

Amendments to the *Exclusion List Regulations* and new *Infrastructure Projects Environmental Assessment Adaptation Regulations*

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Introduction

On March 12, 2009, Cabinet registered an amendment to the *Exclusion List Regulations*¹ and new *Infrastructure Projects Environmental Assessment Adaptation Regulations*² (“Adaptation Regulation”) under the federal *Canadian Environmental Assessment Act*³ (“CEAA”). These new regulations were made public on March 19, 2009 by publication in the Canada Gazette Part II.⁴ Both regulations relate to projects funded, at least in part, through the federal government’s 2007 *Building Canada: Modern Infrastructure for a Strong Canada* (“Building Canada Plan” or “Plan”).⁵ The Building Canada Plan promises \$33 billion dollars of federal funds over seven years for public infrastructure projects throughout Canada. The Plan contemplates lending or granting funds for a variety of projects including wastewater and drinking water treatment facilities, brownfield redevelopment, highway construction and improvements, short-line railways, airport modifications, public transit, green energy developments, solid waste management facilities, and sports and culture facilities.

The short explanation regarding these regulations is that the *Exclusion List Regulation* amendment removes the requirement for federal environmental assessment (“EA”) for an anticipated 2000 Building Canada Plan projects over the next two years and the *Adaptation Regulation* purports to authorize substitution of provincial EA processes for federal ones for Building Canada Plan projects that are not excluded under the amendments to the *Exclusion List Regulation*. A longer explanation and brief critique follows. Be warned that the longer explanation is based on my initial review of these regulations and could be modified on closer review.

Amendment to the *Exclusion List Regulation*

The amendment to the *Exclusion List Regulation* excludes many projects contemplated by the Plan from federal EA under the CEAA. The criterion for exclusion from federal EA in the CEAA is that Cabinet has determined that the “projects or classes of projects” ... “have insignificant environmental effects.” In other words, in order for a project or class of project to be placed on the *Exclusion List*, Cabinet must make a finding that such project or class of project has only insignificant environmental effects. Reading the *Exclusion List Regulation* prior to the March 12, 2009 amendment shows that in the past Cabinet took this requirement fairly seriously. The pre-March 12, 2009 *Exclusion List Regulation* pertains only to matters such as repairs and maintenance, decommissionings, and minor expansions and constructions (limited by size or output). The pre-March 12, 2009 exclusions usually do not apply to listed projects (that is there is no exclusion from federal EA) if the projects take place within 30 metres of a water body, and might release pollutants into it. The March 12, 2009 amendments do not show that same regard for meeting the statutory criterion of “insignificant environmental effects.”

According to the Regulatory Analysis Statement (“RIAS”) statement published along with the March 12, 2009 *Exclusion List Regulations* amendment, the amendment is meant to reduce the number of federal EAs up to 2000 over the next two years.⁶ The projects excluded by this regulation from federal EA are listed on Schedule 4 to the Regulation and include, among many others:

¹ *Exclusion List Regulations*, 2007, SOR/2007-108. The amendment is SOR/2009-88.

² SOR/2009-89.

³ S.C, 1992, c. 37 (“CEAA”).

⁴ Canada Gazette Part II, Extra, Vol. 143, No. 2, March 19, 2009.

⁵ The Building Canada Plan is available online at <<www.buildingcanada-chantierscanada.gc.ca>>.

⁶ Regulatory Impact Analysis Statement (“RIAS”). 2009/03/19, Canada Gazette Part II, Vol. 143, Extra.

- ♦ the installation of “intelligent transportation systems” (a system that uses technologies to increase efficiencies and the like of a transportation network);
- ♦ construction, modification, etc. of a building to be used for residential, institutional, or other accommodations; providing office space, meeting room or facilities; educational financial, or informational facilities; cultural, recreational, heritage, artistic, tourism, sporting, or other community events; or municipal parking;
- ♦ the construction etc. of rapid transit systems, public or railway systems;
- ♦ the construction etc. of roads and public highways under certain conditions; the widening of bridges; and
- ♦ the construction etc of certain facilities for treatment or distribution of potable water and for wastewater and stormwater management.

Some of the above are limited to developments either not within 250 metres of an “environmentally sensitive area,” or within 250 metres of an “environmentally sensitive area” designated by the federal government, where the project cost is under \$10 million dollars. The amendment defines “environmentally sensitive area” narrowly as an area protected for environmental reasons in “regional or local land use plans, or by a local, regional, provincial or federal government body.”⁷ Before one concludes that this is an effective environmental protection mechanism one should compare the usual limitation on developments listed in the *Exclusion List Regulation*, that developments not occur within 30 metres of a body of water and might pollute the water body. “Environmentally sensitive area” is much narrower than the water body limitation as it only applies to areas that have actually been designated to be protected by a government. It is safe to say that the great majority of water bodies (which would include rivers and stretches of rivers) are not designated for protection or within designated protected areas in Canada. Also, even if a project falls within an environmental sensitive area, it may be immune from federal EA in any event because of the application of the *Adaptation Regulation*. As well, as mentioned, if a project is within an “environmentally sensitive area” (and complies with management plans etc. for the area) and has a total cost, other than the cost of land, below \$10 million dollar threshold, it also is exempt from federal EA. One might anticipate that to fit under the \$10 million dollar threshold, project-splitting techniques could be used.

The Adaptation Regulation

The *Adaptation Regulation* applies to projects funded by the Canada Building Plan that are not excluded from federal EA under the March 12, 2009 amendment to the *Exclusion List Regulation*. The *Adaptation Regulation* applies to the funding trigger in the CEAA. Authority for the regulation is based on subparagraph 59(i)(iv) of the CEAA which enables the “varying” of the provisions of the CEAA in respect of projects triggered by the federal money trigger (s. 5(1)(b)). The regulation is meant to alter certain provisions of the CEAA insofar as they apply to projects funded by the Canada Building Plan and are not excluded under the new amendment to the *Exclusion List Regulation*.

The Adaptation Regulation has a number of impacts. The first set of “adaptations” or varying of the application of the CEAA apply to projects by the Plan that need to be assessed that commence as a screening, which is the lowest level of federal EA under the CEAA, and those that commence as a comprehensive study. An EA must be commenced by way of comprehensive study if the project is described in a regulation under the CEAA called the *Comprehensive Study List Regulation*,⁸ These are projects that are likely to have significant adverse environmental effects, such as large-scale industrial developments. The CEAA imposes more regulatory requirements (such as mandatory public

⁷ Definition of “environmentally sensitive area” from amendments to the *Exclusion List Regulation*, *supra* note 1.

⁸ S.O.R./94-638.

participation opportunities (CEAA s. 21)) with respect to comprehensive studies than with respect to screenings.

Here are the changes:

- ▶ The regulation removes the potential to bump up a screening to a mediation or panel review that otherwise applies to screenings where “public concerns warrant a reference to a mediator or a panel review” or it is “uncertain whether the project ... is likely to cause significant environmental effects” (CEAA s. 20(c) (iii)). A panel review is potentially the most intensive and comprehensive level of federal EA. Under the regulation, if a project assessment pursuant to the regulation proceeds as a screening it will stay as a screening, notwithstanding public concerns, or uncertainty regarding its impacts.
- ▶ The regulation removes public consultation requirements regarding the scope of comprehensive studies, and the potential for a bump up from a comprehensive study to a panel review. It does this by stating that sections 21-23 of the CEAA do not apply (*Adaptation Regulation*, s. 2(2) (b).). Sections 21-23 of the CEAA enable the Minister to bump up an EA proceeding by way of comprehensive study to a panel review.
- ▶ The regulation makes it possible for a responsible authority to determine that a project may proceed even if it likely will have significant environmental effects, if the responsible authority determines that the effects can be justified in the circumstances, and Cabinet gives approval. This is not possible for projects not subject to the regulation. For projects not subject to the regulation, the Act requires that where the responsible authority determines that a project likely will have significant environmental effects the responsible authority must either not exercise authority to enable the project to go ahead, or the project must be bumped up to a mediation or panel review (CEAA, s. 29(i)(c)).

The second set of “adaptations” or varying the application of the CEAA concerns substituting provincial EA processes for federal EA under the CEAA for screenings and comprehensive studies (a more comprehensive and involved assessment process than screenings). These provisions do not apply to panel reviews, potentially the most intensive and comprehensive level of EA under the CEAA, but since the bump up from a screening or a comprehensive study to a panel review has been removed for projects falling under the regulation, it is hard to imagine that there could be panel reviews where the Minister authorizes a substitution under the regulation.⁹ These provisions allow the Environment Minister, where “appropriate,” to approve of the substitution of a provincial EA process for one under the CEAA. In other words, the Minister may determine that no federal assessment of a project is necessary at all, where a provincial EA is conducted in respect of a project. After a provincial assessment is completed the regulation purports to require the provincial entity to submit a report to the responsible authority. The responsible authority then makes a regulatory decision, presumably, as to whether to fund the project.

This substitution “adaptation” greatly departs from the CEAA as written and “unadapted”.¹⁰ The CEAA only allows substitution for panels, the most intensive level of federal EA, and then only to other federal entities, such as the National Energy Board, or a body established under a land claim agreement. It does not permit substitutions to provinces. Even in its unadapted state, there have been serious criticisms of the substitution provisions.¹¹

⁹ The CEAA contains a process for the Minister to bump up a comprehensive study to a panel review (*see* CEAA, ss. 21, 21.1, and 21.2.). It is unclear at this stage of my review of the *Adaptation Regulation* whether the regulation impacts this authority with respect to projects subject to the regulation.

¹⁰ See CEAA, s. 43.

¹¹ Gary Schneider, John Sinclair, and Lisa Mitchell point out in their report “Environmental Assessment Process Substitution: A Participant’s View” (available online at <<http://www.cen-rc.org/eng/caucuses/assessment/docs/Final%20Substitution%20Paper%20March29.pdf>>) there are worrisome

Legal and Policy Concerns regarding the Regulatory Initiatives

Even on a cursory review there appear to be numerous legal and policy concerns and questions regarding the amendment to the *Exclusion List Regulation*, and the new *Adaptation Regulation*. Here are but a few:

1. The 2007 *Cabinet Directive on Streamlining Regulation*¹² (the “Directive”) imposes obligations on the federal government when developing regulations under federal legislation. Numerous of these policy requirements have been violated or compromised in the March 12, 2009 regulatory initiative under the CEEA. Here are a few examples:

- ♦ The Directive (4.1) requires departments and agencies to include Canadians in developing policy objectives and provide Canadians and affected parties with time to provide input into policy development. This simply was not done. There was no public consultation in respect of this regulatory initiative. Environmental organizations, even those specifically interested in EA were not consulted. Not even the Minister’s own multi-stakeholder Regulatory Advisory Committee, which was formed under the CEEA for the explicit purpose of advising the Minister on regulatory and policy direction, was consulted.¹³
- ♦ The Directive (4.1) requires departments and agencies to publish regulatory proposals in the *Canada Gazette Part I* to allow for a public comment period of at least 30 days. The government did not comply with this policy directive. It provided no public comment period whatever and published the regulations directly into *Canada Gazette II*, where regulations that have already been registered (and therefore are in effect) are published. The Directive only allows a more “expedited process” where there are “[e]mergency situations- when there is an immediate and serious risk to the health and safety of Canadians, their security, the economy, or the environment” in which case the department or agency must work with Regulatory Affairs to “proceed in a manner that most effectively protects the public interest.” However, even on a very liberal interpretation of “emergency” it is hard to see how denying the public the right to comment can be justified in these circumstances.
- ♦ The RIAS contains no information on potential short and long term environmental and health costs of not conducting a federal EA for what in many cases will be major projects, or for relying on provincial processes to base decisions that must be made federally. Nor does it contain any information on the effect of taking the national interest out of the EA process when a provincial substitution is authorized.

2. Regarding the amendments to the *Exclusion List Regulations*, one might question how Cabinet could rationally determine that such projects, no matter where they occur in Canada, no matter how much they cost (since money spent on a project is not an indicator of environmental impact) have only “insignificant environmental impacts?” How can it be justified, for example, that the construction of any buildings, roads, transit systems, wastewater or potable water systems, will have only insignificant environmental effects? The RIAS suggests that the insignificance is asserted on the

issues with even federal/federal EA substitution. In their report, the authors analyzed the first federal/federal substitution - the National Energy Board (NEB) substitution of the CEEA process in the 2006 Emera Brunswick Pipeline panel review. The authors noted several impediments to effective public participation in the substituted NEB process, including lack of pre-hearing consultation, the difficulties that participants had with the formal and complex NEB process, the need to retain legal representation, overly tight timelines and “heavy-handed scheduling,” and putting public interest participants through the rigors of formal proceedings and cross examination. The authors note that “in a regular CEEA Review Panel process the opportunity to present arguments and raise questions is well-accommodated within a less formal and less intimidating forum.” If public interest values and citizens’ concerns cannot be easily aired at a federal substituted EA process, consider how problematic it would be for these values and concerns to be effectively put forth at a provincial substituted EA process which vary from province to province.

¹² Available online at www.regulation.gc.ca/directive/directive01-eng.asp.

¹³ The writer has first hand knowledge of this as a member of the Regulatory Advisory Committee.

assertion that “[c]ompleted environmental assessments on over 1 000 projects have demonstrated that these types of infrastructure projects have insignificant environmental effects”¹⁴ This “explanation” lacks plausibility. How could it be said, for example, that since in the past the construction of sporting facilities have had only insignificant environmental impacts that all future ones will (other than in “environmentally sensitive areas”)? Sporting facilities can be tiny, medium sized, large, or huge and can have an enormous variety and range of environmental impacts. Such facilities range from small community parks to major stadiums. There is no single type of ‘sporting facility’ and environmental impacts depend on location, size, proximity to water bodies, construction design and so on.

3. Related to the preceding point, subsection 4(2) of the CEAA states:

Duties of the Government of Canada

In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

Regarding the *Adaptation Regulation* it should be noted that the authorizing provisions to vary CEAA provisions are limited to projects that are triggered by the federal land or federal funding trigger.¹⁵ The *Adaptation Regulation* refers to the federal funding trigger only. Insofar as the *Adaptation Regulation* purports to apply to projects that have been triggered by a provision other than the funding trigger (e.g. a *Law List* trigger) the regulation may be *ultra vires* the CEAA.

4. Although the *Adaptation Regulation* only authorizes a provincial substitution for a federal process where the “public is given an opportunity to participate in the assessment” and will have “access to environmental assessment documents”¹⁶ the regulation says nothing about opportunities for participant funding for comprehensive studies, as is otherwise required by the CEAA.¹⁷ . Will funding opportunities still exist? How will they be administered?
5. The *Canadian Constitution* requires government bodies to consult and as appropriate, accommodate, Aboriginal communities when carrying out government initiatives that could have an adverse impact on Treaty or Aboriginal rights or interests.¹⁸ Apparently no specific Aboriginal consultation has occurred and accordingly these Constitutional requirements have not been fulfilled.
6. According to the RIAS the purpose of the regulations is to address claims of unnecessary duplication and overlap. The author has challenged the validity of such claims elsewhere.¹⁹

¹⁴ *Canada Gazette Part II*, *supra* note 4 at 11.

¹⁵ CEAA, s. 59(i) (iv).

¹⁶ *Adaptation Regulation*, *supra* note 2, s. 3.

¹⁷ CEAA s. 58(1.1.).

¹⁸ Government’s obligation to consult and accommodate is based on s. 35(1) of the *Constitution Act*. It states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

¹⁹ See A. Kwasniak, “Harmonization in Environmental Assessment in Canada: The Good, the Bad, and the Ugly” available online at the cen-rce.org website (follow the links to the Environmental Planning and Assessment Caucus publications.)