under either subs. 33 (1) or 40 (2).	qualification.	and in all types (comp.study, etc.) of EA.
30 (1) **59 (a.1) [Authority to make regulations]**	Allows G-i-C to make regulations respecting duties and functions of "federal EA coordinator", and respecting the selection or designation of same.		
[Regulation-making powers]	The following sections propose new powers to make regulations:		
30 (2) **59 (c) [Regulation-making powers]**	(c) Changes wording of current subs. (c), explicitly "exempting from the requirement to conduct an assessment" projects which "in the opinion of G-i-C, ought not to be assessed" i) "for reasons of national security"; ii) are projects in relation to physical works having insignificant environmental effects; or iii) have a total cost below a prescribed amount and meet prescribed environmental conditions (new).	Subsection currently allows G-i-C to "prescribe" any project or class for which an EA is not required (rather than "exempted"), where G-i-C is "satisfied" of i) and ii). Note that the terms used are "EA" and G-i-C is "satisfied", rather than "an assessment …" and "in the opinion of"; the term "ought not to be assessed" adds a quasi-objective element to the determination. i) currently requires that EA is "inappropriate for reasons of national security", and ii) currently allows such projects to be prescribed "where the contribution of RA to project in exercising duties or functions referred to in s. 5 in relation to the project is minimal."	Reject 59 (c) (iii). Cost is not always if ever a relevant consideration of environmental significance of a project. "Environmental conditions" should be prescribed by Parliament in law, not by regulation.
59 (c.1) [Regulation-making powers]	Allows regs to be made "in replacement of exemptions made under (c)" above, "in relation to [Crown corps in s. 8]", or CIDA, exempting any project or classes of projects outside Canada and outside "any federal lands from the requirement to conduct an assessment" under s. 8 or 10.1, and meeting one of the three criteria in (c) above.		Reject 59 (c.1) (iii). Cost is not always if ever a relevant consideration of environmental significance of a project. "Environmental conditions" should be prescribed by Parliament in law, not by regulation.
30. (3)	Allows regs to be made	See s. 55 above.	The charging of fees for

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
59 (h) [Regulation-making powers] See RAC #30.1 [consensus]: implemented in part	prescribing information to be included in Registry, and "respecting charging of fees for providing copies of documents" in or listed in Registry.	Para. 59 (h) currently allows for regs "respecting the dissemination by RAs of info relating to projects and EA of projects and the establishment, maintenance and operation of a public registry."	documents should not be allowed to pose a barrier to information concerning EAs.
59 (h.1) [Regulation-making powers] See RAC #15.2	New: Allows regs to be made prescribing "the manner of designing a follow-up program" (see subs. 38 (1), (2), 53 (1)).	Minimum elements of follow-up program should be listed in greater detail. Should include mitigation measures (see, for example, subs. 20 (2.1)).	See recommendations re subs. 38 (2).
30. (4) **59 (i.1) [Regulation-making powers]**	New: Allows regs to be made prescribing "circumstances" or "terms and conditions" where: i) federal authorities are not required to conduct EAs of projects outside Canada and outside federal lands but are "subject to assessment of environmental effects" (s.8),; ii) federal authorities for whom obligations in the Act "are deemed to be satisfied by" a s. 8 assessment (except obligation to decide whether to allow project to proceed (ss. 20 (1) and 37 (1)).		This amendment should not be allowed to come into force until proposed regulations meeting or exceeding CEAA standards have been developed. See s. 8.
59 (i.2) [Regulation-making powers]	New: Allows regs to be made for the purpose of varying subs. 20 (1) or 37 (1) in its application to federal authorities prescribed in 59 (i.1) (ii) above.		Reject.
59 (j) [Regulation-making powers]	Allows regs to be made "for purposes of section 8, <u>designating corporations</u>" and classes of corporations, respecting manner in which they conduct: assessments of environmental effects; follow-up programs; and <u>respecting "any action to be taken in respect of projects during the assessment projects</u>". Provides that	Mainly unchanged from current form. Proposed version is more explicit that a different regulation could be made for each federal Crown corporation.	Propose minimum standards. See s. 8.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
	assessments, follow-up programs and actions "may vary by corporation or class of corporation." These regs may also concern the application to designated corporations of provincial laws.		
59 (j.1) [Regulation-making powers] **[Inclusion List for Crown projects outside Canada]**	Allows regs to be made prescribing (for purposes of s. 8 and projects outside Canada and any federal lands, in relation to corps. described in (j)) any physical activity(ies) replacing those in para. (b).	Proposes a parallel "inclusion list" (physical activities not related to a physical work – see def'n of "project") for projects outside Canada by Crown corps in s. 8.	See s. 8. Will apply to Canadian Commercial Corporation? And what other Crown corporations? (Must be designated in (j).)
59 (j.2) [Regulation-making powers] **[Law List for Crowns]**	Allows regs to be made prescribing a list of powers, duties of functions for Crown corps in s. 8, the exercise or performance of which requires an assessment of environmental effects under para. 8 (1.1) (d).	Proposes a parallel "law list" regulation for Crown corps.	
59 (j.3) [Regulation-making powers] **[Land trigger for Crowns; prescribed federal lands]**	Allows regs to be made prescribing circumstances in which a Crown corp. in s. 8 must ensure an assessment of a project on federal lands be conducted, and specifying what "right or interest" in such lands it must have in order to trigger this obligation.	Proposes a parallel land trigger for Crown corps. See proposed subs. 8 (1.1). Crowns must have specified right or interest in lands, in prescribed circumstances.	
59 (k) [Regulation-making powers] **[Assessments by port authorities, etc.]**	Changes wording of this para. to read "for the purposes of s. 9." Regs made under this para. would prescribe how harbour commissions, port authorities, etc. must assess projects, conduct follow-up programs, and prescribing "any action to be taken in respect of projects during the assessment process and, for those purposes, respecting the application of the laws from time to time in force in any province."	Current para. refers explicitly to the s. 5 triggers. These references would be removed by this amendment, as proposed s. 9 would impose an obligation to conduct "an assessment" only if regs were made. This amendment could impose obligations to conduct an assessment that looks very different than a regular EA.	Propose minimum standards. See s. 9.
59 (k.1) [Regulation-making powers]	Allows regs to be made prescribing a list of powers, duties of functions for s. 9 bodies, the	Proposes a parallel "law list" reg for s. 9 bodies. See subs. 9 (1) and (2)(d).	

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
[Law List for port authorities, etc.]	exercise or performance of which requires an assessment of environmental effects under para. 9 (2) (d).		
59 (k.2) [Regulation-making powers] [Land interests – port authorities, etc.]	Allows regs to be made prescribing circumstances in which a s. 9 body must ensure an assessment of a project on federal lands be conducted under para. 9 (2) (e).	Proposes a parallel land trigger for s. 9 bodies. See proposed subs. 9 (2) (e).	
59 (k.3) [Regulation-making powers] **[Assessments by prescribed authorities]** See RAC #10.1, 10.2, 10.3, 10.4, 34.1 and 35.1-35.6 [consensus]	Allows regs to be made prescribing "by class, authorities other than federal authorities [see proposed s. 9.1] and respecting the manner in which [they] shall conduct" assessments, follow-ups, "as well as any action to be taken in respect of projects during the assessment process…".	This provision would allow for regs to be developed describing how new classes of authorities must conduct assessments (similar to para. 59 (k) for harbour commissions, etc.).	See proposed s. 9.1 ("prescribed authorities").
59 (k.4) [Regulation-making powers] **[Law List for prescribed authorities]** See RAC #10.1, 10.2, 10.3, 10.4	Allows regs to be made prescribing a list of powers, duties of functions for s. 9 bodies, the exercise or performance of which requires an assessment of environmental effects (para. 9.1 (2) (d)) by bodies listed in a reg. under para. (k.3).	Proposes a parallel "law list" regulation for bodies listed in para. 59 (k.3). See para. 9.1 (2)(d), para. 59 (k.3).	
59 (k.5) [Regulation-making powers] **[Land trigger for prescribed authorities, prescribed interest in lands]**	Allows regs to be made prescribing circumstances in which a para. 59 (k.3) body must ensure an assessment of a project on federal lands be conducted under para. 9.1 (2) (e), and specifying the right or interest the body must have in those federal lands.	Proposes a parallel "land trigger" for those bodies listed under para. 59 (k.3); proposes to limit this trigger to certain rights or interests in federal lands. See proposed subs.	
59 (l) [Regulation-making powers] **[Assessments on reserve lands; designated bands]**	Changes existing reg-making power for requiring assessments on Indian reserve lands.	Changes this section to read "for the purposes of s. 10", and allowing bands subject to such regs to be "designated" individually or by class," so that rules for conducting assessments and follow-ups can be tailored to bands designated in this way.	See proposed s. 10.
59 (l.01) [Regulation-	Allows regs to be made "for the purposes of s.	Proposes a parallel system for assessments	See subs. 10.1, s. 54.

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
making powers] **[Assessments of CIDA projects]**	10.1": (i) "Varying the definition [of] "project" in subs. 2 (1)"; (ii) Respecting manner of conducting assessments and follow-ups for projects "triggered" by CIDA (see s. 10.1 (2)) and "respecting any action to be taken in respect of those projects during the assessment process"; (iii) Providing that CIDA does not have to assess a project if it enters into an agreement under subs. 54 (2); (iv) Varying or excluding "any" s. 54 obligations in their application to CIDA; or (v) Making s. 55.4 ("protection from civil proceeding or prosecution") apply to CIDA as if it were an RA.	by CIDA to be enacted through regulation.	An all-inclusive definition of "project" would be preferable.
59 (l.02) [Regulation-making powers] **[Registry - CIDA]**	Allows regs to be made varying or excluding any provisions of ss. 55 to 55.3 (Registry; duty to contribute records; third party information) in their application to CIDA.	Justification for excluding CIDA projects from public access on Registry?	
31. **62 (d.1) [Objects of Agency]** See RAC #1.5, 1.1 [consensus], 1.2 [no consensus]	Adds a new object for Agency, namely "to promote and monitor compliance with this Act and the quality of assessments conducted under this Act".	Agency should be provided with stronger powers over proponents and government departments to ensure compliance with the Act.	Support.
32. (1) **63 (1) (d) [Duties of Agency]** See RAC #1.5, 1.1 [consensus], 1.2 [no consensus]	Adds a new duty for Agency, namely to "establish and lead a quality assurance program for assessments conducted under this Act".		Reject. Add duty to ensure compliance with CEAA by proponents and federal authorities.
32. (2) **63 (2) (f), (g) [Powers of Agency]** See RAC #1.5, 1.1 [consensus], 1.2 [no consensus]	Adds new powers for Agency, namely (f) [to] assist parties in building consensus and resolving disputes; and (g) [to] request federal authorities, and persons and bodies in ss. 8 – 10, to provide information respecting assessments they conduct under this Act.	Nothing in other proposed sections suggests Agency is likely to exercise powers in (f).	Add powers to enforce compliance with CEAA by proponents and federal authorities.
33.	Provides that an EA or	Prevents retroactivity of	Make clause 33 sub-clause

Clause in Bill C-19 **Section in CEAA**	**How the clause would change the Act**	**Comments**	**Recommendations**
Non-application of amended provisions to assessments already commenced	assessment already underway before this section comes into force "shall be continued and completed as if this Act [Bill C-19] had not [yet] been enacted."	Bill C-19 to projects already being assessed at time Bill C-19 comes into force. The projects to which this provision applies should be listed in a regulation.	33 (1), and add 33 (2): "Before this section comes into force, all projects to which subsection (1) applies shall be listed in a regulation, and subsection (1) shall apply only to those projects listed in the regulation." (Add a regulation-making power if necessary.)
34. **Coming into force**	Provides that the provisions in Bill C-19 are to come into force "on a day or days [i.e. different provisions could come into force on different days] to be fixed by order of the Governor in Council."		

Abbreviations used in the Table:

CEAA: Canadian Environmental Assessment Act
CIDA: Canadian International Development Agency
Comp. study: comprehensive study (defined)
CSL: Comprehensive Study List (regulation) (defined)
EA: Environmental assessment (defined)
G-i-C: Governor-in-Council
RA: responsible authority (defined)
RAC: Regulatory Advisory Committee (a multi-stakeholder advisory committee reporting to the Minister of the Environment)
RAC # [consensus]: refers to recommendation numbers found in the RAC's *Review of the CEAA: Report to the Minister of the Environment, May 2000*) and whether there was consensus among RAC members for the recommendation

Appendix A: Draft Canadian Strategic Environmental Assessment Act [39]

An Act to establish a federal process for strategic environmental assessment

WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

WHEREAS strategic environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of proposed policies, plans and programs to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as the *Canadian Strategic Environmental Assessment Act*.

2. In this Act,

> "Agency" means the Canadian Environmental Assessment Agency established by section 61 of the *Canadian Environmental Assessment Act*;
>
> "environment" has the same meaning as in the *Canadian Environmental Assessment Act*;
>
> 'environmental effect" means, in respect of a proposal, any change that the proposal may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, whether any such change occurs within or outside Canada;
>
> "federal authority" means
>
> (a) a Minister of the Crown in right of Canada;
> (b) an agency of the Government of Canada or 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;
> (d) the Hamilton Harbour Commissioners constituted pursuant to *The Hamilton Harbour Commissioners' Act, 1911*;
> (e) a harbour commission established pursuant to the *Harbour Commissions Act*;
> (f) a Crown corporation within the meaning of the *Financial Administration Act*;
> (g) 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; and

[39] Adapted from "Federal Strategic Environmental Assessment: Towards a Legal Framework" by Stephen Hazell and Hugh Benevides. (1998) 7 Journal of Environmental Law and Practice at p. 374.

(h) any other body that is prescribed pursuant to regulations made under paragraph 59 (e);

"Minister" means the Minister of Environment;

"proposal" means a proposed policy, plan or program that may have adverse environmental effects;

"sustainable development" means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

3. This Act is binding on Her Majesty in right of Canada or a province.

4. The purposes of this Act are

(a) to ensure that government policies, plans and programs do not cause adverse environmental effects;
(b) to ensure that the environmental effects of proposed policies, plans and programs receive careful consideration by responsible authorities taking actions in connection with them;
(c) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy; and
(d) to ensure that there be an opportunity for public involvement in the process of environmental assessment of government policies, plans and programs.

5. (1) A strategic environmental assessment of a proposal is required to be carried out by a federal authority or authorities prior to making a submission to the Governor in Council seeking a decision with respect to that proposal.

(2) Where a strategic environmental assessment is to be carried out **[prior to making a submission to the Governor in Council]**, the federal authority or authorities shall give notice and details of the proposal to the public through publication in the *Canada Gazette* and at least one national publication of general circulation, and by means of at least one national broadcast or electronic medium that the federal authority or authorities consider appropriate.

(3) The notice referred to in subsection (2) shall provide a public comment period of at least 120 days, and information how members of the public may offer comments on the proposal.

6. (1) Notwithstanding section 5, a strategic environmental assessment of a proposal is not required where

(a) the proposal is to be carried out in response to a national emergency for which special temporary measures are being taken under the Emergencies Act, or carrying out the proposal forthwith is in the interest of preventing damage to property or the environment, or is in the interest of public health or safety;
(b) the Governor in Council is of the opinion that a strategic environmental assessment would be inappropriate for reasons of national security;
(c) the Governor in Council is of the opinion that the matter is of such urgency for the economy or a particular industrial sector, that the normal process of Cabinet consideration is shortened and even a simplified strategic environmental assessment cannot be undertaken; or
(d) the proposal comprises Treasury Board submissions on matters already assessed under a previous proposal to Cabinet, or under the Canadian Environmental Assessment Act.

7. A strategic environmental assessment shall include a summary of the anticipated beneficial and adverse environmental effects of the proposal and their expected significance, the purpose, need for and alternatives to the proposal, alternatives means of implementing the proposal, information on measures adopted to mitigate adverse environmental effects, and information on follow-up programs to monitor the proposal's environmental effects over the long term.

8. (1) For the purpose of facilitating public access to records relating to strategic environmental assessments conducted under this Act, a public registry shall be established and operated in a manner to ensure convenient public access to the registry and in accordance with this Act and the regulations in respect of every proposal for which a strategic environmental assessment is conducted.

(2) The public registry in respect of proposals shall be maintained by the Agency.

(3) Subject to subsection (4), the public registry shall include summaries of all strategic environmental assessments that are prepared pursuant to this Act and may contain, at the discretion of the federal authority, all records produced, collected or submitted with respect to the environmental assessment of the proposal.

9. (1) For the purposes of this Act, the Minister may issue guidelines and codes of practice respecting the application of this Act.

(2) The Minister shall provide reasonable public notice of and a reasonable opportunity for anyone to comment on draft guidelines, codes of practice, agreements, arrangements, criteria or orders under this section.

(3) Any guidelines, codes of practice, agreements, arrangements, criteria or orders shall be included in the public registry.

10. The Governor in Council may make regulations respecting the procedures and requirements of, and the time periods relating to, strategic environmental assessments and follow-up programs under this Act.

11. The Agency shall advise and assist the Minister in performing the duties and functions conferred on the Minister by this Act.

12. (1) In carrying out its objects as set out in the *Canadian Environmental Assessment Act* and as relevant to this Act, the Agency shall provide information or training to facilitate the conduct of strategic environmental assessments.

(2) In carrying out its objects, the Agency may
(a) undertake studies or activities or conduct research relating to strategic environmental assessments;
(b) advise persons and organizations on matters relating to strategic environmental assessments;
(c) examine and from time to time report to the Minister on the implementation of the strategic environmental assessment process by federal authorities; and
(d) issue guidelines regarding the records to be kept by federal authorities in relation to the strategic environmental assessment process.

13. Five years after the coming into force of this section, a comprehensive review of the provisions and operation of this Act shall be undertaken by the Minister.

14. This Act, or any provision of this Act, shall come into force on a day or days to be fixed by order of the Governor in Council.

Appendix B: List of recommendations

Recommendations specific to Bill C-19 proposals (additional recommendations respecting Bill C-19 may be found in the Table):

The Minister of Environment, not the RA's Minister, should be given the exclusive authority to make an order in section 11.1 (proposed in Bill C-19) prohibiting a proponent from doing "any act or thing that carries out the project being assessed in whole or in part." No part of a project being assessed should be allowed to proceed until the EA has been completed and a decision has been made.

Proposed subsection 11.1 (5) (Bill C-19) would prevent a minister from making a subsequent order prohibiting the same act or thing. This limitation has neither a legal nor an environmental justification, and the subsection should therefore be deleted.

Proposed s. 11.2 would allow the Attorney General (the federal Minister of Justice) to apply for and a court to issue an injunction preventing action contrary to the order, until a decision is made respecting the project. The power to apply for an injunction of this nature should be made available to any person, not just the Attorney General.

Proposed subs. 15 (1.1) and (1.2) (Bill C-19) should be amended as follows:

(1.1) For greater certainty, in determining the scope of the project as required by subsection (1), the responsible authority or the Minister, as the case may be, is not limited by the Acts of Parliament that confer the powers exercised or the duties or functions performed by that responsible authority or any other responsible authority in relation to the project.

(1.2) A federal authority shall provide any assistance requested by a responsible authority in providing information related to the determination of the scope of the project.

Proposed subsection 21.1 (2) (Bill C-19) (making the Minister's decision to keep a project on the comprehensive study track rather than calling for a review panel) should be deleted.

Proposed subsection 38 (5) (Bill C-19) proposes to use follow-up programs "for implementing adaptive management measures." This could result in the Act having an even greater emphasis on mitigating environmental damage instead of an environmental enhancement mandate. These words should be deleted.

Proposed paras. 59 (c) and (c.1) allowing regulations to be made exempting projects based on cost should be rejected.

Current technology easily allows posting of documents through links, or by scanning to "PDF" format. Regional offices of the RA closest to the proposed project should provide hard copies of all documents meeting the criteria in current subs. 55 (3), and these same documents should be available through the proposed electronic registry. **These should be mandatory obligations of every EA**.

General recommendations

The self-assessment system must be replaced by a binding process (including enforceable decisions) administered by an independent, central Agency with the power to compel compliance with the Act.

The constitutional basis for CEAA should be set out in the Preamble.

The definition of "environmental effect" should be amended to read as follows:

> "environmental effect" means, in respect of a project,
>
> (c) any change that the project may cause in the environment in the short-term and long-term, including any [ ] change in health and socio-economic conditions, any changes that are likely to result from the project in combination with other projects or activities that have been or will be carried out, and any changes in physical and cultural heritage, in the current use of lands and resources for traditional purposes by aboriginal persons, or in any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and
>
> (d) any change to the project that may be caused by the environment in the short-term and long-term,
>
> whether any such change occurs within or outside Canada.

The Agency should be asked to report to the Committee on possible definitions for terms used in the definition of "project", namely "construction", "operation", "modification", "decommissioning", abandonment" and "other undertaking", and the pros and cons for including such definitions in the Act.

Section 4 should be amended to read

> 4. The purposes of this Act are:
> (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them, in order to ensure projects do not cause significant adverse environmental effects; …
> (b) [remains the same];
> (b.1 and (c) [deleted]; and
> (d) to ensure that there be an opportunity for meaningful public participation early and often throughout the EA process.

The Act should be amended to oblige all federal bodies to conduct EAs until alternate, equivalent regulations are developed under CEAA. (See table re ss. 8-10.)

Consideration of the purpose of, need for and alternatives to the project should be mandatory at the earliest stage of every EA. Section 16 of CEAA should be amended as follows:

> 16. (1) …
> (e) the purpose of the project, need for the project and alternatives to the project; and
> (f) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel that the responsible authority or, except in the case of a

screening, the Minister after consulting with the responsible authority, may require to be considered.
[delete para. 16 (2) (a)]

Amend sections 5 (2)(b)(i), 8 (1), 9, 10, 11 (1) and 54 (1) and (2) as follows: "[Where an environmental assessment of a project is required, the relevant authority in relation to the project] shall ensure that the environmental assessment is conducted, and shall be referred to in this Act as the responsible authority in relation to the project." The words, "as early as practicable in the planning stages of the project and before irrevocable decisions are made" should be deleted in those sections.

Make federal strategic EA a legal requirement in one of three ways:

- Include in CEAA by amending definition of "project" to include "policies, plans and programmes", making necessary changes to CEAA;
- Include SEA in CEAA by appending a parallel SEA process to the current CEAA, with necessary changes to CEAA (see Appendix for draft provisions); or
- Legislate a parallel SEA process by enacting a Canadian Strategic Environmental Assessment Act (see Appendix for draft provisions).

Sections 20 and 37 should be amended as follows:

20 (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18 (3):

(a) subject to paragraph (c) (iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will make a positive overall contribution to the environment in the longer term and is not likely to cause significant adverse environmental effects, the RA may exercise any power or perform any duty or function … [the rest remains the same];

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive overall contribution to the environment in the longer term, the responsible authority shall not exercise … [the rest remains the same]; or

(c) where

(i) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, will cause significant adverse environmental effects or will make a positive contribution to the environment in the longer term, or

(ii) public concerns warrant a reference to a mediator or review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

37 (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23 (a), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate that the project will make a positive overall contribution to the

environment in the longer term and will not cause significant adverse environmental effects, the responsible authority may exercise any power or perform … [the rest remains the same]; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the responsible authority has reasonable grounds to anticipate the project will cause significant adverse environmental effects or will not make a positive contribution to the environment in the longer term, the responsible authority shall not exercise any power or perform … [the rest remains the same].

Guidance should be developed respecting the interpretation of positive contribution as provided in paragraph 58 (1) (a) of the current Act (omitting reference to "justifiable in the circumstances").

CELA recommends that subs. 58 (1.1) respecting participant funding be amended in order to extend such funding to comprehensive studies.

The words "in accordance with any regulations made under s. 59 (a.1)" should be deleted from ss. 8 (1), 9 (1), 9.1 (1), 10 and 10.1.

The words "in accordance with any regulations" in subsections 38 (1) and (2), and 53 (1) and (2) should be deleted.

CEAA should be amended to include Crowns within the definition of "federal authority", and para. 59 (j) should be amended to require Crowns to do "environmental assessments" rather than "assessments of the environmental effects."

Outside the immediate scope of CEAA, federal authorities should, as recommended by the Commissioner of Environment and Sustainable Development, strengthen compliance measures to ensure that all project proponents apply for required permits and licences in the Law List Regulations.

CELA recommends that a comprehensive regime for mandatory compliance be included in CEAA. A provision should be added after s. 11, making it an offence to proceed with any part of a project until a federal EA has been completed. A new offence and penalty Part of the Act should be created, setting out the penalties for violations of s. 11 and other provisions.

Federal agencies should also be given the express authority to require proponents to provide copies of development plans on request.

A final decision about a proposed project should include enforceable terms and conditions to ensure that the project does not cause environmental damage.

The Act should have more stringent requirements for follow-up and the Agency should be given stronger legislative tools and fiscal capacity to require follow-up.

CELA recommends that subs. 35 (1) be amended to empower review panels to hire experts, in order to improve the capacity of panels to assess information.

The Act should be funded sufficiently to ensure effective implementation of EA, and a specific funding commitment should be made to ensure adequate levels of participant funding in all types of EA.

The following new provision is recommended:

> 72 (1.1) A comprehensive review of the provisions and operation of this Act shall be undertaken by Parliament every five years after the review referred to in subsection (1) is completed.
>
> (1.2) The Minister may refer the review referred to in subsection (1.1) to a Committee of the House of Commons as may be designated or established for that purpose, in which case the Committee shall report the results of the review to the House of Commons.

Because CEAA should impose a comprehensive EA regime on all projects under federal government jurisdiction, CELA recommends that the Committee review the implications of Bill C-31 along with Bill C-19, with a view to repealing Bill C-31 and making EDC subject to CEAA.

Recommendations for public notice and comment

The public should be given an opportunity for notice and comment at every stage of the EA. CELA recommends the following amendments to CEAA, to improve public involvement and to provide public notice and comment periods at various stages of the EA process:

> ***Scoping***
> New subs. 16.1 (1)
> Public notice and comment on scoping
> 16.1 (1) The RA shall advise the Agency and the Agency shall post on the Registry and in a newspaper of general circulation in the area of the project for a 60-day public notice and comment period, all the matters to be considered in sections 15 and 16.
>
> (2) Before taking any further action in respect of the project, the RA shall consider all public comments received in response to (1) and forward to the Agency for posting on the Registry and in a newspaper of general circulation in the area of the project, any changes to the matters to be considered in sections 15 and 16.
>
> ***Screenings***
> Replace subs. 18 (3) with the following:
> Consideration of public comments
> 18 (3) The RA shall advise the Agency and the Agency shall post on the Registry for a 60-day public notice and comment period, a draft screening report, along with any record filed in respect of the project. Notice of the availability of the draft screening report shall also be published in a newspaper of general circulation in the area of the project.
>
> New subs. 18 (4)
> 18 (4) The RA shall consider all public comments received in response to the documents posted pursuant to subsection (3), and shall forward to the Agency for immediate posting on the Registry any changes to the draft screening report before taking any course of action under section 20. The changes shall also be published and in a newspaper of general circulation in the area of the project.
>
> Amend subs. 19 (2) to read:

Public notice and consideration of public comments
19 (2) The Agency shall, before making a declaration pursuant to subsection (1),

(a) publish in the *Canada Gazette,* in the Registry and in a newspaper of general circulation in the area of the project, a notice setting out the following information, namely,

(i) the date on which the screening report will be available to the public, which should be at least 60 days before making the declaration in subsection (1).

Amend subs. 19 (3) to read:
Publication
19 (3) Any declaration made pursuant to subsection (1) shall be published in the *Canada Gazette,* in the Registry and in a newspaper of general circulation in the area of the project.

New subs. 20 (4):
20 (4) Where the RA takes a course of action under (1) it shall immediately forward the decision to the Agency for immediate posting on the Registry and in a newspaper of general circulation in the area of the project.

Comprehensive studies
New subs. 22 (1)
Public notice
22 (1) After receiving a comprehensive study report in respect of a project, the Agency shall post the report on the Registry for a 90 day public notice and comment period. Notice of the availability of the comprehensive study report shall also be published in a newspaper of general circulation in the area of the project.

New s. 23.1
23.1 The Minister shall advise the Agency immediately of the course of action taken under section 23, and the Agency shall immediately post the decision on the Registry, and in a newspaper of general circulation in the area of the project.

"Discretionary powers" (ss. 25-28)
New s. 28.1
28.1 Where a RA or the Minister takes an action in any of sections 25, 26, 27 or 28, the RA or the Minister shall advise the Agency immediately of the course of action and the Agency shall immediately post the decision on the Registry, and in a newspaper of general circulation in the area of the project.

Mediation and Review Panels
New s. 29.1
29.1 The Minister shall advise the Agency and the Agency shall immediately post on the Registry and in a newspaper of general circulation in the area of the project any referral or decision made under s. 29.

Amend s. 36
Public notice
36. On receiving a report submitted by a mediator or a review panel, the Minister shall immediately advise the Agency and the Agency shall immediately post the report on the Registry, and shall make the report available to the public in any other manner the Minister considers appropriate to facilitate public access to the report, and shall advise the public in a newspaper of general circulation in the area of the project that the report is available.

New subs. 37 (1.2) and (1.3)
Public notice of action by Governor in Council

37 (1.2) The Governor in Council shall immediately advise the Agency of any action it takes under paragraph (1.1) (a) or (b), and the Agency shall immediately post this information on the Registry and in a newspaper of general circulation in the area of the project.

Public notice of decision of RA
(1.3) Where the RA takes a course of action under (1) it shall immediately forward the decision to the Agency for immediate posting on the Registry and in a newspaper of general circulation in the area of the project.

Follow-up Program
Amend subs. 38 (2)
Public notice
38 (2) A RA referred to in subsection (1) shall advise the Agency and the Agency shall post on the Registry and otherwise give notice to the public of the following matters: …
[the rest remains the same].

The Agency should be empowered to enforce the above obligations.

Similar notice and comment provisions should be implemented in respect of all manner of "assessments of environmental effects" provided for in the Act.

All documents relevant to an EA should be made available to the public at all stages of the EA as they are received by the RA, both through posting on the Registry or the provision of links, and at the closest office of the RA to the proposed project and affected communities.

Preparation of this submission

Hugh Benevides, B.A. Geography (Carleton), LL.B. (Dalhousie) was principal researcher and author of this submission. Hugh's environmental law and policy background includes coordinating the CEN's EA caucus in 1992 and 1997. He co-wrote "Federal Strategic EA: Towards a Legal Framework" (1998) *Journal of Environmental Law and Practice*, Vol. 7, pp. 349-377 with Stephen Hazell. Hugh's book review of *Canada v. the Environment: Federal EA 1984-1998* by Stephen Hazell appeared in the journal *Policy Options* in December 1999, and he was the CEN EA caucus delegate to a RAC sub-committee that discussed a possible CEAA regulation for the Export Development Corporation in 2001. He was Legislative Assistant to Hon. Charles Caccia, M.P. in 1997-1999. Most recently he was co-author (with Dr. Mark Winfield) of "Drinking Water Protection in Ontario: A Comparison of Direct and Alternative Delivery Models", for the Walkerton Inquiry (June 2001).

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