

East Coast Environmental Law

Environmental Assessment: Legal Toolkit for Prince Edward Island

This volume of the East Coast Environmental Law Summary Series provides an overview of the environmental assessment process at both the federal and provincial (Prince Edward Island) level, highlighting key opportunities for public involvement. The goal is to inform the public on how they can have an impact on and contribute to the environmental assessment process.

Please see the side columns on pages 4 and 8 for definitions of words used in this publication and highlighted in blue. Because the processes of both federal and provincial environmental assessments are set by legislation, a clear understanding of certain defined words is crucial to the understanding of the legislation.

For all legislation and cases referred to in this publication as well as past volumes of our Summary Series and other environmental legal resources, visit our website at: www.ecelaw.ca

What is environmental assessment?

Environmental assessment (EA) is a process that anticipates the potential environmental impacts of a proposed project before it is carried out. It is a planning tool that is used to try and predict the possible negative effects of a project, propose measures that could be used to **mitigate** its adverse effects and predict whether or not there will be significant environmental impacts even if the **mitigation** were to be implemented. Therefore, EA is an approach to preventing and minimizing possible environmental problems caused by proposed projects and activities, thereby improving the result.

In cases when the EA shows that significant environmental impacts will arise, the project will not proceed or will proceed under certain conditions or modifications that minimize its negative effects. EAs may also be used to explore the socio-economic impacts a project may potentially have, including its effects on employment, local economy and cultural traditions.

EAs were first performed in Canada in the 1970s; however, it was not until the 1990s that mandatory legislation pertaining to EA was adopted. At the federal level, the *Canadian Environmental Assessment Act (CEAA)* is the key piece of legislation. At the provincial level, the *Prince Edward Island Environmental Protection Act* deals with EA, but refers to it as Environmental Impact Assessment (EIA).

• Do not confuse EA, as described in this publication, with:

- o **Environmental impact statement or environmental assessment report:** The report produced, usually by a consultant, that describes the potential environmental effects of a project as part of the EA/EIA process.
- o **Environmental site assessment:** A report that assesses the extent and nature of potential environmental contamination liabilities of a site. This can be done on any piece of real estate and is not part of the EA process described in this publication.
- o **Energy audit:** An inspection and survey of energy flows in a building, for the purposes of energy conservation.
- o **Environmental audit:** An evaluation used to identify environmental management and regulatory compliance of a specific operation. This is not part of the EA process.

Why are there two pieces of legislation dealing with EA in Prince Edward Island?

In Prince Edward Island, EA can proceed under the federal *Canadian Environmental Assessment Act* and the provincial *Environmental Protection Act*. This is because the authority to make laws is divided between the Parliament of Canada and the provincial legislatures. Article 91 of the Canadian Constitution defines the legislative authority of the federal government; Article 92 lists matters about which the provinces may exclusively make laws. There are also areas of shared jurisdiction, such as immigration and agriculture. Anything local and private in nature falls under the jurisdiction of the provinces, as do Crown lands and natural resources. Criminal law, navigation, fisheries, and inter-provincial and international trade fall under the jurisdiction of the federal government. Thus, the environment does not fall solely under federal or provincial jurisdiction and both federal and provincial governments have established environmental departments. Where an activity falls within a federal area of constitutional jurisdiction, a federal EA may be required; where it falls within a provincial area of constitutional jurisdiction, a provincial EIA may be required. Sometimes both are required.

Federal Level

According to the ***Canadian Environmental Assessment Act***, an environmental effect is any change that the project may cause in the environment, including any change it may cause to a species listed for protection in the federal *Species at Risk Act*, or its habitat. It includes also the effect that a change could have on

- (i) health and socio-economic conditions,
- (ii) physical and cultural heritage,
- (iii) the current use of lands and resources for traditional purposes by aboriginal persons, or
- (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Provincial Level

According to the ***Prince Edward Island Environmental Protection Act (PEI EPA)***, advance approval is required for any project that defined as an **undertaking**. Undertakings are defined in Section 1(p) of the PEI EPA, and include any project that may: cause a contaminate to be discharged; effect an endangered or rare part of the environment; have a significant effect on the environment; or, cause public concern due to its effect on the environment. One differentiating feature between the PEI EPA and the federal CEAA is that, pursuant to the federal act, an environmental effect could also includes effects that a project may have directly on socio-economic conditions, environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance.

How do I know which piece of legislation applies?

There are various **triggers** that cause *CEAA* or the *PEI EPA* to apply. According to *CEAA*, a federal EA is performed when a **federal authority** is involved in the project, either by proposing a project, funding a project, providing federal lands or providing a licence, permit or an approval that is listed in the *Law List Regulations* that enables a project to be carried out. The *CEAA Inclusion List Regulations* describe projects that, whether physical or not, require an EA.

Different activities **trigger** an EIA at the provincial level. According to section 9 of the *PEI EPA*, if the project qualifies as an “**undertaking**” (with the exception of certain undertakings that are excluded), the proponent must file a written proposal with the Department of Environment, Energy and Forestry and obtain written approval from the Minister prior to commencing the project. The Environmental Impact Assessment Guidelines contain a list of undertakings that do not require an Environmental Assessment. If a proposed undertaking is not on that list, it must proceed through the EIA process.

Examples of when the federal *CEAA* applies

At any one time, there are numerous projects in Nova Scotia that are undergoing EAs through the federal *CEAA* process. As of the date of this publication there were 145 listed projects. Examples of projects, their **trigger** and the **Responsible Authority (RA)** include:

- Spat Collection Site in Brudenell River, Georgetown Harbour, PEI ;action under Navigable Waters Protection Act; Transport Canada (TC)
- Redredging & Disposal at Sea, North River, PEI; federal proponent; Fisheries and Oceans Canada (DFO)
- Dune Crossing Modification, PEI National Park of Canada; federal proponent; Parks Canada
- Concert Venue and Parking Facility, Charlottetown, PE; federal funding; Atlantic Canada Opportunities Agency (carried out in conjunction with provincial EIA)

At times, the **RA** may not appear to the public to have the greatest affinity with the project. This is likely because the identification of the **RA** may have been as a result of it being the first to **trigger** an EA. For example, a funding commitment could precede a determination that there may be an effect on fish habitat or species at risk. Sometimes a **federal authority** works with a **proponent** so that a project is adjusted in advance of requiring an EA in order to **mitigate** potential environmental effects.

If you are interested in learning more about current or completed federal EAs, or providing feedback or comments, visit the Canadian Environmental Assessment Registry at <http://ceaa.gc.ca/050/index-eng.cfm>

Examples of when the *PEI EPA* applies

A There are currently two projects listed as under review at the date of this publication, with 40 having been approved since 2006. Examples of projects, their proponents and the status include:

- Expansion of facility, Charlottetown, PE, Biovectra Inc.; under review
- Construction of multi-use trail, Wellington, PE; PEI ATV Federation Inc; under review
- Development of research and development (R&D) park and energy storage system, North Cape, PE; Wind Energy Institute of Canada (WEICan); Approved March 25, 2011
- Construction of parking lot and concert venue site in Charlottetown; Charlottetown Area Development

If you are interested in learning more about these types of projects visit:
<http://www.gov.pe.ca/eef/index.php3?number=1005874&lang=E>

When do *CEAA* and *PEI EPA* work together?

There are instances when both the federal and provincial EA laws will apply to a project. This usually occurs when there is a triggering factor at both the federal and provincial level, such as federal funding of a provincial undertaking. *The Canada-wide Accord on Harmonization of Environmental Assessment* was signed by all Ministers of the Environment, who are all members of the Canadian Council of Ministers of the Environment (CCME). The federal Minister of the Environment may enter into bilateral agreements with provincial and territorial governments on either a general or project basis to coordinate EAs. There is no bilateral agreement between Prince Edward Island and Canada on **harmonization**. Instead, the provincial Environmental Assessment Section coordinates its review with the federal department on a project by project basis

Harmonization does not mean that all EA processes should be uniform. The effects of **harmonization** can be positive when it reduces duplication or uncertainty, encourages communication and improves coordination and efficiency. However, it can have a negative effect from an environmental or public interest point of view if it lowers standards by substitution of the less rigorous or less accessible assessment process. This is referred to as “downward **harmonization**”.

One issue that has been discussed in the context of both a provincial and federal assessment is “late **triggering**”. This means, for example, that sometimes a project can proceed through an entire provincial level EIA prior to a determination that an EA is required under *CEAA*. The result can be to prolong the process.

Examples of when both a *CEAA* and a *PEI EIA* review are required include:

- Wind power projects, a provincial responsibility with federal funding
- Mining or energy projects (a provincial responsibility) that have a federally regulated component such as an interprovincial pipeline or transmission line or an effect on fish habitat.

The Federal EA Process

The federal EA process offers different tracks through which a project may proceed depending on the nature of the project, the likelihood of significant environmental effects and the extent of public concern. The federal Minister of the Environment has a large role to play in the choice of process.

There are four types of EAs at the federal level: screenings, comprehensive studies, mediations and review panels.

In all EAs in Canada, it is the **proponent** who hires the consultant to prepare the environmental impact report or study that forms the basis for the EA process. The report is then submitted to the **RA** or the **Agency**, which is in charge of ensuring that the EA is carried out in compliance with *CEAA*.

A screening is the most basic level of federal EA and involves a consideration of environmental effects caused by the project and their significance. More than 99% of projects that **trigger** the EA process undergo screening level assessments only.

Comprehensive studies, review panels and mediations all require a consideration of additional factors, including: the project's purpose; alternative means of carrying it out; the need for, and the requirements of, any **follow-up program** in respect of the project; and the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

The specific details of the EA process vary from case to case, depending on the **scope** of the **project** and assessment, and the level of potential environmental impact predicted.

Screening

Where a **project** is not described in the comprehensive study list or the exclusion list, the **RA** ensures that a screening of the **project** is conducted and a screening report is prepared. (*CEAA* sec. 18 (1))

A screening involves:

1. Public notice of commencement of assessment
2. Determination of scope of project and assessment
3. Preparation of a screening report
4. Final project decision by the RA

Mediation

Mediation is a voluntary process of negotiation where an impartial and independent mediator helps to resolve the issue.

Following the mediation, the mediator must prepare a report to the **RA** and Minister of the Environment who then must take into consideration this report before determining the significance of the environmental effects of the proposed **project**.

Mediation can only proceed if those interested in the EA process are willing to participate. There has never been a formal mediation under *CEAA*.

Comprehensive Study

Only projects referred to in sec. 21 of the *CEAA* and appearing in the *Comprehensive Study List Regulations* are assessed by a comprehensive study. These projects tend to be large with the potential for significant adverse environmental effects and public concern, such as oil and natural gas developments, nuclear power developments, electrical-generation **projects**, and industrial plants. The Minister of the Environment makes the decision to approve or not approve a project after a comprehensive study is completed.

Since 2010, the **Agency** is in charge of conducting comprehensive studies.

Review Panel

Only a very small number of projects go through an EA by review panel. A review panel consists of a group of experts appointed by the Minister of the Environment, to impartially and objectively review and assess a project that is likely to have adverse environmental effects. It is therefore an independent assessment. A review panel submits its recommendations to both the Minister of the Environment and to the RA.

Open discussion and exchange of information is encouraged. Panels allow for a large amount of public participation as members of the public can present evidence, concerns and recommendations at a public hearing.

Joint Review Panel

A joint review panel is even more rare than a review panel. It may be appointed for a project that requires both a federal and provincial decision to be made. Each joint panel operates on the basis of specific terms of reference.

Definitions

What is a project? CEAA

A **project** is an activity in relation to a physical work (such as construction, operation, modification, decommissioning, or abandonment) or an activity not related to a physical work that is described in the *Inclusion List Regulations*.

If you are interested in reading the *Inclusion List Regulations*, visit: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-94-637/index.html>

What is an undertaking? CEAA and PEI EPA

An **undertaking** is a proposed development that has potential to cause significant environmental effects.

At the federal level, the term **undertaking** is used in relation to a physical work, for example construction, operation, modification, decommissioning, and abandonment.

At the provincial level, an **undertaking** is more particularly described at section 1(p) of the *Environmental Protection Act*, and could include such activities as: expansions on industrial storage facilities; mining facilities; the construction of new highways; energy generating facilities; waste management facilities; and projects that involve transferring water between drainage basins, among others.

What is a federal authority? CEAA

A federal authority is a body that may have expertise relevant to the proposed project. It can include:

- Ministers
- Departments, departmental corporations, agencies of the government and crown corporations
- Other bodies of the federal government who are accountable through a Minister.

What is a trigger? CEAA and PEI EPA

At the federal level, a trigger for an EA occurs when a federal authority has a specified decision-making responsibility in relation to a project.

Specifically, it is when a **federal authority**:

- Proposes a **project**,
- Provides funding sources to a project **proponent** to enable the project to be carried out,
- Sells, leases, or transfers control or administration of federal land ownership to enable a **project** to be carried out,
- Provides a licence, permit or an approval that is listed in the *Law List Regulations* that enables a **project** to be carried out.

or, when a project is one listed in the *Inclusion List Regulations*.

If you are interested in reading the *Inclusion List or Law List Regulations*, visit: <http://lois.justice.gc.ca/eng/regulations-94-636/index.html>

At the provincial level, different activities **trigger** an EA. In Prince Edward Island, an EA is **triggered** when a proposed **project** is deemed to be an "undertaking" within the meaning of the PEI EPA. To view the *Environmental Protection Act* visit: <http://www.gov.pe.ca/law/statutes/pdf/e-09.pdf>

What is a Responsible Authority? CEAA

A **Responsible Authority (RA)** is a federal authority that is responsible for managing the EA. The RA will consult with other **federal authorities** when there is more than one **trigger** for an EA.

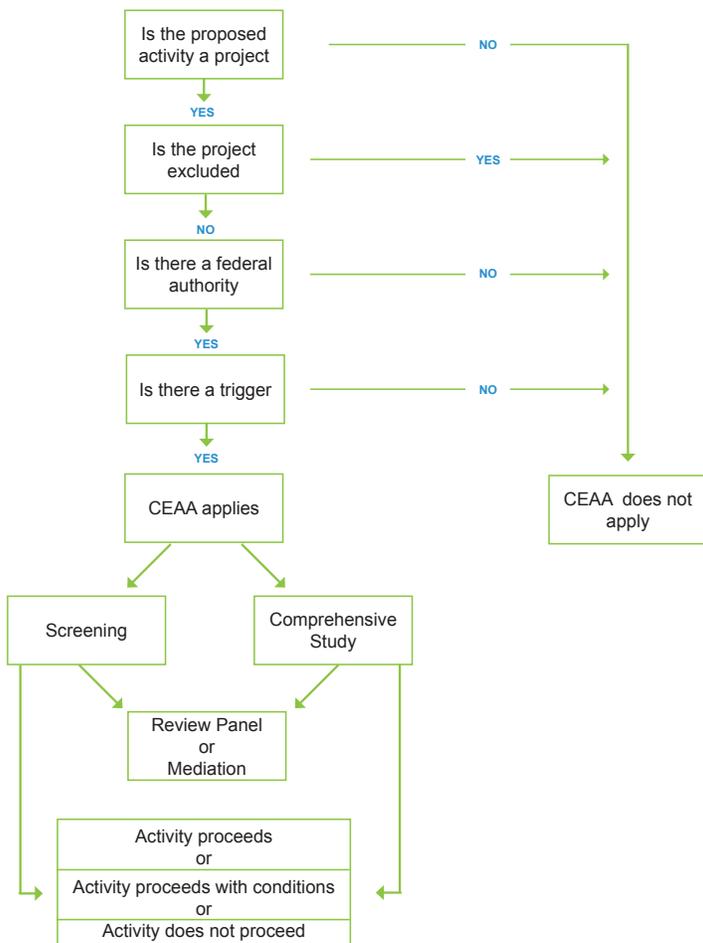
What is the Agency? CEAA

The **Canadian Environmental Assessment Agency** is a federal body accountable to the Minister of the Environment that manages the EA process at the federal level and provides public funding to encourage public participation in the process.

What is a proponent? CEAA and PEI EPA

The **proponent** is the person or body that proposes a project, program, or policy. The proponent might be from the public sector - a department of government or agency - or private sector.

The Federal EA Process



Where can I play a role?

Avenues for Public Participation at the Federal Level

Federal, provincial and territorial governments all require evidence of public input on a project and its environmental effects. Public consultation can be carried out in different ways, depending on the location, size and type of project.

How do I find out when an EA has begun?

One of the purposes of CEAA, as described under sec. 4, is to ensure that there is sufficient opportunity for timely and meaningful public participation throughout the EA process. The Act requires that members of the public be provided with convenient and easy access to documents that are relevant to the EA process on the Canadian Environmental Assessment Registry website. The first document posted in any EA is a Notice of Commencement. If you are interested in searching for projects that are taking place in your area or tracking the process of an EA and participating, visit: www.ceaa.gc.ca/050/index_e.cfm

Who pays for my participation?

You must pay the costs associated with your commenting on a screening. However, funding is available through the [Agency](#) to assist the public, including organisations or groups, in comprehensive studies, mediations and review panels. In order to receive funding, an application must be made to the [Agency](#). For more information about the Participant Funding Program, visit: www.ceaa.gc.ca/default.asp?lang=En&n=E33AE9FB-1

In order to qualify for funding, the Funding Guide states that you must have at least one of the following:

- o a direct, local interest in the project, such as a residence in the area or historical or cultural ties;
- o community knowledge or Aboriginal traditional knowledge relevant to the environmental assessment; or
- o expert information relevant to the anticipated environmental effects of the project.

For panel reviews, funds can be used to prepare for and participate in scoping meetings that identify the factors that the proponent must address in its Environmental Impact Study (EIS); review the proponent's EIS; and prepare for and participate in the panel hearings.

Screenings

According to CEAA, public participation is discretionary at the screening level. The RA will publish information pertaining to the screening on the Registry website, including:

- Notice of Commencement: a description of the project
- [Project Scope](#), or "Description of Factors to be Considered in the Environmental Assessment"
- Screening Report
- The Environmental Assessment Decision

Deadlines are given on the site for comment to be provided for particular components of the process, at least 14 days and usually 30 days. You can review and comment on screening reports before a final decision is made on the project. In some cases, the RA will also provide an opportunity to comment on a draft [scoping](#) document. Even without a formal Request for Public Input, you can send written comments at any time once a [project](#) is registered on the site.

What comments can I make on a scoping report?

The public may be asked to provide comment on [scope](#) of the assessment pursuant to Section 18(3) of CEAA, in which case you may wish to provide comments on the factors to be considered in the assessment, the scope of those factors, and the ability of the screening to address issues relating to the project. The last area of comment is key if you believe that the project would be more appropriately assessed by a mediator or review panel. Ask yourself: what is being left out?

What comments can I make on a screening report?

Since so many EAs are handled only by a screening, comment at this stage is extremely important. Section 16(1) of CEAA describes the factors that must be taken in to account at the screening level. These include:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project, and any cumulative environmental effects that are likely to result, and
- (b) the significance of these effects;
- (c) public comments;
- (d) any other relevant factor that the RA may require.

In order for your comments to be relevant to the decision, they should be directed at these factors. You should be aware of the definition of "environmental effect" in sec. 2(1) of CEAA. It includes any change to the environment and the effects of that change. It does not include direct effects of the project on socioeconomic conditions.

If you think the project should proceed only with certain [mitigation](#), monitoring or research, indicate this in your written submission.

If there is significant public concern about the project, document this in your submission and encourage others to make submissions. If there are significant or unknown environmental impacts and/or significant public concerns, request a panel review.

Comprehensive Studies

The *CEAA* requires an opportunity for the public to comment on the content and conduct of the comprehensive study. Notice of public participation is required and its timing is determined by the [Agency](#).

What comments can I make during a comprehensive study?

Section 16(2) of *CEAA* lists the factors required to be considered during comprehensive studies, mediation and review panels that are additional to those considered in a screening. You may therefore wish to comment on:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any [follow-up program](#) in respect of the project; and
- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Review Panels and Joint Review Panels

Review panels involve hearings where the public can ask questions and provide evidence. Concerns of the public are heard by independent third parties rather than by the federal decision makers. A review panel has the power to summon any person to appear as a witness, order the witness to give evidence, orally or in writing and to produce documents that the panel considers necessary for conducting its assessment of the project. In these respects, a panel has similar powers to a Court.

What role can I play before the Review Panel hearing begins?

In panel reviews, the public may be asked for comment on preliminary documents and procedures such as the Joint Panel Agreement, draft Environmental Impact Study Guidelines, hearing procedures, etc. Each opportunity is an important point at which to establish contact between the panel and the public.

Panel reviews and joint panel reviews are conducted subject to Terms of Reference provided to the panel which provide guidance on the factors to be considered and that may be the subject of public comment.

Once appointed by the Minister, the panel holds informal scoping meetings that are announced in local newspapers. The public may attend the meetings to express their views. As a result of the meetings, the panel will draft guidelines for the [proponent](#) for the preparation of the environmental impact statement (EIS) and makes them available for comment before a final version is prepared.

The [proponent](#) must respond to each element of the guidelines in its EIS. When the panel receives the EIS, it is released to the public for a minimum 60-day period to allow for comments on the adequacy of the EIS as a response to the guidelines. If the panel determines that the EIS is complete, hearings are scheduled with a minimum 21-day notice. If the panel finds the EIS incomplete, it will issue a statement of additional information which the proponent must provide before scheduling of public hearings.

What role can I play at a Review Panel hearing?

The panel will give public notice of the time and place for the hearing and will ask members of the public to register if they wish to make a presentation. Procedures for participation are sent to members of the public who ask to be placed on the panel's mailing list. Prior to the hearing you may submit a written report and also summarize it in an oral presentation. You may have expert witnesses also present reports in writing and speaks to them at the hearing. You may question other witnesses of the proponent and also experts. Advance preparation is extremely important to be effective. The main focus of a panel hearing is the EIS and the factors described in Section 16(2) of *CEAA*; however, the evidence and discussion is not confined to these.

Mediation

Comments from the public must be considered throughout all mediations and any records pertaining to mediations must be made available to the public on the [Agency's](#) website.

How can I influence the process?

Even if there is no [trigger](#) to ensure that a project undergoes an EA, the Minister of the Environment has the discretion to require an EA if he believes that a project has the potential to cause significant adverse environmental impacts. When a screening or comprehensive study is in process, public concern may also warrant a reference to a mediator or a review panel, at the discretion of the Minister. Accordingly, members of the public may be able to influence the Minister or the [RA](#) to change the usual process. Writing to the Minister and [RA](#), seeking media attention, and organising petitions and rallies could all influence the political decision.

What can I do to challenge the decision made as a result of a federal EA ?

It is very difficult to challenge the results of an EA at the federal level. There is no legislative right to Appeal the decision of the Minister or the Responsible Authority. Therefore, the only option is to start a judicial review application in Federal Court. Judicial review is the term used to describe a court's examination of the conduct or decision of an inferior decision-maker, such as a board, committee or Minister, to ensure that the conduct or decision was proper in law. Courts tend to be very reluctant to interfere with the decision of a Minister. Furthermore, review can only be sought by someone who is granted "standing", meaning that the Court decides that there is a close connection to the issue.

In order to overturn a federal EA decision you must prove generally that either there was an incorrect application of law, or, if the

review relates to weighing the significance of the evidence and conclusions drawn from that evidence, then the decision must have been unreasonable. See *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461

For discussion of judicial review, see the ECELAW publication Summary Series II by visiting our website: www.ecelaw.ca

The Provincial EIA Process

The Application Process

In Prince Edward Island, every proponent must submit a written application form to the Department of Environment, Energy and Forestry (the "Department") prior to starting any project that could potentially qualify as an undertaking. This initial form contains introductory information about the project and is intended to provide the Department's Environmental Assessment Section with enough information to determine whether the project meets the definition of an 'undertaking' as set out in the PEI EPA. In reaching its conclusion, the Department may consult with various sources, including a Technical Review Committee and federal or municipal authorities.

Proponents can review the list of common undertakings contained at Appendix "A" of the EIA Guidelines. The list is not exhaustive, but rather is intended to serve as a starting point. If there is uncertainty as to whether a project is considered an undertaking, the Department's Environmental Assessment Section should be consulted.

Environmental Impact Statement (EIS)

If a project is deemed to be an undertaking, the Department will require the proponent to submit an [Environmental Impact Statement \(EIS\)](#) as part of the EIA process. An EIS is usually prepared with the aid of a consultant and is expected to contain specific information on a number of areas connected to the potential environmental effects of the project. The information should be provided for both the construction and operational phase.

Section 9 of the PEI EPA states that an EIS shall be in a form and contain such contents as the Minister directs. In practice, the EIA Guidelines serve as a general reference point for proponents as to what type of information may be required. Proponents are encouraged to consult with the department to ascertain if there are other applicable areas that should be addressed. Areas that may be covered include: description of biological, physical and human environment; alternatives and an evaluation of advantages and disadvantages to the environment of the undertaking; mitigation measures; a discussion of adverse effects or significant environmental effects which cannot or will not be avoided or mitigated through the application of environmental control technology; and a plan detailing the means by which the proponent will consult with the public if necessary. The EIS becomes a public document and is available for viewing at the Department, as well as online.

In addition to the EIS, many projects require an Environmental Protection Plan that details the mitigation measures during the construction phase, and an Environmental Management Plan that details the long-term plan to deal with environmental issues throughout the time that the project is operating.

Review

Once the EIS has been submitted to the Department, the review portion of the EIS process is initiated. The Technical Review Committee (TRC) contains members from various departments who have expertise in specific areas. The EA coordinator responsible for the project assesses which committee members should receive the report, and forwards the EIS to them for evaluation and comments. The TRC members review the report and provide a response to the EA coordinator that includes the environmental issues that were not raised in the EIS, potential conditions that may be attached to approval and whether additional information is required.

Public Consultation Process

Once a project has been deemed an "undertaking", the public may be given an opportunity to provide comment or raise concerns. Public consultation is a vital part of the EIA process and it is the responsibility of the proponent to ensure the public process is adhered to. There are two levels of public consultation which allow for differing opportunities for the public to be involved. The potential impact of a project will determine which level of public consultation necessary, and the EIA coordinator will inform the proponent. Not all undertakings in PEI allow the public an opportunity to provide input. The EIA Guidelines contain a list of undertakings that do not require public consultation.

Decision of Minister

After the information has been received from all sources, the EA coordinator compiles the information into a screening document that is used to assist the Minister in reaching a decision on approval. This screening document will generally contain the background information, the potential environmental effects, any mitigation measures available and any proposed terms and conditions of approval. Section 28 of the PEI EPA empowers the Minister to attach such terms and conditions to the approval of the undertaking.

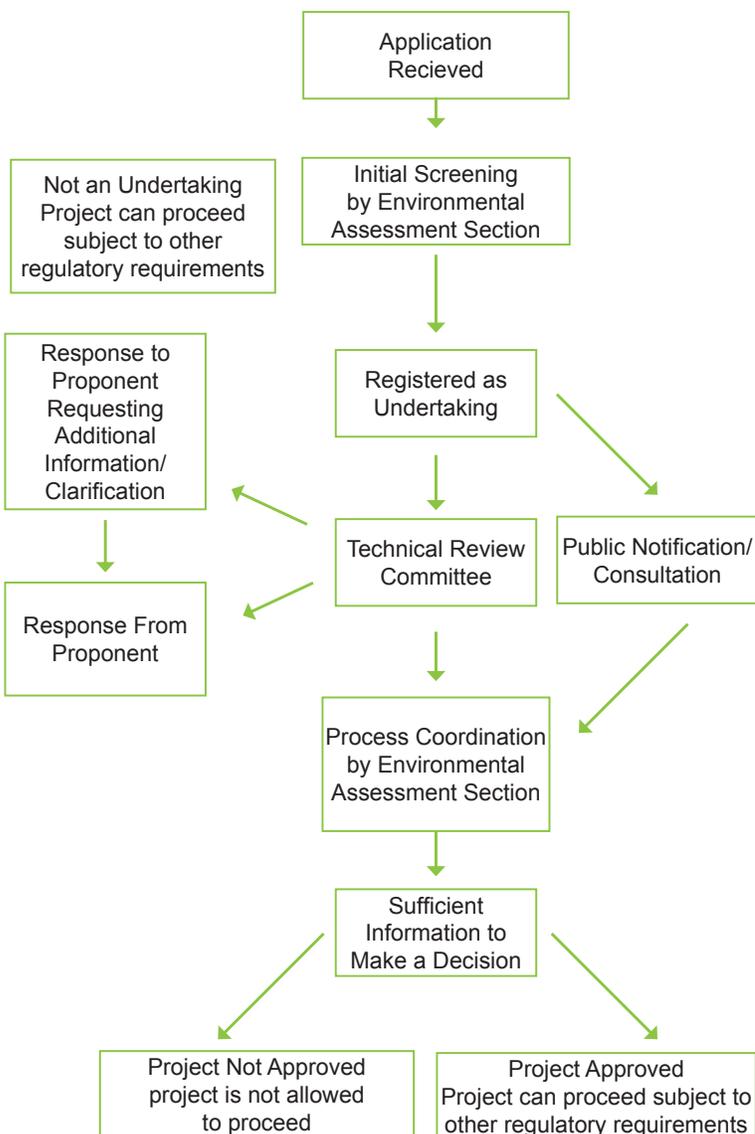
Proponents should be aware that if approval is granted on certain terms and conditions, the Minister can take action to enforce those terms and conditions of the approval pursuant to the powers in the PEI EPA. Consequences of non-compliance with the Minister's terms could include fines and imprisonment.

After the screening document and any other supporting materials have been reviewed, the Minister will do any one of the following: defer a decision and require additional information on the project; approve the project with terms conditions; approve the project with no terms and conditions; or deny approval of the project. Prince Edward Island does not currently have legislation that allows a proponent to appeal this type of a decision by the Minister.

Also, this is only one route which may require the EIA process to be engaged. Other activities may require EIA as well, including subdivision of a parcel of land or applications for development permits under the *Planning Act*. It is important to note that approval under the EIA process does not remove the requirement to obtain permits or approval under other federal and provincial legislation.

The Provincial EIA Process

(From EIA Guidelines)



Definitions con't

What is **harmonization**? *CEAA and PEI EPA*

Harmonization occurs when an **undertaking** requires both a provincial and federal EA. It entails arrangements for cooperation where two or more assessment processes apply to the same project, cover overlapping issues or require overlapping studies, submissions and associated decision making. In these projects, the provincial EA Branch will coordinate or with the federal Minister of the Environment through the **Agency**. **Harmonization** also means broad initiatives and formal agreements to align or standardize EA processes. Cooperative arrangements have been a common feature of EA in Canada for many years.

What is an **excluded project**? *CEAA*

An excluded project is one that does not require an EA.

Excluded projects include:

- Projects** that are included on an Exclusion List,
- Projects** that are being carried out in response to a national emergency for which special temporary measures are being taken, and
- Projects** that are being carried out in response to an emergency in the interest of preventing damage to property or environment or in the interest of public health and safety

What is **scope or scoping**? *CEAA*

Scoping is the determination of what will be included and **excluded** from an EA; it includes the determination of the **scope** of the project to be assessed and the **scope** of the assessment to be carried out.

The scope of the project defines which activities are subject to assessment, for example whether the transportation corridor to and from a project site or other offsite facilities are included. The scope of the assessment defines which information and impacts must be assessed.

At the federal level, the **scope** of the **project** is determined by the **RA**, or by the Minister, after consulting with the **RA**, where the **project** is referred to a mediator or a review panel.

What are **cumulative effects**? *CEAA and PEI EPA*

Cumulative effects are environmental effects that occur as a result of how the project interacts with other projects or activities. The *CEAA* requires their consideration during an EA (sec. 16(1)(a)). The *PEI EPA* does not address cumulative effects specifically, although sec. 12 of the EA Regulations does require consideration of other undertakings and planned land use. Cumulative effects are often difficult to address in project-based EA because they may result either from future developments or from activities that are not within federal jurisdiction.

The **Agency** has published an operational policy for RA's concerning cumulative effects at: <http://www.ceaa.gc.ca/default.asp?lang=En&n=1F77F3C2-1>

What is a **follow-up program**? *CEAA and PEI EPA*

A **follow-up program** is a program for determining the effectiveness of any measures taken to **mitigate** the adverse environmental effects. Sometimes the **mitigation** measures and follow up program are based on adaptive management: that is, not all solutions or technologies are known and as they evolve changes will be made to manage the environmental effects.

In PEI, this could be in the take the form of monitoring, which the Minister may attach as a condition of approval.

What is **mitigation**? *CEAA and PEI EPA*

Mitigation is the elimination, reduction or control of adverse environmental effects of a project. It therefore includes changes to the project to reduce its negative impact. It also includes restitution for any damage to the environment caused by the project's negative effects through replacement, restoration and compensation.

Where can I play a role?

Avenues for Public Participation at the Provincial Level

Under the PEI *EPA*, a project can be considered an “undertaking” if it has the potential to cause the public concern due to the perceived effects on the environment. Section 9 of the PEI *EPA* empowers the Minister to require public consultation in connection with a proposed undertaking. The EIA Guidelines state that the purpose of public consultation is to inform the public about the project and potential environmental effects, receive public input and identify issues not previously addressed by the proponent. As with federal EA's the degree of public involvement varies depending on the project size, type, and potential to cause public concern.

How do I find out when an EA has begun?

Once a proponent has registered its [undertaking](#) for an EIA, it is required to publish notification of the proposal for the public if it is not on the list of undertakings excluded from public consultation. At a minimum, the proponent is required to provide notice 1) in a newspaper with general circulation in the location in which the [undertaking](#) is to be carried out, and 2) on the website for the Department of Environment, Energy and Forestry. Reviewing your local newspaper as well as the Department's website will allow you to be informed when a proposal is filed.

How can I participate in a Level I Public Consultation?

Level 1 public consultation is required where the undertaking is generally of little public concern. Notice of the proposal itself will be listed on the Department's website accompanied by contact information for the Department's EIA Section. The public can contact the EIA Section to request additional information. In addition, a minimum of one, maximum of six, notices will also be required in a newspaper of general circulation. The notices should contain contact information for the Department's EIA Section. The Department sets its own procedures for Level I Consultation with regards to the content of the notices, as well as the length of time the notice must be displayed in the paper. These requirements will vary on a project by project basis.

The public can submit comments or request additional information on the undertaking. These requests and comments are considered by the Minister before a decision is made as to whether or not the project must undergo a more detailed review.

How can I participate in a Level II Public Consultation?

Level II Public Consultation requires the proponent to hold a public meeting in order to provide the public with information on the proposed undertaking. The public meeting may not occur sooner than 14 days after the EIS has been submitted to the Department, and it must be advertised in both the Guardian Newspaper and the local newspaper for 6 consecutive days.

The Department has informational standards for the public meeting to which the proponent must adhere. The proponent must provide the public with the EIS and project summaries, as well as maps and project drawings. The proponent must give a formal presentation to the public, and have representatives with the ability to answer technical questions about the project at the meeting. The proponent is also responsible for supplying public comment forms, which must contain contact information for the Department. All public comment forms are supplied to the Department for review. After the meeting, the public has 10 days to submit their comments on the project to the Department. The Department is responsible for hearing only relevant environmental concerns through this process.

Interested members of the public should monitor the Department website as well as the Guardian and local newspapers to keep informed of public meetings.

What effect do public comments have on the EIA decision and how can I influence the process?

All comments received by the public that are of relevant environmental concern are considered by the Minister before a final decision. After reviewing the comments and issues raised by the public, the proponent may be required to provide additional information on the project, or address additional environmental issues that were not previously addressed.

Public comments may also form part of the screening tool used by the Minister in reaching a decision. In approving an undertaking, the Minister has the discretion to incorporate public comments into the conditions of the project approval. The project proponent will then have to abide by these conditions when carrying out the project.

What can I do to challenge the decision made as a result of a provincial EA?

In Prince Edward Island, there is currently no mechanism for appealing a decision of the Minister to approve or reject an [undertaking](#). Section 29.1 of the PEI *EPA* allows a right to appeal the Minister's decision in certain circumstances and where the Regulations permit it. There are no EIA Regulations that permit an appeal, however, section 13 of the PEI *EPA* – *Watercourse and Wetland Protection Regulations* allows for a limited right of appeal to the Island Regulatory Appeals Committee (IRAC) with regards to certain types of other environmental decisions that are made by the Minister.

For more information on IRAC and what types of cases may be appealed, visit www.irac.pe.ca, and <http://www.irac.pe.ca/document.aspx?file=legislation/EPA-WatercourseandWetlandProtectionRegulations.asp>.

New Developments in Environmental Assessment

Strategic environmental assessment

Strategic environmental assessment (SEA) is a very important tool in contributing to sustainable development in planning and policy making. The process differs from the EA processes described above because it goes beyond a single project and ensures that specific policies, plans and programs do not cause significant environmental effects. A SEA also can be used as a tool to consider sustainability on a regional level.

Despite the usefulness of SEAs, there is currently no federal or Nova Scotia legislation that requires its use. However, the Federal government has implemented SEA in a limited way through a Cabinet directive. Federal departments and agencies are responsible for implementing the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, a document that describes when and what Ministers and Cabinet expect in terms of the SEA process. An environmental analysis is required to be fully integrated into proposal development when its implementation could result in either positive or negative significant environmental effects.

The *Guidelines for the Implementation of the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, updated in October 2010, describes the federal SEA process. Departments and agencies are required to submit a public statement describing the environmental effects of the proposed project, once a detailed assessment has been completed. To view the Cabinet Directive and the Guidelines, visit: <http://www.ceaa.gc.ca/default.asp?lang=En&n=B3186435-1>

The PEI Department of Environment, Energy and Forestry, along with a number of other maritime provinces, is involved in an ongoing SEA being done in connection with drilling near west coast of Newfoundland. The PEI EPA contains a very broad definition of an undertaking that includes any industry, operation or other project that may cause an adverse effect on the environment. The Department had wide discretion to classify these projects as **undertakings**. This could potentially provide an avenue through which the province could embed a form of SEA into its policy development practice.

Amendments to CEAA

As with any legislation, Parliament may periodically amend environmental laws. The latest amendments to CEAA came into effect in July 2010 as part of the omnibus Budget Bill C-9. One amendment was in response to a Supreme Court of Canada (SCC) decision called *MiningWatch Canada v. Canada (Fisheries and Oceans)*, commonly known as the Red Chris case (the name of the mine on which the EA was performed). In January 2010, the SCC ruled that the minimum **scope** of a project for the purposes of an assessment is the project as proposed by the proponent. Therefore, federal authorities could **scope** projects to include more than the activities included in a proponent's proposed project, but they could not **scope** projects to include less. The 2010 amendments to CEAA added a new sec. 15.1 that provides specifically that the Minister may determine that the **scope** of the project is limited to one or more components of that project.

Other 2010 amendments shift control of EAs for large energy projects from the **Agency** to the Canadian Nuclear Safety Commission or the National Energy Board. In addition, routine public infrastructure projects are now legislatively exempted from EAs. However, the Minister of the Environment has discretion to require a public infrastructure project that is potentially **excluded** to go undergo an EA if he believes that it could cause significant adverse environmental effects.

Review of CEAA

Environmental legislation often incorporates a requirement for periodic review. Sec. 32 of CEAA requires that a comprehensive review of the *Act* be undertaken by a Parliamentary committee after a period of seven years. The Parliamentary Standing Committee on the Environment and Sustainable Development began its Seven Year Review during the 2010 Session of the 40th Parliament but has not yet completed its work. For information on the work of this Committee and to submit comments on the review process visit: www.parl.gc.ca/ENVI-e

Incorporating new principles: Climate Change and sustainability

How has EA kept pace with advances in our understanding of global environmental issues? The well known "precautionary principle" is part of EA practice and is referred to in sec. 4 of CEAA. EA focuses chiefly on mitigating adverse environmental effects. In other words, it is intended to balance environmental risk with economic development. EA, therefore, generally serves only to decrease the negative environmental impact of projects, rather than encouraging a positive contribution to sustainability. In Canada, a few major EA panel reviews operating in part under CEAA have applied a positive contribution to sustainability test, including the Nova Scotia Whites Point Quarry Panel. The most advanced application by a Canadian EA panel is in the Mackenzie Gas Project case. See: Joint Review Panel for the Mackenzie Gas Project, *Foundation for a Sustainable Northern Future*, December 2009, www.ngps.nt.ca/report.html

EAs have rarely dealt in detail with climate change and GHG emissions as an environmental effect. For one exception see the decision of the Federal Court in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 in which the Court directed the Panel to provide a rationale for its conclusion that proposed mitigation measures would reduce the potentially adverse effects of the Project's GHG emissions to a level of insignificance.

For more information

Please visit the ECELAW Online Information Library to find all references contained in this publication and other legal resources. www.ecelaw.ca

Refer to the following legislation:

- o *Canadian Environmental Assessment Act*
 - *Law List Regulations*
 - *Inclusion List Regulations*
 - *Exclusion List Regulations*
 - *Comprehensive Study List Regulations*
- o *Prince Edward Island Environment Protection Act*
 - *Environmental Assessment Regulations*

Refer to these federal EA websites for helpful information:

- o Basics of Environmental Assessment: http://www.ceaa.gc.ca/010/basics_e.htm#screening
- o Participant Funding Program: <http://www.ceaa.gc.ca/default.asp?lang=En&n=E33AE9FB-1>
- o Current Projects (Canadian Environmental Assessment Registry) <http://ceaa.gc.ca/050/index-eng.cfm>
- o Resources for Environmental Assessment Professionals <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=ED4330AB-1>.

Refer to these provincial EA websites for helpful information:

- o Environmental Impact Assessment Guidelines: http://www.gov.pe.ca/photos/original/eia_guidelines.pdf
- o Current and Past Projects: <http://www.gov.pe.ca/eef/index.php3?number=1005874&lang=E>

Important case law on EA:

- *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6
- *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302
- *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461
- *Friends of the Oldman River Society v. Canada (Minster of Transport)* [1992] 1 S.C.R. 3

Disclaimer

Please note that this volume cannot cover all EA law issues or all options available to you, nor should it be interpreted as legal advice.

East Coast Environmental Law Association

This guide was developed by East Coast Environmental Law Association (ECELAW), a non-profit organization. ECELAW envisions a future where innovative and effective environmental laws and the just application of those laws provide Atlantic Canadians with a clean, healthy environment, which will make a positive contribution to the quality of life of its present and future inhabitants and visitors.

ECELAW promotes the development and just application of innovative and effective environmental laws in Atlantic Canada through:

- Awareness & Understanding - increasing public awareness of and access to environmental laws;
- Education - aiding in the education of future environmental law professionals; and
- Collaboration - working with the public, community groups and government to strengthen environmental laws in Atlantic Canada.

If you have a question about environmental law, send a message to info@ecelaw.ca and we will get back to you as soon as possible. You may also telephone us at (902) 489 7997.



East Coast Environmental Law
6061 University Avenue
Halifax, Nova Scotia
Canada B3H 4H9
Email: info@ecelaw.ca
Website: www.ecelaw.ca

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