A large graphic consisting of a light blue circle containing a darker blue silhouette of the Earth's continents. Below the circle is a stylized, light blue hand with fingers spread, appearing to hold the globe. The text "REVIEW OF ENVIRONMENTAL ASSESSMENT PROCESSES" is centered in white, bold, uppercase letters within the globe.

**REVIEW OF  
ENVIRONMENTAL  
ASSESSMENT  
PROCESSES**

**Équiterre** Submission  
to the Expert Panel  
on the Review  
of Environmental Assessment  
Processes established by the Minister  
Of Environment and Climate Change  
**22 december 2016**

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# REVIEW OF ENVIRONMENTAL ASSESSMENT PROCESSES

## I. INTRODUCTION

Équiterre is pleased to provide this submission to the Expert Panel on the Review of Environmental Assessment Processes (“Expert Panel”), and is thankful for the opportunity to do so. It is our sincere hope and expectation that this review of the current federal environmental assessment (EA) regime will mark a positive turning point for Canada’s environment and its people.

### A. Background: Équiterre and its experience with environmental assessments

Équiterre, a non-profit, charitable organization with offices in Montréal, Quebec City and Ottawa, has worked for over 20 years to raise awareness and advocate for sound environmental and energy policies in Quebec, Canada and on the international scene as well. Since its creation in 1993, Équiterre’s primary mission has been to help build a social movement by encouraging individuals, organizations and governments to make ecological and equitable choices, in a spirit of solidarity. Our organization includes 18,000 members and more than 150,000 supporters located largely in Eastern Canada, and also manages the world’s largest community supported agriculture program, with over 120 organic farms in Quebec.

As a leading organization covering the full gamut of environmental and energy issues in Canada, including clean energy, transportation, climate change, ecofiscal policy, water and air quality, family farms, and social justice, Équiterre is specially situated to provide input to the Expert Panel.

Through its extensive experience participating in EAs at federal and provincial levels, Équiterre’s ability to identify the full range of potential environmental and socioeconomic impacts of a project or policy underscores its value to this Review of Environmental Assessment Processes.

Équiterre has previously participated and provided high quality information to the NEB as intervenor in hearings on Enbridge Lines 9A and 9B, and was also deeply involved in the NEB hearing process for TransCanada’s Energy East pipeline project, until that hearing, which was in its early stages, was suspended in October 2016. Équiterre has also participated in numerous hearings held by the Bureau d’audiences publiques sur l’environnement (BAPE). Most recently, Équiterre participated in a preliminary BAPE hearing on Energy East in spring 2016, and has also participated in a number of other BAPE consultations around energy and agriculture issues since 2003.

## B. Overview: top concerns and organization of our comments

Équiterre joins the multitude of civil society groups and citizens across Canada who have been declaring for some time that the environmental review process in Canada is broken and must be fixed. Similarly, we join the chorus of those demanding that this repair happen not by way of minor tweaks to the existing and deeply problematic *Canadian Environmental Assessment Act 2012 (CEAA 2012)*, but rather through a complete overhaul of the existing regime, which is outdated, ineffective and inefficient at best – and harmful to the goals of environmental protection and sustainable development at worst.

In 2012, Professor Meinhard Doelle summed up his evaluation of then newly-minted *CEAA 2012* as follows:

“In short, *CEAA 2012* is a major step backward; it makes the EA less effective and less fair. It even makes the EA less efficient in the sense that it now completely duplicates the already existing regulatory process, and therefore is an additional regulatory burden without offering the value of good EA.”<sup>1</sup>

In retrospect, we see that this was an entirely accurate description of the structural flaws of *CEAA 2012*.

As with other groups and citizens, however, we bring to the Expert Panel not just our complaints about the shortfalls and flaws of the current EA regime, but also a way forward. Équiterre strongly supports the development of a “next-generation” approach to EA that presents a strong turn away from preoccupations with adverse effects, mitigation and trade-offs between competing interests and toward ensuring environmental integrity, sustainability and delivering net societal benefits. Specifically, we support an approach that tracks the approach developed during the Federal Environmental Assessment Reform Summit of May 2016 and is grounded closely in all 12 of its pillars.<sup>2</sup>

Our comments in this brief follow a flow from a dysfunctional past in federal EA to a hopeful future. Section II identifies key flaws in the current regime; Section III suggests, in general terms, a process for developing a new EA regime in Canada; Section IV highlights issues of special importance under certain of the pillars; and Section V presents our top-line recommendations and closing comments.

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<sup>1</sup> Meinhard Doelle, “CEAA 2012: The End of Federal EA As We Know It?” (2012), *Journal of Environmental Law and Practice*, Vol. 24(1), at p. 17, available online at <https://uwaterloo.ca/next-generation-environmental-assessment/sites/ca.next-generation-environmental-assessment/files/uploads/files/MDoelle%20End%20of%20EA.pdf>.

<sup>2</sup> As presented in Anna Johnston, Federal Environmental Assessment Reform Summit, Proceedings, West Coast Environmental Law, August 2016, available online at [http://wcel.org/sites/default/files/publications/WCEL\\_FedEnviroAssess\\_proceedings\\_fnl.pdf](http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf).

It is our hope that the Expert Panel will consider seriously our views on the key flaws with the current regime, as well as the need for a new EA paradigm accompanied by concrete and fundamental modifications to the way in which EAs are carried out in Canada.

## II. THE CURRENT EA REGIME IS BEYOND REPAIR AND MUST BE OVERHAULED

### A. Preliminary comments: the urgent need for a new EA regime

It is evident to all who care about environmental protection and sustainability that *CEAA 2012*, a creation from the previous government, is the primary source of problems with Canada's broken EA regime. In fact, the flaws in the law are so many, that simply to identify them all would take many pages. Such a detailed analysis is beyond the scope of this brief, but more importantly is of limited usefulness given the law's grave dysfunctionality. With these considerations in mind, Équiterre highlights, in this section, some of the fundamental ways that the *CEAA 2012* fails Canada and its citizens in carrying out EAs.

First, however, some preliminary observations are in order.

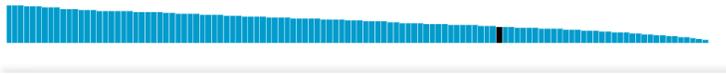
It goes without saying that great care must be taken in crafting new EA legislation to ensure that the problems of the past are not repeated, and the state of Canada's environment demands nothing less. A quick look at a few indicators on protection of ecosystems quickly dispels any illusions that the health of Canada's environment is safe and secure. According to Yale University's Environmental Performance Index (EPI) for 2016,<sup>3</sup> while Canada ranked 25<sup>th</sup> out of 180 countries (far from "leader" status), it ranks distressingly behind other countries around the world on key indicators of environmental health like forest, health, and biodiversity,<sup>4</sup> as is shown in **Figure 1**.

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<sup>3</sup> Hsu, A. et al. 2016 Environmental Performance Index. (2016) New Haven, CT: Yale University. Available online at [www.epi.yale.edu](http://www.epi.yale.edu).

<sup>4</sup> Ibid. Canada's ratings are available online at <http://epi.yale.edu/country/canada>.

**Figure 1.** Canada’s 2016 worldwide rank on protecting key ecosystems (Yale EPI Index 2016)  
On Forests (e.g., preventing deforestation), **Canada ranked 82nd** out of 121 countries:



**On Biodiversity and Habitat, Canada ranked 111<sup>th</sup> out of 180 countries.**



**On Fisheries, Canada ranked 99<sup>th</sup> out of 136 countries.**



In short, the need is urgent and the time is now serious attention to sustainability in the context of EA and other federal programs and policies.<sup>5</sup>

We now turn to a brief review of some of the key failings of Canada’s EA approach under *CEAA 2012*.

## **B. Delegation of EA to regulators not suited to EA**

The *CEAA 2012* delegation of EA to “responsible authorities” such as the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) is a deep, structural flaw which must be remedied. By their very nature, regulatory agencies tend to focus on the subject matter of the industries they regulate, and are typically concerned with technical issues of regulation. As such, they often lack either interest or competence or both in focusing upon the kinds of issues central to environmental assessment. This raises serious concerns with agency ability to evaluate and make recommendations on environmental and socio-economic matters.

As well, regulatory agencies sometimes suffer from “regulatory capture”, a state in which regulatory agencies created to act in the public interest eventually come to be dominated by the very industries they were charged with regulating. Consequently, they gravitate toward advancing the commercial and/or political interests of those industries, which does not bode well for the proper conduct of EAs. Agencies suffering from this malaise become less capable of considering whether “the industry sector they regulate offers the most sustainable long-term solution to the need or purpose being pursued with the proposed project.”<sup>6</sup> In our view, both the NEB and CNSC suffer from regulatory capture, and on that ground alone are not fit to oversee or carry out EAs. With this understanding, the delegation

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<sup>5</sup> While our focus in this brief is sustainability as it pertains to EA regimes, we note that strategic environmental assessments (SEAs), which are one of the pillars of next-generation EA, can potentially inject sustainability into all federal policies and programs.

<sup>6</sup> Meinhard Doelle, “CEAA 2012: The End of Federal EA As We Know It?” (2012), *Journal of Environmental Law and Practice*, Vol. 24(1), at p. 5, available online at <https://uwaterloo.ca/next-generation-environmental-assessment/sites/ca.next-generation-environmental-assessment/files/uploads/files/MDoelle%20End%20of%20EA.pdf>.

of EA to regulatory agencies (as in the current regime) is a recipe for eroding credibility of EA processes and results

Conflicts of interest and appearances of bias have plagued "responsible authorities" such as the NEB. With respect to conflicts of interest and bias, we refer the Expert Panel to the painful example of the NEB recusals of panel members and of the Chairman of the NEB himself from the Energy East pipeline project hearing after the media and public advocacy groups called foul on private meetings that NEB members had had with Jean Charest, in his capacity as an advisor to TransCanada. As is well-known, this event led to the full suspension of the hearing.

### C. Cart-before-the-horse procedures

When public citizens and civil society groups must apply for participation status before projects have even been deemed complete, as was the case in the now-suspended Energy East Pipeline Project proposal under consideration by the National Energy Board,<sup>7</sup> credibility of process is called into question. In the Energy East file, this caused time and capacity issues for citizens and civil society organizations who had to commit time and resources to reviewing available documentation in order to indicate how they intend to participate and identify the issues they intended to focus upon in the hearing all before the proponent's application was complete. According to the NEB's own *Hearing Process Handbook*,<sup>8</sup> and its description of "Basic Hearing Steps", the public would typically be invited to become formal participants (such as intervenors) after the Board issued a Hearing Order – and a Hearing Order is only issued upon a determination that the project application is complete.<sup>9</sup>

By deviating from its own procedure, organizations and citizens had to spend many hours reviewing file documents in order to decide whether or not they wanted to apply to be participants, and they had to do so well before complete information about the project design – much less its environmental or socio-economic impacts – was made available by the proponent.

A related problem involved the List of Issues, which in NEB practice contains the issues that the Board will consider during its assessment of the application. Normally, one would expect the Board to have complete and accurate information about a proposed project before selecting these issues,

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<sup>7</sup> See National Energy Board, Energy East Project and Asset Transfer, and Eastern Mainline Project, Hearing Order OH-002-2016, July 20, 2016, Appendix V – Timetable of events, p. 36, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3011601>.

<sup>8</sup> National Energy Board, *Hearing Process Handbook*, 2013, p. 5 available online at <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngpmphlt-eng.pdf>.

<sup>9</sup> See e.g., National Energy Board, "Participation in a Public Hearing – Part A, Energy East/Mainline Projects" (presentation), slides 7 and 18, available online at: <https://www.neb-one.gc.ca/pplctnflng/mjrpp/nrgyst/nrgystprsnntn/nrgstpbchrng-eng.pdf>.

particularly since intervenors are asked to tie their participation to one or more of these issues. But again, the procedure followed in the Energy East file was completely out of sync with NEB standard procedures: the NEB's *Hearing Process Handbook*<sup>10</sup> indicates clearly that the Board will determine and publish the List of Issues for a hearing at the time it publishes the Hearing Order in a case, and again, the Hearing Order is only issued when the project application is found to be complete. In the case of the Energy East file, the Board issued a List of issues very soon after the initial project application was filed in October 2014 – a full 20 months before the application was deemed complete, in June 2016.

Additionally, interested groups and citizens needing funding were asked to submit detailed funding applications, requiring hours of preparation, well before the NEB made its decisions as to who would even be granted intervenor status. Obviously, a more logical procedure would be the opposite: decide upon intervenors and then offer those intervenors the opportunity to apply for funding.

Referring again to the NEB, the practice of developing conditions for project approval, and asking hearing participants to comment upon them, before the NEB has even rendered its recommendation to Cabinet<sup>11</sup> stands as yet another disturbing “cart-before-the-horse” situation. It goes without saying that this procedure of developing conditions for approval in advance of a the approval/rejection decision does little to assure hearing participants that they are engaged in a credible assessment process or that project rejection is even a serious possibility.

#### **D. Double standards for civil society groups compared to proponents**

Public trust in, and credibility of, the federal EA process have suffered due to the treatment of proponents and civil society groups in ways that tip the balance of convenience – on process as well as result – in favour of project proponents. One example concerns the Energy East pipeline project hearing, in which the proponent, TransCanada, tabled thousands of pages of amendments, re-amendments and finally an error-filled “consolidation” of previous revisions. Due to the NEB’s discretion, the proponent reshaped its project application several times after the initial filing in October 2014. The magnitude and frequency of modifications to project applications create huge time and resource problems for groups which must do their due diligence and review all the filings. At the same time, participants must adhere to inflexible, short timeframes for completing other filings required of participants.

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<sup>10</sup> National Energy Board, *Hearing Process Handbook*, 2013, available online at <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngpmpHLT-eng.pdf>.

<sup>11</sup> As the NEB explains in the Energy East Pipeline Project Hearing Order OH-002-2016, July 20, 2016, the National Energy Board Act, R.S.C., 1985, c. N-7 (“NEB Act”) requires, in section 52(1)(b) that the Board identify all conditions that it considers in the public interest, in advance of the approval decision by Cabinet.

## E. Premature completeness determinations

Both credibility and quality of the fundamental exercise of determining environmental impacts suffer when decisions on completeness are made before critical project information is made available for review by the public and EA reviewers. In the Energy East pipeline project file, the NEB made its determination that the project application was complete on June 16, 2016<sup>12</sup> – only one month after the proponent filed a “Consolidated Application” that, despite claims to the contrary, included several new reports relevant to environmental impacts, not filed with earlier versions of the application.

The most disturbing aspect of the NEB’s completeness determination, however, was the fact that the NEB judged the application complete even while major gaps existed in information both at the level of project design and environmental impacts. Examples of these gaps are below:

- Absence of information on how and where the pipeline will cross the Ottawa River, a crossing of great importance given that an oil spill at that point could contaminate the drinking water for many Montréalers;<sup>13</sup> the pertinent document in the most recent iteration of the application simply substitutes section of the application with a blank page titled “Placeholder.”<sup>14</sup>
- Incomplete information on other river crossings, such as the Saint Lawrence River, where questions remain on the feasibility of the tunnel method chosen for this river crossing, and whether and when a “Phase III feasibility study” would be completed;<sup>15</sup>
- A TransCanada consultant report dated February 27, 2015, indicated that additional geophysical work was needed at several locations near the Saint Lawrence River crossing,<sup>16</sup>

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<sup>12</sup> National Energy Board, Energy East Project and Asset Transfer, and Eastern Mainline Project, Hearing Order OH-002-2016, July 20, 2016, Appendix V – Timetable of events, p. 36, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3011601>.

<sup>13</sup> Savaria Experts-Conseils inc., Mise en service de l’oléoduc Énergie Est de TransCanada: Impacts d’un déversement sur le territoire de la Communauté métropolitaine de Montréal, 6 mai 2015, available online at [http://cmm.qc.ca/fileadmin/user\\_upload/documents/20150514\\_oleoduc-energie-est\\_rapport.pdf](http://cmm.qc.ca/fileadmin/user_upload/documents/20150514_oleoduc-energie-est_rapport.pdf).

<sup>14</sup> Energy East Pipeline Ltd, Energy East Project, Consolidated Application, Volume 4: Pipeline Design, Appendix 4-45, available online at [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2957509/A76921-24\\_V4\\_Appendix\\_4-45\\_PLACEHOLDER\\_Horizontal\\_Directional\\_Drilling\\_Riviere\\_des\\_Outouais\\_-\\_A5A1K1.pdf?nodeid=2957512&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2957509/A76921-24_V4_Appendix_4-45_PLACEHOLDER_Horizontal_Directional_Drilling_Riviere_des_Outouais_-_A5A1K1.pdf?nodeid=2957512&vernum=-2).

<sup>15</sup> Golder Associates, Phase II Assessment, (March 12, 2015) available online at [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2995824/2958035/A76912%2D14\\_V4\\_Appendix\\_4%2D8\\_Golder\\_Hyrotechnical\\_Hazards\\_Phase\\_2\\_1of8\\_%2D\\_A5A0R7.pdf?nodeid=2958038&vernum=1](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2995824/2958035/A76912%2D14_V4_Appendix_4%2D8_Golder_Hyrotechnical_Hazards_Phase_2_1of8_%2D_A5A0R7.pdf?nodeid=2958038&vernum=1).

<sup>16</sup> St. Lawrence River Tunnel Feasibility/DBM Report, by TransCanada consultant Hatch Mott MacDonald, February 27, 2015, pdf pages 25 and 82-83, available online at <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2995824/2957733/A76924->

and that the crossing was located in the Charlevoix Seismic Zone “one of the most active in eastern Canada”;<sup>17</sup> and

- Unclear and insufficient information concerning shipper interest in having certain volumes of crude oil be shipped from an existing Quebec port.

Premature completeness determinations are not endemic to the NEB and its review of Energy East. Équiterre understands from the presentation to the Expert Panel in Halifax by East Coast Environmental Law (ECEL) that the 2007 Whites Point Quarry and Marine Terminal Joint Panel Review (JRP) Process also experienced problems of this nature: the JRP set dates for public hearings in the matter before information requests to the proponent, asking it to provide studies and documentation required by EIS guidelines, were fulfilled.<sup>18</sup> This situation was apparently driven by a concern over meeting tight timelines. There are no doubt other examples.

## **F. Insufficient Funding for Public Participants and Unreasonably Short Time-Frames**

Substantially uneven playing fields as between project proponents and public participants hurt participation, credibility, and quality of the input to the process, and nowhere do we see greater unevenness than in the financial resources available to the parties in relation to project hearings. A good faith effort on the part of government must be taken to fix this problem by way of a fresh approach to the funding of experts that must be developed *in collaboration with* civil society groups.

Funds provided to public interest groups to review environmental impact statements (EIS) of proponents (and in the case of Energy East, three successive versions of the EIS), hire lawyers and experts to prepare filings and evidence, and participate in the process are far from adequate. A real solution must be found to this dilemma in order to fortify credibility of federal EA processes in the future. Whether it means increasing funding for public participants, or having the scientific assessments done by an independent, expert panel with close citizen oversight, or some other option, steps must be taken as soon as possible to rectify this damaging deficiency in the federal EA regime.

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22\_V4\_Appendix\_4-66\_St\_Lawrence\_Tunnel\_Feasibility\_Design\_Basis\_Memorandum\_Report\_-\_A5A1S4.pdf?nodeid=2957397&vernum=1.

<sup>17</sup> Ibid, pdf pages 13-14.

<sup>18</sup> East Coast Environmental Law, “Presentation to EA Reform Panel”, 3 October 2016, Halifax, Nova Scotia, p. 2, available online at [http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/eceland\\_presentation-to-ea-panel-final.pdf](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/eceland_presentation-to-ea-panel-final.pdf).

Mandatory timelines such as those imposed under the *NEB Act* for EA processes that it carries out, in the NEB EA process<sup>19</sup> result in compromised quality of information gathering and review, as well as stymied public participation. Public interest groups, with vastly smaller capacity and fewer resources than proponents or governments, must struggle hard to keep up with filings, additional procedural requirements and new developments. To then require that they do so in a much smaller space of time creates inequities that lead public participants to doubt the sincerity of invitations to participate in EA processes. A concrete example of an unreasonable time-frame is seen in the original plans for the Energy East hearing process as laid out in the NEB's Hearing Order,<sup>20</sup> which provided intervenors with only seven (7) days to review additional proponent evidence and prepare discovery. Given the vast amounts of documentation in the case and the need for public interest participants to consult with their experts and lawyers, this kind of timeframe is unreasonably short.

Due to vastly different level of resources and capacity as between public interest organizations and proponents like Enbridge or TransCanada, tight hearing timeframes are inevitably favorable for proponents and unfavorable for intervenors with limited resources. This adds to the credibility crisis.

### III. DEVELOPING A NEW EA REGIME: A SUGGESTED PROCESS

The question of what specific legislation should replace *CEAA 2012* is an enormous one, well beyond the scope of our brief. That said, Équiterre wishes to offer several suggestions on a thoughtful and fulsome *process* for developing replacement legislation, as well as essential criteria for crafting a successful and effective EA law.

To begin, we suggest that the Expert Panel look closely at examples of EA legislation that, while far from perfect, have been more effective both in terms of process and results than *CEAA 2012*, and assess what worked well and what did not. In order to not repeat the problems of the past, nor overlook effective aspects of EA laws where they exist, we advise the Panel to take a “lessons learned” approach to the study of previous and existing EA laws at both the federal and provincial levels.

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<sup>19</sup> NEB Act, R.S.C., 1985, c. N-7, ss. 52(4) and 52(7). See also, National Energy Board, Energy East Project and Asset Transfer (Energy East), and Eastern Mainline Project (collectively, the Projects), “Completeness Determination and Legislated Time Limit – Ruling No. 11”, June 16, 2016, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2986030>.

<sup>20</sup> National Energy Board, Energy East Project and Asset Transfer, and Eastern Mainline Project, Hearing Order OH-002-2016, July 20, 2016, Appendix V – Timetable of events, p. 38, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3011601>.

In addition to looking back at what has and has not worked in EA regimes in Canada to date, it is essential – and even more important – to look forward and craft new legislation that reflects current needs and realities via a “next generation” approach. In short, we urge the Expert Panel to use all tools at its disposal in order to secure Canada’s environmental health and thus the future of its communities.

Here are our suggestions on key steps for developing new EA legislation:

## **A. Review carefully the lessons learned under CEAA 1992**

While far from perfect it is well known by environmental advocates and others that the legislation in place prior to the 2012 law reforms – namely, the 1992 *Canadian Environmental Assessment Act* (“CEAA 1992”)<sup>21</sup> – worked more effectively than CEAA 2012. In fact, CEAA 2012 is so fundamentally flawed, that in many ways it is more useful to look back at CEAA 1992 for “lessons learned” than to engage in a deep post-mortem on CEAA 2012.

CEAA 1992 certainly had its own flaws, including a lack of independence that saw panel recommendations ignored by cabinet decisions, an adverse-effects focus, weak treatment of cumulative impacts and perhaps most importantly, an absence of sustainability as a core objective. For these reasons and others, Équiterre does not advocate a simple return to this earlier law. That said, we believe it will be instructive for the Expert Panel to make a full inventory of the more helpful provisions in CEAA 1992 that were omitted or modified beyond recognition in CEAA 2012. To name just a few examples, these included:

- relatively broad definitions of “environment” and “environmental effect”;
- “need for the project” and alternatives to the project” as matters to be considered;
- triggers that cast a much wider net over proposed projects requiring EA, in contrast to the exclusivity-prone regulatory list seen in CEAA 2012;
- a more expansive list of factors that an EA must take into account; and
- a hierarchy of different types of federal EA (e.g., comprehensive studies, panel reviews, screenings, mediations) rather than just one option, tailored to mega-projects;

The positive features of CEAA 1992 are perhaps most useful as a checklist of features not to miss, rather than a template for a future EA regime. The next regime should be developed on the basis of a next-generation paradigm.

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<sup>21</sup> Canadian Environmental Assessment Act, S.C. 1992, c. 37 (“CEAA 1992”), available online at <http://laws-lois.justice.gc.ca/eng/acts/c-15.2/20100712/P1TT3xt3.html>.

## B. Learn from provincial EA processes like Quebec’s BAPE

Speaking from Équiterre’s own experience in Quebec, EAs conducted by the Bureau d’audiences publiques sur l’environnement (BAPE) have been, for the most part, viewed with higher levels of credibility and trust than federal processes by public participants. The BAPE is an agency designed primarily for the purpose of facilitating public information and consultation on projects that are likely to impact the quality of the environment.<sup>22</sup> Essentially, the BAPE is empowered by Quebec’s *Environment Quality Act (EQA)* to examine projects subject to the environmental impact assessment and review procedure laid out in the *Act*.<sup>23</sup> While it is beyond the scope of this brief to critique that process, a few points on the BAPE’s role demonstrate that the EA regime in Quebec is worth study by the Panel.

The BAPE’s function, per the *EQA*, is “to inquire into any question relating to the quality of the environment submitted to it by the Minister and to make to him a report of its findings and of its analysis thereof.”<sup>24</sup> It serves a consultative role: its decisions are not binding.

While the BAPE, itself, an administrative body, reporting directly to the Minister of Sustainable Development, Environment and the Fight Against Climate Change, it appoints commissions that have quasi-judicial powers. These commissions carry out public hearings and, when so directed by the Minister, also hold public consultations on questions of general interest related to a specific environmental issue. In this respect, they are vehicles capable of undertaking strategic environmental assessments (SEAs).<sup>25</sup>

The BAPE prides itself on being a neutral agency, insulated from regulatory capture and politics, and provides a high level of transparency to all participants in the public consultations and hearings that it oversees. In general, the commissions it appoints to carry out specific EAs are typically viewed as

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<sup>22</sup> For more information on the BAPE in Quebec, consult the Government of Quebec website on Frequently Asked Questions (FAQ) on the BAPE, available in online at [http://www.bape.gouv.qc.ca/sections/faq/eng\\_faq\\_ind.htm](http://www.bape.gouv.qc.ca/sections/faq/eng_faq_ind.htm) (English version).

<sup>23</sup> R.S.Q., c. Q-2, art. 6.3. The Act is available online at <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/Q-2>. Amendments to the EQA are currently being considered in Bill 102. For the status of Bill 102, see Assemblée nationale du Québec (Quebec National Assembly), Bill n° 102 : An Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund, <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-102-41-1.html>.

<sup>24</sup> Ibid.

<sup>25</sup> Mario Gauthier and Louis Simard, “Public Participation in Strategic Environmental Assessment (SEA): Critical Review and The Quebec Approach”, presentation at Environmental Evaluators Network Forum, Ottawa, September 22–23, 2009, available online at <http://www.environmentalevaluators.net/wp-content/uploads/2011/01/Public-Participation-in-Strategic-Environmental-Assessment-SEA.pdf>.

impartial and independent. In fact, all members of the BAPE, commissioners and administrators must abide to an ethics code to ensure their impartiality and independence.<sup>26</sup>

As well, the commissions are seen as well-versed in dealing with the public, and the format of hearings lends itself to very direct give and take between commissioners and public participants. Additionally, a BAPE commission may – and typically does – invite resource persons and experts from government departments and agencies as well as the private sector, to help answer the public’s and commission’s questions on a project. Finally, BAPes can and do find projects unfavourable: one study of 60 projects evaluated by the BAPE from 200 to 2005 found that nearly 20% were judged as unfavourable. At the cabinet level, however, about 88% of projects were finally authorized subject to conditions.<sup>27</sup>

### C. Hear the loud, clear call to implement a next-generation EA

Équiterre enthusiastically supports the 12 pillars of a next-generation EA regime developed at the 2016 Federal Environmental Assessment Reform Summit. While we do not discuss all 12 pillars in our brief, we wish to underscore our support for each of these essential and interdependent features, which together represent the criteria for a next-generation approach to EA. The 12 pillars are listed below, with the summary descriptors as they appear in the *Federal Environmental Assessment Reform Summit, Executive Summary* prepared by West Coast Environmental Law.<sup>28</sup>

1. Sustainability as a core objective  
All assessments should ensure the long term health of the environment and social values, and the equitable distribution of risks, impacts and benefits.
2. Integrated, tiered assessments starting at the strategic and regional level (“Strategic and Regional EAs”)  
Participatory and sustainability-based assessments occur at the regional, strategic and project levels, and each of those levels inform the other.

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<sup>26</sup> *Code de déontologie des membres du Bureau d’audiences publiques sur l’environnement*, available online at [www.bape.gouv.qc.ca/sections/documentation/Deontologie.pdf](http://www.bape.gouv.qc.ca/sections/documentation/Deontologie.pdf).

<sup>27</sup> Laurence Bherer, “The Bureau d’audiences publiques sur l’environnement – (The Office of Environmental Public Hearings)”, December 2, 2013, Participedia, available online at <http://participedia.net/de/node/1585>.

<sup>28</sup> Anna Johnston, Federal Environmental Assessment Reform Summit, Proceedings, West Coast Environmental Law, August 2016, pages 3-12, available online at [http://wcel.org/sites/default/files/publications/WCEL\\_FedEnviroAssess\\_ExecSum%2Bapp\\_fnldigital.pdf](http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf) (a French version of this document is available online at <https://cqde.org/wp-content/uploads/2016/08/Sommaire-executif-sommet-evaluation-environnementale-federale.pdf>).

3. Cumulative effects assessments done regionally  
Cumulative effects assessment is regional, focuses on environmental health, and looks to the past, present and future.
4. Collaboration and harmonization  
Jurisdictions harmonize their assessments to the highest standard, collaborating on processes and decisions wherever possible.
5. Co-governance with Indigenous Nations  
Collaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples.
6. Climate assessments to achieve Canada's climate goals  
A climate test ensures that projects keep Canada on track to meeting its climate change commitments and targets.
7. Credibility, transparency and accountability throughout  
Legislation sets out criteria, rules and factors to guide assessments and discourage politicized decisions. An independent body conducts assessments and the public has the right to appeal decisions.
8. Participation for the people  
Meaningful public participation is early, ongoing, accessible and dynamic. It occurs at all levels of assessment and has the ability to influence outcomes.
9. Transparent and accessible information flows  
All relevant information is easily accessible to the public, is shared between different levels of assessment and remains available for future use.
10. Ensuring sustainability after the assessment  
After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance and enforcement.
11. Consideration of the best option from among a range of alternatives  
Assessments consider alternative scenarios, including the "no" alternative.
12. Emphasis on learning  
The assessment regime fosters opportunities for learning, to ensure more informed and better decisions now and into the future.

# IV. COMMENTS ON SELECTED PILLARS AND ISSUES OF SPECIAL IMPORTANCE

While Équiterre asserts that all 12 pillars are essential to building a truly effective and fair EA regime, we focus below on a select subset in order to highlight issues of special importance to us and to raise issues that have perhaps not been raised by others. (Please note that, in this section of our submission, the selected pillars we discuss are presented out of order relative to the list above).

## A. Sustainability as a core objective

In the next-generation approach to EA formulated at the Federal Environment Assessment Reform Summit in May 2016, sustainability is a core concept that permeates and shapes the other pillars. This is both justified and wise, in light of the serious state of our environment in Canada due to a historically insufficient emphasis on sustainability. According to the *2016 SDG Index and Dashboards – Global Report* (“*2016 SDG Global Report*”), Canada is currently quite far from where we need to be on sustainability. The *2016 SDG Global Report* functions as a “report card” for tracking individual country progress on Sustainable Development Goals (SDGs) and ensuring accountability.

While Canada ranks 11<sup>th</sup> among the 35 member countries of the Organization for Economic Co-operation and Development (OECD) – in other words, barely in the top third – on sustainability progress overall, **Figure 2** shows that Canada is far from achieving sustainability on a number of issues. Of the 17 Sustainable Development Goals (SDGs) tracked in the *2016 SDG Global Report*, seven are “seriously far from achieved” (colour-coded red in the graphic below), while seven others are in need of attention (colour-coded yellow).

**Figure 2.** Canada’s rankings on the 2016 SDG Index and Dashboards – Global Report<sup>29</sup>

Colour Key:

Green = SDG already achieved

Yellow = SDG “in a caution lane” (i.e., needs attention)

Red = SDG “seriously far from achieved”

**SDG DASHBOARD**



From these ratings, it seems evident that thus far in Canada’s approach to “sustainable development”, the emphasis on development has far outweighed the emphasis on sustainability. It is abundantly evident that sustainability must be a core objective of a revised federal EA regime.

Indeed, it cannot be overstated that the next federal EA regime must be infused with sustainability from beginning to end and at every stage in between. The 12 pillars of the next-generation approach outlined above are designed to make that happen. In fact, adopting a next-generation EA approach is necessary to help entrench sustainability in Canadian legislation. It is true that sustainability as a general concept is already enshrined in Federal and Quebec law, and improvements are underway. But the rooting of sustainability in Canadian law is nowhere near sufficient.

A stark example of our shortcomings on sustainability in federal legislation is this: while Canada’s *Federal Sustainable Development Act* requires a number of departments and agencies to prepare sustainable development strategies, the Canadian Environmental Assessment Agency is not one of

<sup>29</sup> Swaney, R. (2016) SDG Index & Dashboard Country Page – Canada, available online at <https://www.dropbox.com/sh/7d97nr1pudiof02/AABLVKzzWxJrSa2-WNzv2XXka?dl=0&preview=SDG+Index+%26+Dashboard+Country+Page+-++Canada.pdf>

them! Nor are such strategies required of the agencies deemed by *CEAA 2012* to be “Responsible Authorities” for EAs: the NEB and the CNSC.<sup>30</sup> This is more than a lacuna: it is absurd.

While sustainability seems to be a serious preoccupation of the federal government, as evidenced by both the recent review of the *Federal Sustainable Development Act* by the Standing Committee on Environment and Sustainable Development,<sup>31</sup> and the Federal Sustainable Development Strategy 2016–2019,<sup>32</sup> (FSDS 2016–2019) there is much work left to do. For example, both the Committee report and FSDS 2016–2019 focus primarily on improving the place of strategic environmental assessments in Canada. While laudable, improving sustainability in project-based EAs went largely undiscussed.

It is obvious that there are still many dots to connect on sustainability in Canada, and adoption of an EA regime based on the 12-pillar, next-generation model outlined above will help this happen.

## B. Climate assessments to achieve Canada’s climate goals

Although actions such as support for the Paris Accord is encouraging, Canada can and must stretch higher and harder to do its part in keeping the worst of climate change impacts at bay. As **Figure 3** shows, Canada is currently very, very far from being able to call itself a leader on climate and energy issues. Integrating climate assessments into a federal EA regime can help. It provides a powerful tool by which the federal government can evaluate how far proposed projects, programs or policies might move us away from our emissions objectives and goals.

**Figure 3.** On climate and energy, **Canada ranked 64<sup>th</sup> (of 113 countries)** on the Yale EPI index<sup>33</sup>



Note: Some specific indicators in the Climate and Energy category were even worse: Canada ranked 107<sup>th</sup> on “Trend in CO2 Emissions per KWH” and 75<sup>th</sup> on “Trend in Carbon Intensity”.<sup>34</sup>

<sup>30</sup> *Environment and Climate Change Canada, A Federal Sustainable Development Strategy for Canada 2016–2019*, Government of Canada, Annex 4: Lists of Departments and Agencies, p.85, available online at [https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130\\_FSDS\\_Eng\\_FINAL.pdf](https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130_FSDS_Eng_FINAL.pdf).

<sup>31</sup> *Federal Sustainability for Future Generations – a Report Following an Assessment of the Federal Sustainable Development Act*, Report of the Standing Committee on Environment and Sustainable Development, June 2016, 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session, <http://www.parl.gc.ca/content/hoc/Committee/421/ENVI/Reports/RP8378128/envirp02/envirp02-e.pdf>.

<sup>32</sup> *Environment and Climate Change Canada, A Federal Sustainable Development Strategy for Canada 2016–2019*, Government of Canada, available online at [https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130\\_FSDS\\_Eng\\_FINAL.pdf](https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130_FSDS_Eng_FINAL.pdf)

<sup>33</sup> Hsu, A. et al. 2016 Environmental Performance Index. (2016) New Haven, CT: Yale University, available online at [www.epi.yale.edu](http://www.epi.yale.edu). Canada’s ratings are available online at <http://epi.yale.edu/country/canada>.

<sup>34</sup> Ibid, <http://epi.yale.edu/country/canada>.

In developing rules and criteria by which climate change issues will be properly and thoroughly handled in the next federal EA regime, we urge the Expert Panel to incorporate an effective climate test into its recommendations on EA reform. Équiterre has developed a detailed suggestion on what a climate test should look like in EA, which it submitted recently in a brief<sup>35</sup> to the Committee on Transportation and Environment (Quebec) in the context of the Committee's special consultations on Bill 102, *An Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund*.<sup>36</sup> Our proposal is, in most respects, applicable to federal EA. A core question of any climate test should be: does the proposed project help or prevent us from attaining Canada's climate commitments (short, medium or long-term) as well as climate targets as determined by scientists or the Intergovernmental Panel on Climate Change (IPCC).

Additionally, we ask the Expert Panel to study the following key components in a climate test for project and policy decisions that were proposed in February 2016 by Équiterre and other major Canadian and U.S. environmental organizations.<sup>37</sup> While only the third and fourth components address EA regimes specifically, the first two components are too critical to omit and so are reproduced below as well:

- Energy decisions must be guided by climate science. According to the IPCC's most recent analysis, global greenhouse emissions must be reduced dramatically by mid-century in order to limit global temperature rise to 2 °C. Achieving the 1.5 °C limit agreed to in Paris will require greater and more immediate reductions. Globally, these reductions will require the majority of fossil fuel reserves to remain unexploited. Within this context, it is imperative that decision-makers are provided with the tools they need to assess how energy projects and policies fit within a climate-safe energy future.
- Decision-makers must develop and consider models that are consistent with a global economic transition away from fossil fuels. It is essential that the United States and Canada have a clear

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<sup>35</sup> Équiterre, "Pour une évaluation des impacts sur le climat.", 2016, available at [https://www.assnat.qc.ca/2FMedia%2FProcess.aspx%3FMediald%3DANQ.Vigie.Bll.DocumentGenerique\\_125883%26process%3DDefault%26token%3DZyMoxNwUn8ikQ%2BTRKYwPCjWrKwg%2BvIv9rjj7p3xLGTZDmLVSmJLoqe%2FvG7%2FYWzz&usg=AFQjCNFZJmikJBYS2FceVYjryumakQNX4Q&sig2=NGo3gw8XwD5h3QswL-18tw](https://www.assnat.qc.ca/2FMedia%2FProcess.aspx%3FMediald%3DANQ.Vigie.Bll.DocumentGenerique_125883%26process%3DDefault%26token%3DZyMoxNwUn8ikQ%2BTRKYwPCjWrKwg%2BvIv9rjj7p3xLGTZDmLVSmJLoqe%2FvG7%2FYWzz&usg=AFQjCNFZJmikJBYS2FceVYjryumakQNX4Q&sig2=NGo3gw8XwD5h3QswL-18tw)

<sup>36</sup> Assemblée nationale du Québec (Quebec National Assembly), Bill n° 102 : An Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund, <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-102-41-1.html>.

<sup>37</sup> See e.g. Briefing Note, February 23, 2016, published jointly by Équiterre and other major Canadian and U.S. environmental organizations, <http://www.climateest.org/wp-content/uploads/2016/02/ClimateTest2-23-16.pdf>  
French version here: [http://www.equiterre.org/sites/fichiers/climate\\_test\\_principles\\_french\\_final.pdf](http://www.equiterre.org/sites/fichiers/climate_test_principles_french_final.pdf).

roadmap for global energy supply and demand based on 1.5°C and 2°C limits. This roadmap will require U.S. and Canadian energy information agencies to construct robust models for global energy markets that are consistent with these climate scenarios.

- Environmental review processes must assess the need for projects and policies in the context of global energy supply and demand scenarios consistent with international climate goals. Any environmental review should take the aforementioned data and analysis and apply it to existing projects and policies under federal review to determine the economic and environmental viability of those proposals.
- Environmental review processes must assess a project or policy’s greenhouse gas emissions. In addition to assessing the need for a project or policy in a scenario consistent with international climate goals, decision-makers should evaluate the greenhouse gas emissions associated with a project, assess the environmental impact of those emissions and evaluate their effect on national and international efforts to meet long term carbon reduction targets. In assessing the carbon pollution from any proposed project, the government should be able to show how that upward pressure is accounted for in their plan to meet their targets in the medium and long term.

Climate change is destroying our path to sustainability. Ours is a world of looming challenges and increasingly limited resources. Sustainable development offers the best chance to adjust our course.

—Ban Ki-moon

### **C. Credibility, transparency and accountability throughout**

Équiterre agrees that Canada’s next EA regime must be credible, transparent and accountable at every stage of the assessment process. A core requirement for credibility is that federal EA decision makers –whether agency, Cabinet or independent tribunal – must examine closely the need for the project, and alternatives to the project. The decision makers must scrutinize, critically and thoroughly, the proponent’s information and evidence on the issue of need, sometimes referred to as justification.

Considering the massive impacts that projects such as pipelines, mines, and marine terminals, to name but a few, can have upon the environment and consequently upon the socio-economic and physical health of people, the threshold question of “is this project needed” should be considered with great care in EA.

Alarming, however, *CEAA 2012* devotes not one single word, much less a subsection, to either the need for the project or to alternatives. Correction of this problem is essential: credibility for federal EA will simply not be re-established until and unless this oversight is addressed. Furthermore, the question must not stop at “is this project needed (and why)”, but must be pursued to deeper levels. An EA process that wins the public’s trust and respect will also examine the conditions giving rise to the project’s need, and most importantly will clarify who will benefit from the project – and who will not.

Additionally, Équiterre agrees with other civil society groups that EA requires a single, independent tribunal for carrying out federal EAs. New EA legislation must set out criteria, rules and factors to guide assessments made by such bodies. This is essential for avoiding decisions by agencies suffering from regulatory capture, and will go far in discouraging politicized decisions.

Équiterre strongly suggests that a next-generation approach, based on all 12, interdependent pillars, is the best way to handle issues of need for the project, independence from bias, and achieve full transparency and accountability. Credibility will flow from proper treatment of all of these issues.

#### **D. Transparent and accessible information flows**

We echo what others who support the 12 pillars have said on this point but must underscore that, first and foremost, there must be hard and fast rules about proponents providing fully translated documents in Quebec, with no lag time between French and English versions. Such requirements are fundamental to equal access to information for Francophones and Anglophones trying to inform themselves about a proposed project and its potential environmental and socio-economic impacts in their community.

Inaccurate or incomplete translations of project documents cause grave problems for public participants. A stunning example of such problems occurred in the Energy East review process in the form of inexcusable differences between French and English versions of the sentence in a project document on the Saint Lawrence river crossing: in the English version, it is said that an additional feasibility study is needed. In the French version, this sentence is simply absent.<sup>38</sup> (See box below).

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<sup>38</sup> Golder Associates, Phase II Assessment, (March 12, 2015) available online in English at [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2995824/2958035/A76912%2D14\\_V4\\_Appendix\\_4%2D8\\_Golder\\_Hydrotechnical\\_Hazards\\_Phase\\_2\\_1of8\\_%2D\\_A5A0R7.pdf?nodeid=2958038&vernum=1](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2543426/2995824/2958035/A76912%2D14_V4_Appendix_4%2D8_Golder_Hydrotechnical_Hazards_Phase_2_1of8_%2D_A5A0R7.pdf?nodeid=2958038&vernum=1), and in French at [http://www.oleoducenergieest.com/reg-files/R%C3%A9glementaire/08\\_Demande%20consolid%C3%A9e%20%E2%80%93%20Volume%204%20%E2%80%93%20Conception%20du%20pipeline%20%E2%80%93%20Annexes%20g%C3%A9n%C3%A9rales%20%E2%80%93%20Dossier%201/A76912-14%20V4\\_Annexe\\_4-8\\_Golder\\_G%C3%A9orisques\\_Hydrotechnique\\_Phase\\_2\\_1de8%20-%20A5A0R7.pdf](http://www.oleoducenergieest.com/reg-files/R%C3%A9glementaire/08_Demande%20consolid%C3%A9e%20%E2%80%93%20Volume%204%20%E2%80%93%20Conception%20du%20pipeline%20%E2%80%93%20Annexes%20g%C3%A9n%C3%A9rales%20%E2%80%93%20Dossier%201/A76912-14%20V4_Annexe_4-8_Golder_G%C3%A9orisques_Hydrotechnique_Phase_2_1de8%20-%20A5A0R7.pdf). Compare pdf page 45 in the English version with pdf page 48 in the French version.

Grave translation error left uncorrected in a hearing document in Energy East

- English version of Golder's Phase II Assessment on Hydrotechnical hazards concludes by saying "At this point, a Phase III assessment is recommended for the St. Lawrence River crossing."
- French version of exactly the same document omits this line completely, leaving Francophone readers with the impression that no further assessment is needed.

These consultant reports by Golder were produced at the request of and presumably reviewed by the proponent, TransCanada. Where is the accountability here?

It is also essential that English and French versions of environmental impact statements and EA hearing information be “housed” together, on the same systems, with the same searchability features and capabilities. In other words, under a proper, next-generation federal EA law, we should *never again* see a note on an agency website of the type that currently exists on the NEB website for the Energy East pipeline project directing Francophone readers to the website of the proponent, TransCanada:

“If you need to read the application for the Energy East Project in French, please visit the company’s website.”<sup>39</sup>

On its face, such directions are likely to deepen doubts about the objectivity and credibility of the EA process. Equally as serious, Francophone users of project documents are put at a distinct and serious disadvantage relative to their Anglophone counterparts in their access to easily searchable document databases. When full-text searching across multiple project documents is possible on the NEB website, but not possible on the proponent website (as is the case in the Energy East file), there is a serious equality of access issue.

## **E. Participation for the people**

As an experienced public interest advocacy organization, Équiterre can attest to the fact that meaningful public participation is truly a core requirement for a credible and effective EA regime. We believe that participation is meaningful when it takes place at all stages of EA, and is capable of influencing EA outcomes in significant ways.

Équiterre supports the comments of in the public interest community calling for wider, deeper, better-funded citizen participation in federal EA processes, and it is not necessary to repeat those

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<sup>39</sup> National Energy Board, “Energy East and Eastern Mainline Projects”, [webpage] available at <https://www.one-neb.gc.ca/pplctnflng/mjrpp/nrgyst/index-eng.html>.

points here other than to underscore the message that proper funding is also critical to the viability of the core goal of public participation. (We have also discussed the importance of funding for public participation in EAs in **section II F**, above). Rather, we wish to discuss briefly several issues relating to the quality environmental impact statements and other project and impact information provided to participants in EAs and how quality, rather than quantity, can facilitate public participation and enhance credibility of EA processes.

When environmental impact statements prepared by proponents are poorly conceived, or based upon data that is old, unreliable or of questionable validity, or contain primarily descriptive rather than analytical information,<sup>40</sup> or poorly organized and full of redundancies, public participants are negatively impacted in two ways. First, they must take extra time (for which they may not be receiving financial support) to investigate information gaps, inconsistencies or inaccuracies. Second, their faith in the sincerity of the proponent's efforts to properly evaluate environmental and/or socioeconomic impacts diminishes. The credibility of the EA process takes yet another hit.

Next-generation EA can enhance public participation by setting higher standards for the quality of information in environmental impact statements and other EA documents, and holding proponents accountable when they underperform.

As part of this connection between the authenticity of the EA analysis and public participation, Équiterre also asserts that it is critical that the "need for the project" aspect of EA be conducted from a public interest-based perspective.

Finally, Équiterre fully supports the idea that EAs must involve participation by indigenous peoples in ways that fully respect and honour their rights, and which truly recognizes the value of Indigenous Traditional Knowledge to the information gathering and analysis phase of EAs.

## **F. Cumulative effects assessments done regionally**

Evaluations of the state of cumulative impact assessments in Canada do not paint a rosy picture. One article states, point blank: "Cumulative effects assessment (CEA) in Canada is in dire straits."<sup>41</sup> In part, this is due to poor understanding of the concept of CEA, but it is also due to the challenges of putting

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<sup>40</sup> Équiterre notes and concurs with the claim by Ecology Action Centre that "Currently, EIS are 95% descriptive" and the "quality of science in the documents is often low or mundane." Ecology Action Centre, Presentation by Mark Butler to the Expert Panel to Review Environmental Assessment Processes on October 11, 2016 (Fredericton), available online at [http://eareview-examenee.ca/wp-content/uploads/uploaded\\_files/mark-butler\\_ecology-action-center.docx](http://eareview-examenee.ca/wp-content/uploads/uploaded_files/mark-butler_ecology-action-center.docx).

<sup>41</sup> Peter N. Duinker and Lorne A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment," *Environmental management* Vol. 37(2), pp. 153-161, p.1, available online at <https://www.ncbi.nlm.nih.gov/pubmed/16362488> (subscription).

it into practice.<sup>42</sup> Some of these challenges are no doubt rooted in the fact that *CEAA 2012*, with its focus on adverse effects from individual projects, does not at all lend itself to considering and analyzing cumulative effects.<sup>43</sup> Unfortunately, however, projects do not exist nor operate in a vacuum: they interact with their environmental and socio-economic contexts over time and space.

Équiterre wishes to highlight the fundamental importance of CEA to EA because only an EA that is comprehensive in terms of timeframe as well as geography is likely to succeed in capturing most of the potential environmental impacts of a project. A narrow, fragmented view of projects can ultimately result in piecemeal project assessments and piecemeal approvals – one of the worst consequences of failing to conduct meaningful CEAs. Additionally, piecemeal assessments can be extremely misleading. Such was the case with the NEB assessment processes for Enbridge Line 9 Phase I (also called “Line 9A”), which was designed to carry crude from Sarnia to North Westover, Ontario, and Line 9B, which was designed to carry crude from North Westover to Montréal. The two pipeline projects were subjected to separate EAs even though they were obviously designed as two successive segments that, when joined, would transport crude from Sarnia to Montréal. The NEB considered the “Line 9 Reversal Phase I application (emphasis added) to be a standalone project because it [did] not depend on any future facilities to proceed.”<sup>44</sup> While this may have been true at a very technical level, it was well known by industry and opponents alike that a second phase, ultimately tagged by the NEB as “Line 9B” instead of “Line 9 Phase II,” was in the works and would soon be proposed: the segments were all part of one single pipeline and had, in the past, been used to move crude from Montréal to Sarnia.

Opponents of the project saw through the charade and were not pleased. Their suspicions were vindicated when Enbridge filed its application with the NEB for the “Line 9B Reversal and Line 9 Capacity Expansion Project,” in November 2012,<sup>45</sup> just four months after the Line 9 Phase I project was approved, in July 2012.<sup>46</sup> As a result, the credibility of the NEB, as well as the EA process itself, slipped another notch.

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<sup>42</sup> John Sinclair, Meinhard Doelle and Peter N. Duinker, “Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset,” 2016 available online at <https://ssrn.com/abstract=2774579>.

<sup>43</sup> Peter N. Duinker and Lorne A. Greig, “The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment,” *Environmental Management* Vol. 37(2), pp. 153-161, p.1, available online at <https://www.ncbi.nlm.nih.gov/pubmed/16362488> (subscription).

<sup>44</sup> NEB, “NEB decides Enbridge’s Line 9 Reversal application will go to an oral public hearing,” [CNW News Release] December 5, 2011, available at <http://www.newswire.ca/news-releases/neb-decides-enbridges-line-9-reversal-application-will-go-to-an-oral-public-hearing-509213871.html>.

<sup>45</sup> Enbridge Pipelines Inc., “Line 9B Reversal and Line 9 Capacity Expansion Project Application,” November 29, 2012, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/890345>.

<sup>46</sup> NEB, “Enbridge Pipelines Inc., Line 9 Reversal Phase I Project”, Hearing Order OH-005-2011, July 27, 2012, available online at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/834303>.

Piecemeal project assessments must stop. In addition to being disingenuous and inefficient, they stand in the way of cumulative effects assessment. Équiterre offers the following as a guideline to consider for avoiding piecemeal assessments and helping facilitate cumulative impact assessments: if Project A is not physically, technically and/or economically feasible without Project B, then Projects A and B must – no exceptions – be assessed together.

It is useful to consider a real-world example of the need for careful cumulative effects assessment. In the Energy East pipeline project, for example, it will be essential when evaluating potential environmental effects of crossing the Ottawa River near Montréal, to assess the cumulative impacts to the river and nearby communities of having two pipelines cross under the river bed in close proximity to one another. It will be important to consider in advance the cumulative effects of an accident, for example, arising from the installation of the new Energy East pipeline within meters of the existing Enbridge Line 9 pipeline, and workers or contractors accidentally rupturing one or both lines in the process. While information is still not complete on the Ottawa River crossing details, as mentioned above, local people have indicated that they've been informed that the Energy East pipeline will cross the river in the same right-of-way as the existing Enbridge Line 9B oil pipeline.

## G. Collaboration and harmonization

Federal EA needs significant improvement in this area. Current problems with harmonization of federal and provincial EAs stem largely from the fact that *CEAA 2012* largely rejects the idea that harmonization is best achieved by cooperation across jurisdictions in the service of a single, comprehensive EA to be utilized for decision-making at both levels of government.<sup>47</sup>

This stands as a very different approach than that embodied in the *Canada-Quebec Agreement on Environmental Assessment Cooperation*,<sup>48</sup> which seeks to ensure a one-project-one-assessment approach to the application of federal and provincial EA requirements.<sup>49</sup> A next-generation federal EA

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<sup>47</sup> Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012), *Journal of Environmental Law and Practice*, Vol. 24(1), at p. 13, available online at <https://uwaterloo.ca/next-generation-environmental-assessment/sites/ca.next-generation-environmental-assessment/files/uploads/files/MDoelle%20End%20of%20EA.pdf>.

<sup>48</sup> Government of Canada, available online at <https://www.canada.ca/en/environmental-assessment-agency/corporate/acts-regulations/legislation-regulations/canada-quebec-agreement-environmental-assessment-cooperation/canada-quebec-agreement-environmental-assessment-cooperation-2010.html>.

<sup>49</sup> Government of Canada, Canadian Environmental Assessment Agency, "Renewal of the Canada-Quebec agreement on environmental assessment cooperation," September 24, 2013, available online at <https://www.canada.ca/en/environmental-assessment-agency/news/acts-regulations/backgrounder-canada-quebec-agreement-environmental-assessment-cooperation.html?=&wbdisable=true>. According to this document and the Agreement itself, it was last renewed in 2010 and is still in force.

that is mindful of the pillar of collaboration and harmonization will certainly aid in the implementation of, and respect for, this Agreement.

We also wish to point out that the mandatory timeframes for EAs, created by *CEAA 2012*, tend to work against collaboration and harmonization since all such activities take time and time is in short supply under the current law.

## **H. Consideration of the best option from among a range of alternatives**

Équiterre echoes other civil society groups in the call for an EA process which validates and includes the discussion of alternatives to proposed projects. As well, we underscore the need for funding support that enables intervenors to develop and put forward high-quality information about sustainable alternatives to proposed projects, such as alternative scenarios for job creation through clean energy or green jobs. Équiterre also agrees emphatically with other groups that the “No project” option must be a real option. If it is not, then the EA process lacks credibility from the start.

An important aspect of weighing options and choices from a range of alternatives, and one that Équiterre takes quite seriously, is assessing the relative importance of the choices we make in service of doing what’s best for the environment – and for its inhabitants. Certain choices may be difficult, or even counterintuitive, and next-generation EA needs to examine and understand the complexities and trade-offs inherent in competing alternatives.

For example, any energy project may have some costs (i.e., negative impacts) and these can manifest in ways that we may not like: birds may hit wind turbines, rare and tiny creatures may get trapped under solar panels, migratory birds may find their flight paths disrupted when solar roofs prevent rest stops. But in order to move ahead on clean energy, we sometimes need to make hard choices. Thus, Équiterre believes that forward-thinking EA should give substantial weight to the benefits of renewable energy projects that promote the clean energy transition and climate solutions. As well, effective EA will need to recognize and balance the needs, complexities and opportunities inherent in shared jurisdiction. Many clean energy projects, for example, will be under provincial jurisdiction, while endangered species protection, for example, will be under federal control.

In closing on this point, Équiterre wishes to remind the Expert Panel that a clean energy transition and climate change solutions are key objectives of the current government, and next-generation EA will need to be crafted in a way that reflects sensitivity to these priorities and the realities of our climate challenged world.

# V. GENERAL RECOMMENDATIONS AND CLOSING COMMENTS

Équiterre offers to the Expert Panel the following key recommendations for this EA review:

- Repeal CEAA 2012 in its entirety.
- Replace CEAA 2012 with an entirely new piece of EA legislation built upon the 12 pillars of next-generation EA, as formulated during the Federal Environmental Assessment Reform Summit of May 2016, and reflecting a strong and concrete commitment to sustainability throughout.

Additionally, we urge that new EA legislation must absolutely do the following (in addition to numerous other modifications that will inevitably be necessary for proper and complete implementation of a next-generation strategy):

- Create an independent, quasi-judicial expert tribunal, comprised of full-time members with EA experience who are carefully vetted to ensure they are free of bias and conflicts of interest.
- Implement measures to ensure integrity, quality and independence of information used in assessing environmental and socio-economic impacts, and establish new standards for the environmental impact statements that assures proper focus on sustainability considerations, and moves the EIS model away from the traditional adverse impacts/mitigation focus.
- Absolutely eliminate the notion of “Responsible Authorities” or other delegations of responsibility for conducting federal EAs.
- Utilize broad definitions of “environment” and “environmental impact”.
- Ensure that the “need for the project” is properly substantiated by the proponent and analyzed from a public interest-based perspective, and that alternatives to the project are given substantial weight and consideration.
- Avoid lists of designated projects and establish more sensitive triggers for EA application that will ensure capture of all projects, policies and programs in need of evaluation.

We implore the Expert Panel to take advantage of the rare opportunity offered by this EA Review process, to create a legacy law – one that embodies a next-generation EA process that moves us

away from outdated, unfair and ineffective processes and moves us forward with an approach that will better ensure a healthy planet for the next generation and those that follow.

This moment is rare and the time to seize it is now.

It is the Expert Panel's TOR<sup>50</sup> that creates this special opportunity – this door to greatly improved EA processes in the future. The TOR mandate specifies that: “The Panel's review shall consider the goals and purpose of modern-day environmental assessment” (emphasis added). Équiterre hopes that the Panel will indeed go back to basics, and do so in a way that is fully cognizant of today's realities and needs, including the precarious state of the environment and insufficient progress on sustainability. We believe such an approach will inevitably lead to next-generation EA.

“This is a legacy law – we need to get it right, and ensure that the Canadian public has confidence in this process.”

–The Honourable Catherine McKenna  
Minister of Environment and Climate Change  
(Federal EA Reform Summit, May 2016)

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<sup>50</sup> Expert Panel Terms of Reference: <http://eareview-examenee.ca/panels-terms-of-reference/>.