

# East Coast Environmental Law

## Environmental Assessment: A Legal Toolkit for Nova Scotians

This volume of the East Coast Environmental Law Summary Series provides an overview of the environmental assessment process at both the federal and provincial (Nova Scotia) 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](http://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, Part IV of the *Nova Scotia Environmental Act (NSEA)* deals with EA.

#### • 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 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 Nova Scotia?

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 well as Crown lands and natural resources. Criminal law, navigation, fisheries, and interprovincial 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 EA may be required. Sometimes both are required.

Under Canadian and Nova Scotia legislation, EA considers the “environmental effects” of a project.

#### 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 *Nova Scotia Environment Act*, an environmental effect is any change, whether negative or positive, that a project (defined as an **undertaking**) may cause in the environment. The difference from the federal *CEAA* is that an environmental effect 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 *NSEA* 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 EA at the provincial level. According to the *NSEA*, an EA is required if the project is one of the project types called **undertakings**, which are listed in Schedule "A" of the *Environmental Assessment Regulations*.

## 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:

- Wind power project: funding: Natural Resources Canada (NRC)
- Highway alteration: funding and approval under the *Fisheries Act*: Transport Canada (TC) and Department of Fisheries and Oceans (DFO)
- Marina and dock construction: ACOA funding: Public Works Canada (PWC)
- Coastal breakwater: approvals under the *Fisheries Act*: DFO
- Aquaculture site: permit under *Navigable Waters Act*: TC
- National Park recreational trail: federal lands: Parks Canada
- Expansion of container port: federal lands and approvals under the *Fisheries Act*: Halifax Port Authority, DFO
- Tidal energy demonstration project: funding: NRC
- Offshore gas development project: various triggers: Canada-Nova Scotia Offshore Petroleum Board (CNSOPB), National Energy Board (NEB), DFO, Environment Canada (EC), Industry Canada, TC

It may be that the **RA** is not one that seems to the public to have the greatest affinity with the project. This is because the identification of the **RA** may be 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 *NSEA* applies

A large number of projects are reviewed through the *NSEA* EA process. Four projects are listed as ongoing as of the date of this publication with 86 having been completed since 2000. Examples of projects assessed include:

- Wind power projects
- Large quarries producing construction aggregate, gypsum, etc.
- Tidal energy demonstration project
- Surface mining for gold
- Mine reclamation
- Wetland alteration over 2 hectares
- Highway construction
- Cranberry growing operation

If you are interested in learning more about these types of projects or their EAs, or reading or submitting comments, visit: [www.gov.ns.ca/nse/ea/projects.asp](http://www.gov.ns.ca/nse/ea/projects.asp)

## When do *CEAA* and *NSEA* work together?

There are times when both the federal and provincial EA laws will apply to a project. 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 Nova Scotia and Canada on **harmonization**. Instead, the provincial Environmental Assessment Branch coordinates its review with the federal department on a project by project basis. For each project, an agreement will contain guidelines as to the responsibilities of each government in the EA process.

**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 EA 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 *NSEA* 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.

Examples of when a joint review panel has been held in Nova Scotia include: Whites Point Quarry and Marine Terminal Project in Digby County; Remediation of Sydney Tar Ponds and Coke Ovens.

## 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 NSEA

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, a list of **undertakings** is included in Schedule A of the *Environmental Assessment Regulations* of the *NSEA*. These include: 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 NSEA

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** EA. In Nova Scotia, an EA is **triggered** by a list of **project** types called **undertakings**, which are listed in Schedule "A" of the *Environmental Assessment Regulations*. To view the regulations visit: <http://www.gov.ns.ca/Just/regulations/regs/envassmt.htm>

### 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.

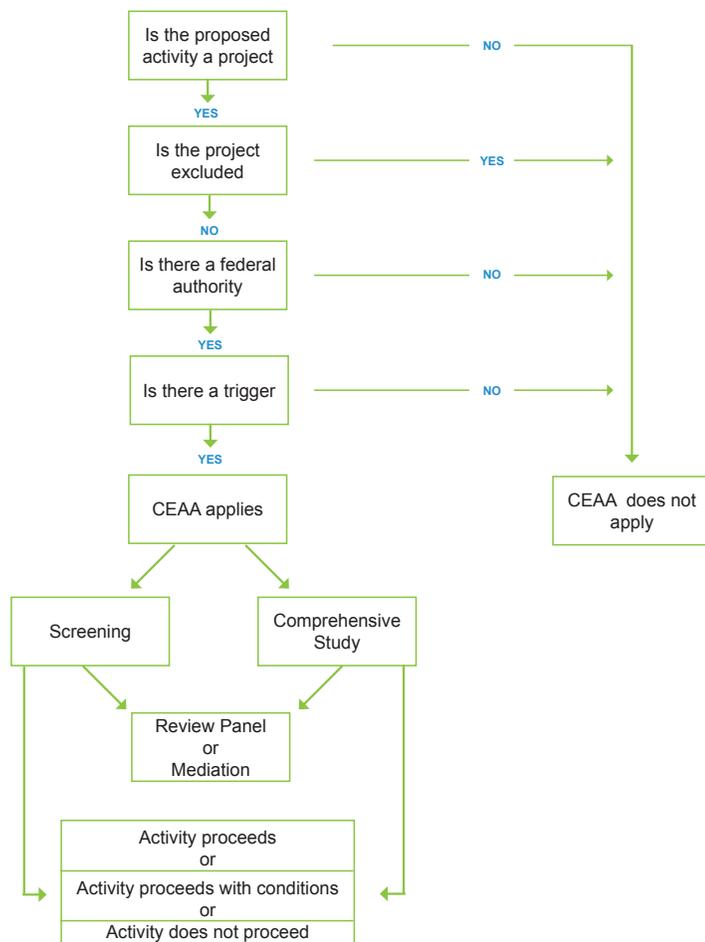
### What is the Agency? CEAA

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 NSEA

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](http://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](http://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](http://www.ecelaw.ca)

## The Provincial EA Process

The provincial EA process also offers different pathways through which a project may proceed. Where the environmental effects of an undertaking are limited or capable of mitigation, the project will be subjected to a preliminary and more streamlined assessment process ( Class 1 undertaking). At the completion of this first-level review, projects may be referred to the more comprehensive second-level review process where it appears that the environmental impacts warrant further study. The provincial Minister of the Environment has a large role to play in the choice of process. Larger scale projects are submitted automatically to a more intensive review.

The *NSEA* provides four types of EA process: assessment on the basis of a registration document, a Focus Report or an Environmental Assessment Report, and referral to the Environmental Assessment Board.

According to the *NSEA*, an EA is **triggered** when a project falls within one of the list of project types called **undertakings**, which are listed in Schedule "A" of the *Environmental Assessment Regulations*. The regulations divide projects into two classes of undertaking.

Class 1 **undertakings** are smaller in scale and may or may not cause significant environmental impacts. For example: mines, highway projects, tidal power projects capable of producing at least 2 megawatts of energy, transmission lines, paper products, disruption of wetlands, quarries.

Class 2 **undertakings** are larger in scale and are considered to have potential to cause significant environmental impacts and concern to the public. For example: solid waste incinerators, large energy generating projects, petrochemical facilities and pulp mills. All Class 2 undertakings must be assessed by the Environmental Assessment Board.

### Registration

Once a proponent has registered its **undertaking** for an EA, it is required to file a registration document. Its' required contents are described in the *NSEA Regulations sec. 9(1)*, including environmental baseline information, and must be sufficient to enable the Minister to make a decision to either approve, reject or require a more in depth EA.

### Focus Report

The second level of assessment beyond the filing of a registration document is the requirement for a **Focus Report**. It is required when the Minister is of the opinion that the adverse environmental effects that could be caused by the **undertaking** are limited.

### Environmental Assessment Report

An Environmental Assessment Report is required for a Class 2 **undertaking** and may be required at the discretion of the Minister for a Class 1 **undertaking**. The contents are determined by Terms of Reference which must include a wide range of factors as set out in sec. 19(1) of the *Environmental Assessment Regulations*. Some of these include: alternatives to the **undertaking**; an evaluation of advantages and disadvantages to the environment of the **undertaking**; 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; a program of public information to explain the **undertaking**.

### Environmental Assessment Board

The Environmental Assessment Board is an independent tribunal of 3 to 5 members appointed by Cabinet to conduct public hearings under sec. 42(2) of the *NSEA*. Hearings are conducted by a panel of 3 to 5 persons, of which at least one must be a regular member of the EA Board.

## Definitions con't

### What is harmonization? CEAA and NSEA

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 and NSEA

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 NSEA

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 NSEA 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 NSEA

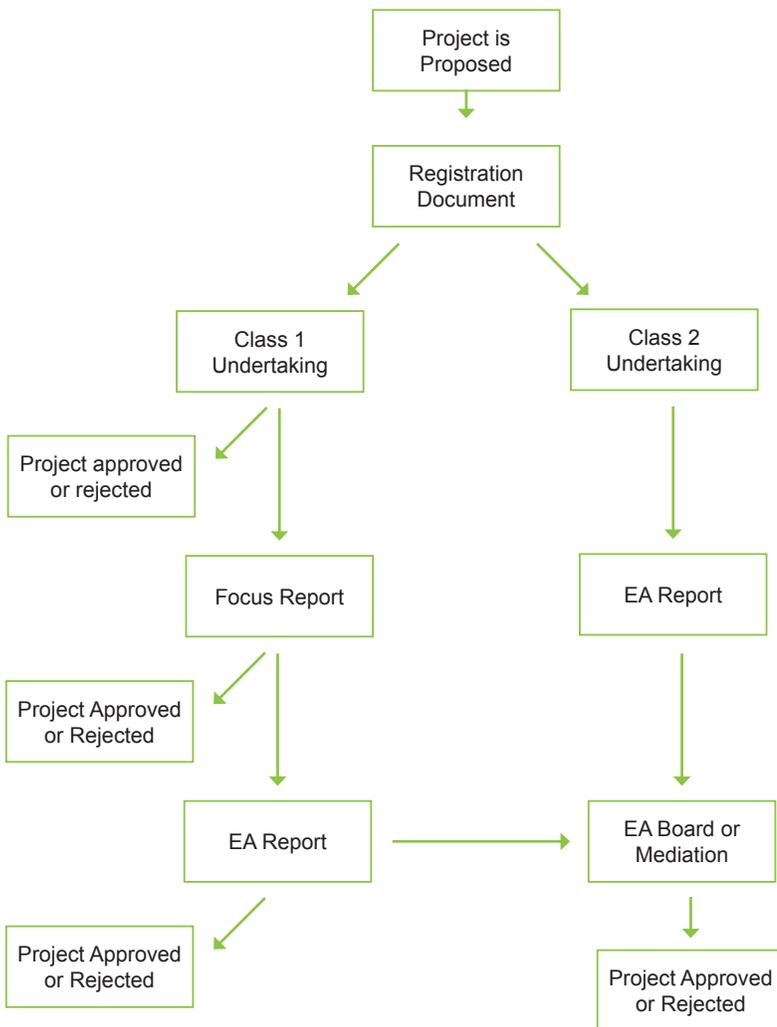
A follow-up program is a program for determining the effectiveness of any measures taken to mitigate the adverse environmental effects. Sometimes the mitigation measures and follow up program are based on adaptive management: that is, not all solutions or technologies are known and as they evolve changes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

### What is mitigation? CEAA and NSEA

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.

For an example of mitigation under the NSEA, when the construction of a Walmart in Yarmouth required an EA due to its disruption of a wetland, the project proponent was required to restore a wetland in a nearby area.

## The Provincial EA Process



## **Where can I play a role?**

### **Avenues for Public Participation at the Provincial Level**

One of the purposes of the *NSEA*, as described under sec. 2, is to provide access to information and to facilitate effective public participation in the decision-making process revolving around the environment. As with federal EAs, the degree of public involvement varies depending on the project size and type and therefore the level of review that is required.

If you are interested in an EA, want to review documents or leave comments, visit: [www.gov.ns.ca/nse/ea/projects.asp](http://www.gov.ns.ca/nse/ea/projects.asp). All public comments are then made available for viewing at the Nova Scotia Environment Library. To view comments and other documents, visit: [www.gov.ns.ca/nse/dept/division.pcs.library.asp](http://www.gov.ns.ca/nse/dept/division.pcs.library.asp) or call the Library to arrange an appointment at (902) 722-1330, Monday - Friday, 2:00 PM to 4:00 PM

#### **How do I find out when an EA has begun?**

Once a proponent has registered its [undertaking](#) for an EA, it is required to file a registration document and publish a notification, in 1) a newspaper with general circulation in the location in which the [undertaking](#) is to be carried out and 2) a newspaper with Province-wide circulation. If there is no local newspaper in the area in which the [undertaking](#) is to be carried out, the notification must be posted in the municipal building, post office or another public building in the area.

#### **How can I participate in the assessment of Class 1 undertakings?**

The EA registration document itself is generally available for public comment for 30 days. The public can submit comments to the EA Administrator for the Province and these are considered by the Minister before a decision as to whether or not the project must undergo a more detailed review. The matters that the Minister is required to consider under sec. 12 of the Regulations are broad and include whether the [proponent](#) has taken steps to address public concerns about adverse effects of the proposed [undertaking](#). Some of the matters that the Minister is required to consider are: whether environmental baseline information is sufficient for predicting adverse environmental effects; potential and known adverse effects or environmental effects; planned or existing land use and other [undertakings](#) in the area. There is no requirement to consider [cumulative effects](#). If you are of the view that not all issues have been addressed then you should comment on them. As suggested earlier, ask yourself: what has been left out? Your input may encourage the Minister to require a Focus Report or EA Report.

Within 50 days of registration, the Minister must decide how the process will proceed. The Minister has the discretion to:

- (a) request more information;
- (b) approve the [undertaking](#) (if no adverse effects or significant environmental effects which may be caused by the [undertaking](#) or that such effects are mitigable);
- (c) require a focus report (if adverse effects or significant environmental effects which may be caused by the [undertaking](#) are limited);
- (d) require an EA report (if there may be adverse effects or significant environmental effects caused by the [undertaking](#)); or
- (e) reject the [undertaking](#) (if there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable).

The Minister also has the option to refer a Class I [undertaking](#) to alternative dispute resolution (ADR) or to the EA Board if an EA Report is required.

#### **What comments can I make on a Focus Report?**

If the Minister determines a focus report is necessary, the proponent will receive Terms of Reference (TOR) for the preparation of the report within 25 days. However, the public is not given opportunity to comment on the TOR. The [proponent](#) must submit the focus report within one year of receiving the TOR. At this stage, the public is given notice and may submit comments on the report within 30 days. The review of the Focus Report is confined to the limits of the TOR and therefore new information or concerns are unlikely to be addressed at this stage. An Administrator reviews any public comments and the Report and makes a recommendation to the Minister. The Minister then has 14 days to approve the [undertaking](#); require an EA report; or reject the [undertaking](#).

#### **What comments can I make on an EA Report?**

If the Minister decides an EA Report is required for a Class I [undertaking](#) or if a project is a Class II [undertaking](#), the Administrator prepares the Terms of Reference for the EA Report. The public has 30 days to comment on proposed TOR and the Administrator must take into consideration comments received from the public, including affected Aboriginal communities, jurisdictions outside of Nova Scotia, and federal and provincial departments.

Commenting on Terms of Reference is a significant opportunity to shape the EA Report. The TOR will determine the scope of the EA. In examining the TOR, you can consider whether there are issues that you are concerned about that have not been addressed. Under provincial government guidelines, it is recommended that an EA Report include information on the effects of the project on groundwater, surface water, flora, fauna, aquatic habitat and any other aspect of the environment. Additionally, the guidelines recommend that the [proponent](#) include any effects on environmental health, such as any contaminants that may affect human health that will be released into the atmosphere, water or land. Keep in mind that an EA under *NSEA* can include socioeconomic as well as environmental effects.

After the TOR are finalized, a [proponent](#) has 2 years to submit a draft EA Report to the Administrator. Upon receipt of the EA Report, the Minister has the discretion to refer a Class I [undertaking](#) to the EA Board. If a Class I [undertaking](#) is not referred to the Board, the Administrator will notify the public of the EA Report and accept comments for 48 days. Following the comment period, the Administrator will, within 25 days, submit to the Minister a summary of comments and recommendations on whether to approve or reject the undertaking. Within 21 days of the receipt of this information, the Minister will make a decision under s. 40 of the *NSEA* to approve the [undertaking](#) with or without conditions, or reject it.

## How can I participate in the assessment of Class 2 undertakings?

All projects listed in the Class 2 List must go to the Nova Scotia Environmental Assessment Board. The Board's process is outlined in the *Nova Scotia Environmental Assessment Board Regulations*. It starts its work after the final EA Report is released. Up to that point, the public's opportunities for comment are as described above.

Board hearings are non-adversarial, informal and do not apply the same evidentiary rules that are required by a Court. The purpose of a hearing is to allow comments and submissions from any interested party (or their legal counsel), to allow a panel to ask questions on the environmental effects of an [undertaking](#), and to provide information which will help a panel make recommendations to the Minister.

The public must be notified at least 21 days in advance of a hearing date, and further notification is required before the hearing date. *The Board Regulations* allow intervenors to participate in hearings as long as they have pre-registered with the Administrator, and any person may make written submissions to the Board.

The Board produces a Hearing Panel Report which must be submitted to the Minister within 110 days of the referral to the EA Board, unless that deadline is extended by the Minister. The Minister then has 21 days to make the decision whether approve the [undertaking](#), with or without conditions, or reject it.

## What effect do public comments have on the EA decision?

All comments received from the public are considered by the Minister before a final decision. If the Minister decides that there are no adverse environmental effects associated with a proposed [undertaking](#), and the project is approved, public comments may be incorporated into the conditions of the project approval. The project proponent will then have to abide by these conditions when carrying out the project.

## How can I influence the process?

The Minister possesses discretion to ultimately approve or reject an undertaking. In many cases, he will make this decision after having received recommendations from the Administrator, a report and recommendation from the EA Board. As described, the Minister also has the discretion during the EA process to require a Focus Report or an EA Report or reference to the EA Board. As with federal EAs, members of the public may be able to influence the Minister. Writing to the Minister, 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 provincial EA ?

The NSEA specifically states that there is no right of appeal from the Minister's decision to approve or reject an [undertaking](#). However, as with *CEAA*, there is a limited opportunity to apply to the Supreme Court of Nova Scotia for judicial review (see above and the ECELAW publication Summary Series II visit: [www.ecelaw.ca](http://www.ecelaw.ca))

# 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 Fundy Tidal Energy SEA completed in 2008 is the only use of a SEA process to date by the Province of Nova Scotia. However, the *NSEA* provides the Minister with discretion to classify a policy, plan or program as an [undertaking](#) if it causes or may cause an adverse effect or an environmental effect. This provides 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](http://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](http://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.

At the provincial level, the EA Branch has recently published *A Guide to Considering Climate Change in Environmental Assessment in Nova Scotia*.

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## 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](http://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 *Nova Scotia Environment 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](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 Assessment: <http://www.gov.ns.ca/nse/ea/>
- o Current Projects: <http://www.gov.ns.ca/nse/ea/projects.asp>

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 (Minister 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](mailto:info@ecelaw.ca) and we will get back to you as soon as possible. You may also telephone us at (902) 489 7997.



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