Streamlining the Regulatory Process:  
Why it takes so long and What needs to change? 

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Regulatory challenge, and, as a result, regulatory reform is a constant subject to conversation. Alberta's regulatory regime has gone through a constant evolution. New regulatory bodies are created with new responsibilities; regulatory bodies are changed or consolidated; then still later regulatory responsibilities are again shifted.

Despite the constant focus and discussion on regulatory reform, we do appear to be in a period where discussion of regulatory reform has reached a boil, from its otherwise steady simmer. This paper will provide a high-level overview of topics related to regulatory reform in the following sections.

I. Regulatory Reform in Alberta;
II. Project Approval Processes;
III. Canada–Alberta Environmental Assessment Agreement; and
IV. Reforming the Canadian Environmental Assessment Act

I. REGULATORY REFORM IN ALBERTA

On January 31, 2012, Alberta's Environment and Water Minister, Diana McQueen, announced that the provincial government was drafting legislation to create a single energy regulator for Alberta. This legislation is expected to be introduced in the fall of 2012 and be in place by the spring of 2013.¹

This legislation is being built as a result of a Government of Alberta discussion document entitled "Enhancing Assurance: Developing an Integrated Energy Resource Regulator" ("Enhancing Assurance") which was released in May 2011.² Enhancing Assurance was issued in response to the recommendations of the Government's Regulatory Enhancement Task Force (the "Task Force"). The Task Force was established in March 2010 to conduct a comprehensive upstream oil and gas regulatory review and recommend system level reforms to ensure that Alberta is strongly committed to environmental management, public safety, and resource conservation.

Enhancing Assurance was a product of an engagement process involving key stakeholders in the energy sector, such as: landowners, officials of municipal governments, representatives from environmental organizations, the upstream oil and gas industry, and other interest groups. Participants in this engagement process identified several ways in which Alberta's regulatory system could be improved, generally agreeing that a simpler, consistent, and more transparent regulatory system was needed. The Task Force took the comments of these participants and developed several recommendations to address common concerns.

Enhancing Assurance makes several recommendations to improve the current regulatory regime:  

1. **Simplifying the system.** There are currently multiple regulators with different processes. Simplifying the system and using consistent processes will improve the system's navigability and transparency.

2. **Enhancing policy clarity.** A higher degree of collaboration is needed to ensure policies are consistently applied and communicated.

3. **Improving public engagement processes.** The system needs to provide opportunities for interested parties to have their voices heard.

4. **Enhancing accountability.** Increase clarity as to how the system operates and include regular measuring and reporting on how well the system is performing.

5. **Improving knowledge and information sharing.** Information needs to be shared more effectively. This will improve coordination and reduce duplication amongst regulators.

6. **Ensuring risk is assessed and managed throughout the system.** Decisions about upstream oil and gas development activities should be based on the level of risk involved. This will encourage innovation from industry while maintaining high environmental standards.

7. **Setting clear expectations.** The system should not act as a barrier but should set clear expectations for industry regarding the environment, public safety and resource conservation.

**The Current Regime**

The Government of Alberta’s discussion document, Energizing Investment: A Framework to Improve Alberta’s Natural Gas and Conventional Oil Competitiveness (the ”Framework”), notes that the current regulatory approvals processes have created an inefficient and complicated series of processes resulting in higher compliance costs to industry.  

Energy development projects in Alberta currently require regulatory approvals from three provincial bodies:

1. **Energy Resources Conservation Board (”ERCB”).** The ERCB regulates the safe, responsible and efficient development of Alberta’s energy resources. It issues well, facility and pipeline licences, in-situ bitumen recovery scheme approvals and approvals related to resource reservoir management (including pooling, spacing, commingling); conducts information collection and dissemination; undertakes compliance assurance activities; and oversees the abandonment of facilities at the end of their lifecycle.

2. **Alberta Environment (”AENV”).** AENV issues authorizations for certain oil and gas and coal activities; administers and manages the environmental assessment process; administers and manages the reclamation and remediation of project sites following

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3 Supra note 2 at 4-5.
5 Ibid., at 5-6.
closure; and issues licences for water use and approvals for disturbances that may affect water.

3. **Sustainable Resource Development ("SRD").** SRD is responsible for: approving geophysical exploration activities on public and private land; administering surface land access and rights-of-way on most public land; ensuring reclamation is completed on public land; issuing reclamation certificates; and auditing reclamation and remediation of certified sites on public lands.

In addition to meeting strict standards of these bodies, obtaining approval to develop an oil or natural gas well also involves many other regulatory processes and requirements, including:

1. Securing mineral tenure;
2. Securing the right to access land;
3. Consulting with local community residents and Aboriginal peoples; and
4. Applying for and securing various permits and approvals.  

While regulatory requirements are aimed at ensuring that oil and gas development occurs in an orderly and informed way that is in the public interest, the current regulatory requirements and processes are not always efficient. This is due to various factors identified in the Framework, including:

1. **Complexity and uncoordinated regulatory approvals processes.** There is duplication and information is not effectively and efficiently shared amongst the ERCB, AENV, SRD, and Alberta Energy. Project proponents must submit applications and secure various approvals through multiple, disconnected points even when they are related to the same project. Stakeholders potentially impacted by oil and gas development have similar challenges when attempting to access information about a project.

2. **Delays in regulatory processes.** It is not always clear which ministry or agency has precedence in decision making. Delayed response times in one ministry or agency can cause a chain reaction across others, undermining project timelines and increasing overall costs. Directives and policy decisions are not consistently applied amongst regulatory bodies, such as consultation requirements.

The Framework recommended reforms to create a more integrated, practical, and efficient regulatory system. **Enhancing Assurance** is the response to the reforms recommended by the Framework.

**Why have a Single Regulator?**

The object of using single regulator is to have an efficient and effective regulatory process to encourage investment in Alberta's energy resources.

For instance, the Canadian Energy Research Institute has forecasted that Alberta's oil and gas industry is poised to contribute over $2.5 trillion to Alberta's GDP alone, of which, nearly $1 trillion will come from

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natural gas and conventional oil.\textsuperscript{8} Upstream oil and gas activity in Alberta is also expected to boost the economies of other provinces and territories by an additional $300 billion. Alberta's oil and gas industry is expected to create hundreds of thousands of direct and indirect jobs within the province and across the country over this time – 18.5 million person-years of employment nation-wide, with 13.75 million person-years created in Alberta.

The competitiveness of Alberta’s regulatory compliance regime will directly impact the economic growth of Alberta and Canada. The Fraser Institute's 2011 Global Petroleum Survey (the "Survey") suggests that regulation of Alberta's energy sector is a major source of frustration to current and would-be investors.\textsuperscript{9} The Survey indicates that Alberta ranks only 68\textsuperscript{th} of 235 jurisdictions in a regulatory climate index (created from responses to questions regarding regulatory uncertainty and compliance costs).

The leading drivers of using a single regulator are to reduce the duplication, complexity, overlap, and unnecessary delays of the current regulatory regime without sacrificing the integrity of safety and environmental protection.\textsuperscript{10} Applicants in the current regulatory regime are required to submit separate applications to multiple regulatory bodies. This process is inefficient because it often involves duplication of information, increased costs, and uncertainty in the authorization process.\textsuperscript{11} Delays from any one regulator compound the length and complexity of the approvals, creating a complicated and repetitive process.

**What to Expect**

The single regulator will be responsible for all regulatory functions currently under the ambit of the ERCB, AENV and SRD in respect of oil, natural gas, oil sands and coal, in addition to all air, water, land, mine and facility authorizations. These regulatory functions will remain largely unchanged.

The single regulator will not assume responsibility for mineral tenure or surface rights, which will remain the responsibility of the Department of Energy and the Surface Rights Board, respectively. Both SRD and AENV will continue to provide services with respect to non-energy activities.\textsuperscript{12} For example, AENV will continue to provide services with respect to forestry and mining issues.

**Role**

Enhancing Assurance indicates that the new single regulator is not going to be an expanded ERCB – it will be an integration of all of the important regulatory responsibilities and functions of all three regulators in regards to energy development.\textsuperscript{13} Accordingly, the single regulator will regulate energy activities throughout the lifecycle of a project:

1. **Application, Review and Authorization of Energy Activities**

The single regulator will serve as a single point of access. Project proponents will no longer need to initiate multiple applications with different regulatory bodies, only needing to submit and access information about a proposed energy activity from a single regulator. The goal is to establish a


\textsuperscript{10} Richardson, supra note 1.

\textsuperscript{11} Sean Parker, "Alberta's 'Energy Superboard" (2011) Legal Counsel.

\textsuperscript{12} Enhancing Assurance, supra note 2 at 9.

\textsuperscript{13} Ibid., at 6.
consistent process involving one application, one review, and one decision. This will provide greater certainty and predictability for those involved in that process.

The process will remain relatively unchanged from that used by the current regulators: 14

- Pre-Application
- Application
- Notice
- Public Input
- Review
- Public Interest Examination
- Decision

2. **Hearings and Participation in Hearings**

Public engagement will remain a vital component of the regulatory process and the participation rights of landowners and those with specific interests in a project will not change. The enhanced system will create better opportunities for the public to provide input with respect to policy development and regulation of specific projects. The engagement processes currently used by the existing regulators are quite different. The single regulator will use a consistent process which will provide more clarity and predictability to the public, enabling landowners and others with specific interests to better know how and when they can participate in a project.

3. **Compliance and Enforcement**

All compliance and enforcement functions will be delivered by the single regulator. This will allow for coordination of compliance activities and will provide industry with more certainty and consistency. The single regulatory will take a risk-management approach to prevent non-compliance and reduce environmental risks, public safety, and resource conservation risks. The compliance and enforcement tools used by the current regulators will remain unchanged.

4. **Shut Down and Closure of Facilities**

As the single regulator will be responsible for regulating energy activities throughout the project cycle, it will also be responsible for regulatory functions related to the shut down, closure and abandonment of facilities, and reclamation of land. The existing regulatory processes will remain unchanged but will be delivered by the single regulator. These processes include: the reclamation certification process (currently the responsibility of SRD and AENV); suspension and abandonment of wells and facilities and the management and administration of the orphan fund (currently the responsibility of the ERCB); and delivery of the Mine Financial Security Program (currently the responsibility of AENV).

Transfer of responsibilities from the existing regulators is expected to be undertaken in phases, with clear guidance provided to industry and other stakeholders around these transitions. 15

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14 Ibid., at 13.
15 Ibid., at 13.
Structure

Enhancing Assurance provides the Task Force's views as to how the single regulator should be structured. If those recommendations are adopted, it is likely that:

1. The single regulator will be established as a corporation (just as the ERCB is) – it will be at arms-length from government;

2. The single regulator will have: a Board whose members are appointed by Cabinet; a Chief Executive; and will have the authority to hire personnel, retain experts, and appoint committees;

3. The legislation will explicitly require the single regulator to make decisions and act in accordance with established government policies, including regional plans;

4. The single regulator will have authority to establish technical standards and operating procedures for energy activities on public land; and

5. The approach currently used to fund the ERCB will be initially continued to fund the single regulator. Once the single regulator is established, the funding approach will be reviewed with the aim of apportioning costs between government and industry in a fair way.

The Task Force also identified additional issues that needed to be examined further, including:

1. How the single regulator's authority will be expanded to include the minerals sector;

2. What best practices in operations and processes of the current regulatory entities should be incorporated; and

3. How the single regulator can work with other regulatory entities responsible for matters that could impact energy activities.

II. PROJECT APPROVAL PROCESSES

Energy development projects in Alberta may require regulatory approvals from several government agencies or regulatory bodies, including the ERCB and AENV. In addition to these processes, such projects may also require approvals from the Canadian Environmental Assessment Agency (the “Agency”) when federal environmental assessments under the Canadian Environmental Assessment Act\(^\text{18}\) (the “CEAA”) are triggered.

ERCB Approval Process

The general ERCB approvals process is as follows:

1. **Pre-application stage.** Public disclosure and consultation of a proposed project is to be completed prior to the submission of any application so concerns and objections may be


\(^{17}\) *Ibid.*, at 11.

raised, properly addressed, and, if possible, resolved. There are minimum geographical and public notification and consultation requirements to be met by a company prior to filing an application. The public consultation requirements vary based on the type of project proposed.

2. **The Application.** Section 20 of the ERCB Rules of Practice\textsuperscript{19} outlines the information that is required in every application. ERCB Directives regarding specific types of applications outline what particular information is required. The following must be included in every application:

- Description of the approval, permit or license applied for;
- Grounds on which the application is made;
- Reference to the statutory provision under which the application is made;
- Description of the relevant facts;
- Description of the consultation process; and
- Any other information necessary to provide the ERCB with full and complete understanding of the application.

3. **Notice of Application.** A notice of application may be issued if the ERCB considers deciding the application without a hearing. Where there are no outstanding concerns or issues between the company and landowners/residents relating to the application and the proposal is technically sound, ensures public safety and environmental protection, and is in the public interest, the ERCB will consider approval without a hearing. A hearing may be triggered if someone who is directly or adversely affected by the proposed project files their legitimate concerns in the manner specified by the ERCB.

4. **Notice of Hearing:** If a hearing is triggered, the ERCB issues a notice of hearing to all persons and organizations potentially directly and adversely affected to inform them of the hearing and to allow time to file submissions. A notice may also be published in the local newspaper to inform the general public.

5. **Hearing.** A public hearing may be oral, electronic, or written.

6. **Review.** Upon the ERCB's own initiative or by the application of a person, an application may be reviewed or reheard.

7. **Appeal.** If an appeal is sought, the ERCB's decision must be made to the Alberta Court of Appeal and leave to appeal must be sought within 30 days of the issuance of the decision.

Environmental approvals by AENV or the Canadian Environmental Assessment Agency are independent from the ERCB's approval process.

\textsuperscript{19} As contained in Alberta Regulation 98/2011 of the *Energy Resources Conservation Act*. 

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Environmental Assessment Processes

An environmental assessment process (an “EA Process”) is an information gathering tool designed to predict the environmental effects of a proposed energy project prior to its commencement. It provides an opportunity for participation by those members of the public who may be affected by a proposed project and allows for a consideration of environmental consequences at an early stage of project planning. The EA Process also provides an opportunity to propose plans for the mitigation of any adverse effects predicted to occur.

The EA Process may occur at either, or both, the provincial or federal level. An environmental assessment (an “EA”) in the province of Alberta is undertaken pursuant to the provisions of the Environmental Protection and Enhancement Act (the “EPEA”). Federal EAs are undertaken pursuant to the CEAA.

The Alberta EA Process

The EA Process in Alberta is governed by EPEA and is administered by Alberta Environment. While not all projects are subject to the EA Process, the “mandatory activities” listed in the EPEA regulations encompass nearly every type of energy, utility and natural resource project. Most energy projects are therefore subject to an EA and the project proponent must conduct an environmental impact assessment (an “EIA”) and submit an EIA report (an “EIA Report”).

The purpose of an EA under EPEA is to:

1. Gather information that will inform the public and government agencies about a project proponent's understanding of the consequences of their project;
2. Provide an opportunity for persons affected by a proposed project to express their concerns to the project proponent and government agencies; and
3. Support sustainable development by using information provided during the EA Process to consider the proposed project's place in the overall plan for the province's environment and economy.

The Provincial EA Process begins whenever a proponent, a government department, local authority, or any other person, informs AENV about a new project. AENV then decides if the project requires an approval under EPEA or the Water Act. The Environmental Assessment Director also determines if an EIA Report will be required.

The EIA Process administered by AENV has several steps:

1. Preparation and circulation of a public disclosure document and proposed terms of reference for the proposed project.

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20 Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.
21 The mandatory and exempted projects are listed in the Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/93.
22 EPEA, supra note 19, s. 44(1)(a).
2. **AENV sets and issues terms of reference which dictate the scope of studies to be conducted for the EIA.** The EIA report must be prepared in accordance with the final terms of reference. Most EIA reports include:

(i) A detailed description of the project;
(ii) The location and environmental setting for the project;
(iii) The potential positive and negative effects of the project;
(iv) Plans to mitigate adverse effects of the project;
(v) Information on public and First Nations consultation; and
(vi) An assessment of cumulative effects of the project.

3. The EIA report is submitted to AENV. For most large energy or resource development projects, the EIA is part of the application submitted to the ERCB.

4. AENV reviews and considers the project, activities around the project, economic, environmental, and social issues and the cumulative effects of existing and foreseeable future projects in the area.

Upon satisfactory EIA review, an application is made to the AENV for **EPEA** approval. Once the **EPEA** approval process is complete, construction and operating approvals will be issued under **EPEA** which contain environmental requirements relating to emissions, monitoring, reporting, conservation and reclamation of the project.

**The Federal Environmental Assessment Process**

The Federal EA Process is governed by the **CEAA** and administered by the Canadian Environmental Assessment Agency (the “**Agency**”). The **CEAA** is designed to ensure that the environmental effects of a project are carefully considered and reviewed before any federal authority takes action in allowing the project to proceed, including:

1. Ensuring that projects will not cause significant adverse environmental effects;
2. Encouraging federal authorities to take actions that promote sustainable development; and
3. Facilitating communication and coordination between federal authorities and Canada's First Nations.

The Federal EA Process is triggered whenever a federal authority has decision-making responsibility over a proposed project. It is therefore triggered whenever a federal authority:

1. Proposes a project;
2. Provides financial assistance to a project proponent for a certain project;
3. Sells, leases or otherwise transfers control or administration of federal land to enable a project to be carried out; or

4. Provides a licence, permit or an approval listed in the regulations which enables a project to be carried out.²⁴

If it is determined that the federal EA Process has been triggered, the responsible authority (the federal authority required to ensure that an environmental assessment is conducted)²⁵ must determine how the EA Process will be conducted by identifying the scope of the project and any factors which must be considered in the course of the assessment, who the assessor will be, and implementing any time lines.²⁶

The amount of time it takes to complete the federal EA Process depends on the level of assessment required. The level of assessment is driven by the nature and scope of the project. There are four types of environmental assessments at the federal level:²⁷

1. **Screening.** A screening assessment is generally the most basic process and is usually reserved for activities whose environmental effects are well-known. A screening is a systematic approach to identifying and documenting the environmental effects of a proposed project and determining the need to eliminate or mitigate adverse effects, to modify a project plan, or to recommend further assessments. Most projects are assessed relatively quickly under a screening and public participation is at the discretion of the responsible authority.

2. **Comprehensive Study.** If a project meets the criteria in the Comprehensive Study List Regulations, the EA will proceed by way of a comprehensive study. A comprehensive study is more in-depth than a screening and is generally required for complex large-scale projects likely to have significant adverse environmental effects. Examples of such projects include large oil and natural gas developments and nuclear power developments.

Public participation and implementation of a follow-up program are mandatory for comprehensive studies. Since July 2010, the Agency has had responsibility for conducting comprehensive studies, except for those regulated by the National Energy Board and the Canadian Nuclear Safety Commission.

The Agency administers the comprehensive study process under the CEAA. According to the regulations, the Agency must decide whether to commence a comprehensive study within 90 days from receipt of an acceptable project description. Following this 90-day period, the Agency has 14 days to post a notice of commencement and start the comprehensive study. The Agency then has 365 days to complete public consultation and produce a comprehensive study report (the "CSR").

The CSR is issued to the Minister of the Environment and outlines the scope of the project, the factors to be considered in its assessment of scope, public concerns with regard to the project, the potential of the project to cause adverse environmental effects, and the ability of the comprehensive study to address issues in relation to the project.

²⁵ CEAA, ibid., s. 2(1), “responsible authority”, s. 11(1).
²⁶ ibid., s. 15(1).
²⁷ ibid., s. 14.
After receiving the CSR, the Minister of the Environment issues an EA decision statement. This statement includes the Minister’s opinion about the significance of the environmental effects of the project and sets out any mitigation measures or follow-up program the Minister deems appropriate. The Minister also has the power to request additional information or order public concerns be addressed before issuing an environmental assessment decision statement.

3. Panel Review (public hearing). A review panel is a group of experts appointed by the Minister of the Environment. The panel is appointed to objectively and impartially review and assess projects likely to have significant adverse environmental effects. The Minister also retains discretion to require a panel review where public concerns warrant it. A panel review is not an automatic process.

Reviews have the capacity to encourage open discussion and the open exchange of views. They involve large numbers of interested groups and members of the public by allowing individuals to present evidence, concerns, and recommendations at public hearings. Reviews also allow a project proponent to present their project to the public and explain its projected environmental effects.

Following its review, the panel submits an environmental assessment report to the responsible authority and to the Minister of the Environment who then makes it public. The responsible authority must then determine whether the project is likely to cause significant adverse environmental effects and, if it does, if those effects can be mitigated. Following such determination, and with the approval of Cabinet, the responsible authority will then exercise any duty or power to permit the project to be carried out in whole or in part.

When a project requires a decision from another level of government, an assessment may be conducted through a joint review panel in an attempt to save time and money. The government has developed harmonization agreements with some provinces, including Alberta, to facilitate such reviews. Federal-provincial agreements are discussed later in this memorandum.

4. Mediation. Mediation is a voluntary non-adversarial process of negotiation in which an independent and impartial mediator assists the parties in resolving their issues. Like assessments by panel review, it is an advisory process rather than a decision-making process.

The majority of energy projects would be expected to fall within the requirements of a comprehensive study. Certain larger projects or projects with significant public concern or adverse environmental effects may undergo a panel review. A review panel is the most exhaustive and therefore time consuming assessment process and is generally reserved for projects that will likely cause significant environmental effects or for which there is a high level of public concern.

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The CEAA process has several time limits associated with the initiation of an environmental assessment:

- A federal authority that receives a project description from a province, the Agency, or the project proponent must decide within 30 days after receipt of the description if the project is likely to trigger the CEAA EA Process;\(^{29}\)
- Where an EA is required, it is required to be conducted as early as practical in the planning stages of the project and before irrevocable decisions are made;\(^ {30}\)
- No decision regarding a screening level of assessment can be rendered or acted upon until a minimum of 15 days after the notice of commencement and project description have been posted on the Agency’s website;\(^ {31}\) and
- No decision regarding a comprehensive study level of assessment can be rendered or acted upon until a minimum of 30 days after the notice of commencement and project description have been posted on the Agency’s website.\(^ {32}\)

III. THE CANADA-ALBERTA ENVIRONMENTAL ASSESSMENT AGREEMENT

A project requiring a decision as to the environmental implications of a project from both the provincial and federal governments may be subject to two independent environmental assessments. This leads to significant duplication of efforts and increased uncertainty regarding ultimate project approval. To alleviate those concerns, the Government of Alberta and the Government of Canada entered into the Canada-Alberta Agreement on Environmental Assessment Cooperation (2005) (the “Agreement”).\(^ {33}\) The purpose of the Agreement is to reduce overlap and duplication to ensure that EAs are timely, more effective, and less costly. While each government remains responsible for the EA decision requirements in their own legislation, the Agreement integrates features of each process.\(^ {34}\) Between 1999 and 2004, Alberta and Canada participated in 31 joint assessment processes under the Agreement.\(^ {35}\)

Under the Agreement, both governments have reciprocal obligations to notify each other “in a timely manner” about proposed projects that may be subject to a cooperative environmental assessment and, once notified, to identify for the other party of the information it believes will be required to determine if it has an environmental assessment responsibility.\(^ {36}\)

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\(^{29}\) Regulations respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements, SOR/97-181, s.3.
\(^{30}\) CEAA, supra note 17, s. 11(1).
\(^{31}\) Ibid., s. 20(4).
\(^{32}\) Ibid., s. 23(3).
\(^ {33}\) Canada-Alberta Agreement on Environmental Assessment Cooperation (2005), entered into between Alberta Environment and the Canadian Environmental Assessment Agency, released on July 22, 2005. The Agreement was first entered into in 1999 but expired on June 24, 2004. A renewed agreement was negotiated and took effect in 2005. This newly-revised Agreement incorporates legislative changes and has no expiration date (Agreement, section 18.1). However, it mandates that an evaluation be undertaken every 5 years (Agreement, section 15.3). The Joint Review Panel is allowed for under: CEAA, supra note 17, s. 40 and EPEA, supra note 19, s. 57.
\(^ {34}\) The Agency is the federal environmental assessment coordinator for a multi-jurisdictional assessment, as set out in s. 12.1 of the CEAA, ibid, and acts as a primary point of contact for difficulties that may arise and facilitate communication and cooperation among the two jurisdictions.
\(^{36}\) Pursuant to the Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements (SOR/97-181), a federal authority that receives a project description from a province,
When both federal and provincial EAs are necessary, the Agreement requires projects involving to undergo a single cooperative assessment meeting the legal requirements of both governments. In cooperative assessments, one government takes the lead in administering the assessment, but both remain active partners. Under the Agreement, either Alberta or Canada will be the “lead party” and will be responsible for the administration of the cooperative EA. Canada will be the lead party for any proposed project arising on federal lands and Alberta will be the lead party for all other assessments. The lead party uses its own process for the cooperative assessment but attempts to allow both parties to meet their respective legislative and regulatory requirements. The other party must adapt the procedures, practices, and processes of the lead party.

The Agreement also directs the parties to “make every reasonable effort” to agree on a common set of information requirements which will allow both parties to fulfil their respective environmental assessment responsibilities and produce a single environmental assessment report.

In all joint EAs, each party identifies a senior window contact that acts as a facilitator and ensures that timelines and public notification requirements are met. A joint advisory review team is also established. The senior window contact and the joint advisory review team work together to create timelines and a schedule for the assessment. Each party is individually responsible for reviewing the information generated by the assessment and ensuring that their respective legal requirements are met.

Due to the inherent differences between federal and provincial assessment processes, there are provisions in place to ensure that a public hearing is carried out jointly whenever necessary. Each party must notify the other when an EA is recommended to proceed by way of a panel review, and Canada is required to notify Alberta of the type of assessment required under the CEAA. Each party must also provide details of the procedural requirements relating to the type of assessment they will be using so the timing of any hearings can be coordinated.

If both parties determine that a public hearing is necessary, then a “joint panel” will be appointed. Every project subject to a joint panel will have its own project-specific agreement, or joint panel agreement (a “JPA”), established. When a review by a joint panel occurs, each government makes a submission describing their respective environmental responsibilities along with their views, analysis, and conclusion regarding the project. If only one party determines that a public hearing is necessary, the other will complete their remaining screening, review, or mediation, and provide their conclusions to the presiding panel or board of the hearing.

While the Government of Canada and the Government of Alberta make independent decisions respecting the project based on the information generated through a cooperative assessment, their decisions are coordinated and released together.

Practically, harmonization does not work as seamlessly as the two governments intended. Coordination between the two governments therefore requires dedicated pro-active management by a project
proponent. While harmonization may not significantly expedite the environmental assessment process by substantially reducing provincial or federal requirements, it does have the potential to streamline it and reduce some duplication between provincial and federal regulatory entities.\footnote{Duff Harper and Lars Olthafer express this view of harmonization agreements in Blakes doc. #31006328.}

IV. REFORMING THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT

The Report

On March 13, 2012, the federal Standing Committee on Environment and Sustainable Development (the "Committee") released its statutory seven-year review of the CEAA (the "Report").\footnote{Canada, House of Commons, Standing Committee on Environment and Sustainable Development, Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing Our Resources" in Sessional Papers, No. 41 (2012)}. The Report recommends numerous changes to the CEAA that would have significant implications for resource developers in Canada. Significant recommendations in the Report include:

1. *Improving Timeliness.* The Committee recommended that EAs should be carried out by the "best-placed regulator", which should be the Agency at the federal level. The Committee noted that while recent regulations under the CEAA provide mandatory timelines for comprehensive study-level assessments, the Committee recommended further amendments to the CEAA to provide binding timelines for all EAs under the CEAA.

2. *Reducing Duplication.* The Committee recommended that the Agency be empowered to determine that another jurisdiction's EA process fulfills the requirements of the CEAA and is "equivalent". The Committee suggested that those aspects of provincial legislation that are "equivalent" should be identified in a schedule to the CEAA and that the CEAA should be amended to exempt projects subject to those provincial EA laws. This would allow the federal government to be able to rely entirely on a provincial EA provided the process met the main objectives of the CEAA.

3. *Targeting Significant Projects.* The Committee recommended moving the CEAA away from a trigger-based approach (under s. 5 of the CEAA, which is described as an "all in unless excluded" approach) to a project list approach whereby projects requiring federal EAs are enumerated in advance, subject to the discretion of the Minister of Environment to require a federal EA for a non-listed project.

A frequent complaint to the Committee was that a large number of small projects with insignificant environmental effects triggered a federal EA, diverting time and resources from the review of major projects that may significantly affect the environment. For example, in 2007, the Agency concluded that approximately 94% of EAs were for small projects with minimal potential for adverse environmental effects.

The Committee concluded that the CEAA should not be triggered for projects with minor effects that could be addressed through provincial assessments and/or federal and provincial permitting regimes. Furthermore, this would allow a federal EA to be conducted at an earlier stage of project planning.
4. Holistic View of Environmental Effects. The Committee noted that there were many comments suggesting that the CEAA focus of significant adverse environmental effects is too narrow. The Committee therefore recommended that federal EAs should be required to consider the positive environmental effects of a project.

5. First Nations Consultation. The Committee recommended that the federal government work with the provinces and First Nations to develop a single First Nations consultation process applicable to all EAs under the CEAA.

The Budget

On March 29, 2012, the federal government released the 2012 budget (the “Budget”). Measures in the Budget include a streamlined regulatory approach under the CEAA. This indicates that the Government of Canada has largely accepted the recommendations of the Report, acknowledging that the current regulatory review process is often complex, duplicative and inefficient.

A primary reason for reforming the current regulatory system is to increase Canada's competitiveness in attracting investment. For example, there are an estimated 500 projects, representing $500 billion in investment planned to occur in Canada over the next decade and corporations looking to invest in Canada may be discouraged from making such investments due to increasingly complex rules and bureaucratic regulatory reviews.  

Bill C-38

On April 26, 2012, the federal government introduced Bill C-38, the Jobs, Growth and Long-term Prosperity Act (the “Bill”), which contains amendments to key environmental and energy regulatory statutes and is promised to speed the development of Canadian natural resources. Through the Bill the government appears to have delivered on its promises and the changes and, if passed as is, should have far-reaching implications for resource development across the country.

The Bill, if passed as is, implements the proposals of the federal government’s plan for a streamlined regulatory approach in its April 17, 2012 document, Responsible Resource Development (“RRD”). The overriding message and goal of the streamlined regulatory approach under RRD is clear: “one project, one review, completed in a clearly defined time period.” Four areas of improvement are proposed to meet this goal:

1. Making the review process for major projects more predictable and timely;

2. Reducing duplication in the review process;

3. Strengthening environmental protection; and

4. Enhancing consultation with First Nations.

To achieve these improvements, the Bill proposes to replace the existing CEAA with a new CEAA and make noteworthy changes to the Fisheries Act, Species at Risk Act and the National Energy Board Act.

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50 Ibid., at 6.
Predictability and Timeliness

RRD proposed several changes to make the federal approvals system more predictable and timely to facilitate investment and planning decisions leading to job creation and economic growth. The Bill intends to implement these changes, which include:

1. Consolidating responsibility for environmental assessments. Responsibility for federal EAs will be consolidated with the Agency, the Canadian Nuclear Safety Commission, or the National Energy Board for projects within their mandates. This will be significant reform as there are currently over 40 federal government departments and organizations that have responsibility for, or can have a say in, project reviews.

2. Designated Projects. Activities subject to federal EAs are “designated projects” which include those physical activities in Canada or on federal lands that will be enumerated in a regulation. This is a departure from the factors that trigger an EA under the CEAA. According to speeches in Parliament on the Budget and press releases from the government, the regulation (which has not yet been released) will likely narrow the number of projects subject to federal EAs to larger projects or activities.

3. Fixing timelines. Fixed timelines are provided, within which federal EAs must be completed. Unless otherwise modified, these timelines include:
   - Decisions by the Agency as to whether a federal EA is required must be made within 45 days;
   - Standard environmental assessments led by the Agency must be completed within 12 months;
   - Panel reviews in regards to projects under the CEAA must be completed within 24 months; and
   - Binding (though currently undefined) timelines for key regulatory permitting processes, including the Fisheries Act, Species at Risk Act, Navigable Waters Protection Act, Canadian Environmental Protection Act, and the Nuclear Safety and Control Act.

The objects of these reforms are to avoid unnecessary delays in the regulatory approvals process. RRD highlights several major projects which have faced unnecessary delays, such as:

1. Areva Resources Canada’s proposed construction and operation of a uranium mine and mining facilities in northern Saskatchewan with capital investment of up to $400 million and up to 200 construction jobs. There was a 19-month delay in starting the EA. The federal lead department also changed midway through the EA Process, adding unnecessary complexity to the process.

2. An application for the Joslyn North Mine Project, an oil sands mine located in northern Alberta, submitted to the Province of Alberta in 2006. The federal EA did not begin until 2008 and federal approval of the project was not granted until December 2011.51

51 Ibid., at 3.
Reducing Duplication

The government proposes several changes to make the regulatory system more efficient and modern, including federal-provincial regulatory equivalency provisions. The Bill proposes to grant the federal government authority, through substitution and equivalency provisions, to allow provincial environment assessments meeting the substantive requirements of the CEAA to replace federal EAs. This will effectively integrate federal and provincial regulatory regimes and reduce duplication in EAs.

Strengthening Environmental Protection

Several measures are proposed to help ensure that resources are allocated where they are most needed – to major projects with potentially significant impacts on the environment. These measures include:

1. **Targeting significant projects.** Focussing EAs on major projects with the potential for significant adverse environmental effects. The federal environmental approvals process is often triggered by small low-risk projects which divert resources from major projects with a higher likelihood of environmental impact. For example:
   
   (i) The Atlantic Canada Opportunities Agency was required to conduct an EA of the construction of a new pumping house for the expansion of a maple syrup plant;
   
   (ii) The Department of Fisheries and Oceans Canada was required to complete an EA for the construction of a boat launch; and
   
   (iii) The Department of National Defence was required to conduct an environmental assessment of the installation of a 450kw standby generator to maintain power at a naval radio station because the project was on federal lands.

   Accordingly, the CEAA will move away from its current trigger-based approach to a project list approach whereby projects requiring federal EAs are enumerated in advance, subject to the discretion of the Minister of Environment to require a federal EA for a non-listed project.

2. **Increasing compliance and follow-through.** Enforceable EA decision statements will be introduced to help ensure that project proponents comply with measures to protect the environment. If a proponent does not meet the conditions of a decision statement, they may be subject to penalties for non-compliance.

3. **Imposing penalties.** Authorizing administrative penalties for violations of the CEAA, Nuclear Safety and Control Act, and the National Energy Board Act. The Agency does not currently have enforcement mechanisms at its disposal – it must rely on enforcement mechanisms in other acts, such as the Fisheries Act or the Criminal Code. There will be new financial penalties ranging from $100,000 to $400,000 imposed on individuals or business that violate environmental regulations.

Consultation with First Nations

The federal government has the legal duty to consult and accommodate when it contemplates conduct that may adversely affect established rights of First Nations people. The Bill has, as a stated purpose,

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52 Ibid., 9-10.
53 Ibid., at 2-3
the promotion of aboriginal involvement in the federal EA process through communication and co-
operation, and requires that the assessment consider specific effects on affected First Nations.

Implications of a Streamlined Regulatory Process

One of the key questions on the release of the Budget was how the proposals to streamline the
environmental assessment process would apply to current project applications, especially in relation to
panel reviews. The Bill includes transitional provisions to deal with this issue. An assessment by a
review panel that was commenced under the current CEAA will be continued under the processes
established under the new CEAA. In such a case, the Minister must establish the time limit within which
the decision statement for that project must be issued and, if necessary, may extend the 24-month time
limit set out in the CEAA by a maximum of three months.

How this transition provision will work in practice is unclear. For example, in the context of the Enbridge
Northern Gateway Pipeline proceeding that is underway, the joint review panel was established by an
agreement dated December 4, 2009. The final hearings for that project are not projected to commence
until September 2012, with a decision unlikely to be rendered until well into 2013. It is unclear how the
proposed transitional provisions will be integrated into this proceeding given that the 24-month timeline for
panel review has already passed.

Also unclear is how a list-based approach to EAs will be determined, specifically which types of projects
will be “designated projects” subject to federal EAs. Inter-provincial pipelines and resource development
projects affecting interprovincial waterways are obvious targets, but the importance of imposing federal
EAs on other projects, such as “nationally significant” projects can be debatable.

For example, Taseko Mines Ltd.’s Prosperity mine was initially approved by the government of British
Columbia, but rejected by the federal government. The project was a multi-billion open-pit copper and
gold mine that would have kick-started the economy in a “hard-luck” corner of the province, but it meant
draining a trout-filled lake in the Cariboo-Chilcotin region, 125 kilometres southwest of Williams Lake.54

Uncertainties are likely to be addressed as the Bill is implemented and its regulations are established. On
the whole, the proposals appear to be a positive step towards a more efficient regulatory review process.
The federal EA Process will be conducted more quickly due to mandatory timeliness and oversight by a
single “best placed” regulator. Deeming provincial environmental laws as “equivalent” will help reduce
duplication between provincial and federal EAs. Applying the CEAA on the basis of a project list, rather
than the current “trigger” approach will help provide certainty to project proponents of the likely regulatory
requirements for their projects.

If the proposed changes are implemented and the goals achieved, the anticipated result is increased jobs
and more money invested back into Canada through new development and increased royalty revenues.
However, the ultimate test will be whether the regulatory efficiencies contemplated in the Budget are
achievable without sacrificing effective and appropriate environmental review.

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Should you have any questions relating to any of the above, please do not hesitate to contact us.

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