Burning down the house

Environmental policy dismantling by the Harper government

Nigel Kinney[1]

POLICY DISMANTLING TAKES place when a government cuts, reduces, diminishes and/or eliminates a policy or multiple policies.[2] Examples include budget cuts, departmental staff reductions, a drop in the number of regulations — as well as changes in the penalties for breaching them or the ability to enforce them — or the termination of a program. The motivations for such actions can include a program or policy outliving its usefulness, the ascertained failure (or success) or inefficiency of that program, or simply because of an ideological bias against it. The Harper government tends to frame the debate sparked by policy dismantling using the second motivation — efficiency. But as this chapter will show, by focusing on the repeal and replacement of the *Canadian Environmental Assessment Act* (CEAA), references to inefficiency are often just a tactic used by the government to hide underlying ideological reasons for change.[3]

The repeal and replacement of the CEAA

The Conservative government's 2012 budget met great opposition the moment it was tabled. More than 150 pages of the 425-page omnibus bill were devoted to the repeal and replacement of the CEAA. Environmentalists protested that this would

lead to the end of substantive environmental assessments. Peter Kent, then environment minister, argued that the "changes will make the process more predictable and timely, reduce duplication, strengthen environmental protection, and enable meaningful consultation with Aboriginal peoples."[4] In other words, CEAA reform was framed as being entirely about making the law more efficient.

The government was technically correct when it said the budget did not include any cuts — there was even a slight increase in funding for the Canadian Environmental Assessment Agency — but this ignored some of the expiring budgetary grants. Interestingly, those grants were designated for review panel support and Aboriginal consultations, both areas touted by the government as focal points for increasing effectiveness and efficiency. In the end, the agency's total budget was reduced by a drastic 43%.[5] Environmentalists point out how additional significant cuts to Fisheries and Oceans Canada, which also conducts and analyses environmental assessments (EAs), further undermine the role of the agency.

There are three reasons why the new CEAA makes an ideal case study in ideologically driven policy dismantling: 1) it represents the largest case of environmental policy dismantling to date in Canada; 2) the use of omnibus legislation is representative of the government's preferred process for changes in environmental policy; and 3) EAs have long been considered the backbone to any environmental policy, making the dismantling all the more troubling. While EAs are far from the most exciting of topics, they are a critical means of protecting the environment.

The government's mantra for the replacement of the CEAA was "one project, one review," with the aim of ending the "duplication and overlap" in provincial and federal environmental assessments, which was allegedly holding back economically important resource projects.[6] We can test the government's efficiency argument by breaking it down into its parts with respect to EAs: their timeliness; whether provincial assessments have an equally high standard as federal EAs; and whether all projects will still require either a federal or provincial EA under the new CEAA. One might consider a cost-benefit analysis as well, but the majority of expenses for EAs reside with the project proponent and not the evaluating agency. Neither provincial nor federal governments suggested that cost was an important issue needing to be addressed in CEAA reform.[7]

Overlap and duplication

The key feature of the government's "one project, one review" approach to the new CEAA is to allow for the substitution of a provincial EA for a federal EA, with a ministerial declaration of "equivalency," in cases where projects might otherwise re-

quire both.[8] This change stems from the government's arguments, both in the seven-year review of the CEAA and in the 2012 budget bill, that the "duplication and overlap" in federal and provincial assessments is inefficient.[9] We should test that statement by first determining if there are differences in standards between provincial and federal EAs, and then whether all projects will still be required to undergo at least one EA under the reformed CEAA.

All provinces and territories have some form of EA legislation in place. For the Harper government's argument about efficiency to be true, the provincial EAs must be to an equal standard if they are to be "substituted" or deemed "equivalent." Arlene Kwasniak, professor of law at the University of Calgary, has dissected and refuted this claim. Kwasniak could also not find the large amount of "overlap" the government claims to exist.

Overlapping of partial procedures is not a product of poorly designed policies, but a reality of Canada's Constitution, which distributes responsibilities among the federal and provincial governments. Overlap is not inherently negative either. Think of a new hydroelectric dam project (energy is a provincial jurisdiction) that would obviously impact local fisheries (federal jurisdiction) and, therefore, require different types of environmental assessments. Far from the "major problem" the government claims, this overlap is actually quite a rare occurrence: Kwasniak finds that during fiscal year 2007–08, only one-fifth of 1% (0.2%) of the 6,938 provincial and federal EAs overlapped.[10] The Canadian Environmental Assessment Agency found similar numbers in 1995–96 when 98% of federal EAs were not subject to provincial assessments as well.[11]

It should also be noted that in the current electronic age duplication in general is not as onerous as it once was. As Kwasniak points out, despite government statements to the contrary, "having to obtain a federal authorization and a provincial authorization to carry out a project is not duplication,"[12] since this is also representative of the constitutional authority of both levels of government. Importantly, the government has not provided any empirical evidence of duplication being an issue.[13] Industry, namely the oil and gas sector, has been more forthcoming in its complaints, but these stem from a misunderstanding of the accountability of the process.[14] Kwasniak explains:

> it is not the fact of federalism that is the problem of inefficient duplication. *Nor is it the fact that provincial interests and mandates differ from federal mandates and interests*. It is the fact that either a single jurisdiction with more than one agency involved in an EA, or multiple jurisdictions involved in an EA, require the same or similar information of industry and industry finds this to result in inefficient duplication.[15]

Difference in standards?

While there is not much evidence of overlap and duplication, it is still worth examining if the government is correct in asserting that substituting a provincial assessment is more efficient than requiring a project to complete separate assessments. It is important to view provincial EAs as acceptable substitutes or equivalents to federal EAs only if they are of the same standard.

Once again, the government's claims do not hold upon close examination. A defining example of the problems between assessments is found in the case of the New Prosperity Gold-Copper Mine Project in British Columbia. The proposed mine was originally approved by the B.C. government in January 2010. Then, in November that year, the federal government rejected the project based on a federal EA.[16] There were seven major issues with the provincial assessment, all of which can be attributed to the different priorities and jurisdictions of the provinces.

Neglected projects?

The final question to consider is whether there will be projects that fall through the cracks — that are not covered by either a federal or provincial EA — under the new CEAA. The answer can be found in the change from a *category* to a *list* approach for determining which projects must undergo an assessment by the federal agency. In the first, all proposals that fall into certain categories must have an assessment; those that do not are still screened to see if a federal assessment should be carried out. The new *list* approach significantly reduces the number of projects that are automatically assessed or screened to see if an EA is necessary — by 90%, according to one environmental law firm.[17] This represents a major shift from assessing all projects to only assessing major projects.

There are risks to using this approach for assessing efficiency. The first is that by focusing assessments only on large projects, the government is not accounting for the possibility that small projects (or the accumulation of small impacts from multiple projects) may have a large impact in the end. Second, by switching to a *list* approach, it is very likely the federal government will fail to provide EAs for all projects that fall under its jurisdiction.[18]

It is clear the arguments for greater government efficiency of the EA process do not hold up under closer inspection. There is no empirical evidence that the new CEAA will provide more efficient assessments while still attaining the goals of the program, which include making sure major industrial projects do not burden the natural environment or nearby communities. This begs the question of whether the government has changed the goals of the CEAA, or at least its interpretation of them.

TABLE 1 New Timelines of CEAA 2012

New Timelines Enacted as Part of 2012 CEAA			
	New Time Limit	Time Range	Average Time[21]
"Standard" EAs	365 Days	72–308 Days	125 Days
NEB Hearings	548 Days	91–515 Days	219 Days
Panel Review	730 Days	72–921 Days	250 Days

Source Canadian Environmental Assessment Agency (2010).

Timelines

The government's second central argument with respect to enhanced efficiencies (after eliminating duplication and overlap) is to reduce the completion time of EAs. Imposing a deadline seems like an easy way to increase efficiency, but this is only the case if the EA is completed to the same standard as without a time limit. But as *Table 1* shows, nearly all of the EAs completed during the second half of 2009 already fit within the new timelines. This does not suggest the change is merely about optics, as taking time away from the EA process has important consequences.

First, the new tighter deadline does not account for possible delays by the proponent. Absent mitigating factors, such as increased finances, staff or expertise at the environmental assessment agency, there is also a greater possibility the goals of the EA will be compromised: the imposed deadlines cannot expect to increase efficiency without sacrificing some quality.

The Canadian Environmental Law Association (CELA) says, "(t)he overall purpose of the CEAA is to safeguard the public interest, and if this takes a bit more time in relation to particularly significant, complex or controversial projects, then this is time well-spent, particularly since this allows informed decisions to be made about such projects."[19] Also of concern is the fact that the government presented no evidence during the seven-year review and associated committee hearings, or the 2012 budget speech, to support its belief that faster EAs will mean better EAs.[20]

In summary, the new CEAA, which shifts the agency's focus from assessing all projects to only large projects, provides solutions to a nonexistent problem. We have seen that duplication in the approvals process is not the significant issue the government claims it to be, and also that most EAs already conclude within the timelines established in the new CEAA. However, those which do not will almost certainly be for the largest projects — the ones most likely to have significant environmental impacts.

The most important result of the new CEAA is, therefore, to provide the Harper government, through the minister of the environment, the tools to fast-track ma-

jor projects supported by industry under the guise of greater efficiency and timeliness. By putting one set of priorities (major project approval) significantly ahead of the other (environmental protection), the government's true, ideological motivations for CEAA reform come to light.

Seven-year statutory review of the CEAA

The CEAA was amended in 2003 to require that Parliament undertake a "comprehensive review of the provisions and operations" of the act after seven years.[22] When, in 2009, the time came to plan this statutory review, the minority Conservative government repeatedly delayed.[23] It delayed again the tabling of a parliamentary committee report on the CEAA, which was eventually presented in March 2012. Alone these delays are not evidence of ideological bias: for this we must look at the content of the committee report and how it was completed.

The committee's statutory review was "ineffectual, unduly limited by arbitrary timing constraints, and largely driven by ideology rather than rational, evidence-based analysis,"[24] says CELA (which had helped develop the original CEAA) in its assessment of the seven-year review. The group also found the committee hearings were "largely designed to solicit or foster anti-CEAA sentiment among certain industrial sectors whose projects trigger federal EA requirements at the present time." This was in sharp contrast to previous hearings, which were more inclusive of different viewpoints.[25]

The government's ideological opposition was evident in hearings marked by insufficient public consultation, inadequate notifications and substantial uncertainty about the committee's focus. Producing even greater controversy at the time, but now all too familiar in the committee stage of legislation since 2011, was the premature termination of CEAA hearings after only nine meetings, before many notable witnesses could testify.[26] Some of the more significant voices that did not make appearances included the National Energy Board (NEB), Canadian Nuclear Safety Commission, Department of Fisheries and Oceans, and the Major Projects Management Office, as well as many non-governmental stakeholders who participated in the CEAA's implementation such as CELA and West Coast Environmental Law. The minister of the environment did not even present the government's proposals for reform.

The most cited source in the final report was the Canadian Association of Petroleum Producers, followed by the Canadian Hydropower Association, Mining Association of Canada, and Canadian Energy Pipeline Association.[27] The recommendations that emanated from the committee had the energy sector's fingerprints all over

them. This influence becomes unmistakable when comparing the committee's findings with the Energy Policy Institute of Canada's 2012 report, *Canadian Energy Strategy Framework: A Guide to Building Canada's Future as a Global Energy Leader*. Some of the language in the committee's recommendations for shorter and binding timelines, elimination of assessments of alternatives, substitution of provincial for federal assessments, and only requiring assessments for larger projects is lifted verbatim from this industry paper.[28] Both the NDP and Liberals included scathing dissents in the final report citing the committee's lack of credibility and comprehensiveness.[29]

Despite important omissions, but substantial input from the energy industry, the committee felt it had enough information to conclude the CEAA was "outdated" and needed "significant changes" in order to make the federal EA process "more efficient" and less "duplicative and complicated."[30] However, the committee's recommendations do very little to improve on the stated inefficiencies.[31] Many were based on debatable anecdotes presented by the resource extraction industries. In fact, the only views quoted in the final report to Parliament are from witnesses who supported the recommendations; there was not a single opposing view.[32]

When the CEAA reform legislation was included in the 2012 omnibus budget bill it included all 20 of the recommendations from the standing committee's statutory review. While there was at least some public consultation during those hearings, as weighted as it was with voices supportive of the government, there would be none for the legislation proper.

Gibson points out that during the budget debate the government constantly "emphasized its commitment to removing barriers to economically desirable ventures."[33] This conflict between economic expansion and environmental caution was exemplified by the battle related to the EA for the Northern Gateway pipeline. The proposed pipeline had been stalled for months in the protracted federal-provincial EA process. The government took swift action to pass the new CEAA while striking down all of the opposition's amendments. The government immediately started enforcing key regulations that had yet to be published in order to finalize the Northern Gateway pipeline assessment.[34]

In 2013, Greenpeace published a letter from the Energy Framework Initiative (EFI) to the government that further confirms the review of the CEAA was on ideological rails. In it the EFI, which represents all the major oil and gas associations, asked the government to overhaul six environmental statutes that it found "outdated," producing "a position of adversarial prohibition."[35] In under a year, five of the six statutes the EFI listed, including the CEAA, had been replaced or overhauled to industry preferences.

The Harper government has taken an increasingly neoliberal position in the energy sector when it comes to regulations; its ideological position on environ-

mental protection measures is not outright opposition, but more accurately a preference for economic growth over other considerations in cases of conflict. We see this again in the leaked Oil Sands Advocacy Strategy report, which labelled energy companies, the NEB, Environment Canada, and business and industry associates as "allies." In contrast, the government considered the media, environmental and Aboriginal groups as its "adversaries."

An open letter from Joe Oliver, then natural resources minister, describing how "environmental and other radical groups…threaten to hijack our regulatory system to achieve their radical ideological agenda,"[36] explicitly recognizes the government's own ideological justifications for pushing back against what it sees as overly strenuous government intervention in the energy sector.

A final piece of evidence of ideological motivations is found in the timing of the 2010 amendments proposed for the CEAA and the legislation to implement them in 2012. The Harper government made these changes in a quick and quiet manner to avoid as much public criticism and backlash as possible. According to Gibson:

> The more plausible explanation for pushing the legislation quickly through Parliament is that the government knew its agenda of weakening assessment law and other environmental provisions was controversial, waited until it had a governing majority (achieved in 2011) and used the omnibus budget bill, in the context of economic worries arising from global financial system turmoil, as the legislative vehicle offering the fewest openings for effective opposition.[37]

This strategy of stealth would prove useful to the government when dismantling many other environmental policies. Examples include the weakening of the Fisheries Act and Navigable Waters Protection Act, both also included in the 2012 omnibus budget. Bauer *et al* call the strategy "arena shifting," a form of blame avoidance.[38] In the case of the CEAA reforms, the government shifts varying degrees of burden to the provinces (decentralization), thus attempting to deflect the blame for unpopular decisions related to provincial EAs.

The broader implications of policy dismantling

The dismantling of the CEAA is obviously only one aspect of what many political and civil society actors have referred to as the Harper government's attack on science. The dismantling actions have certainly been successful in obstructing environmental research, but the evidence does not suggest this is because the government believes the climate science is incorrect or (more pertinently to this article) that there are rational policy objectives behind recent legislative and regulatory

changes to Canada's environmental protection rules. Rather, the government's view, which is exposed by the dismantling, is that if business believes environmental regulations to be too burdensome then they must go. In other words, the government is acting on ideological motivations unrelated to finding greater efficiencies.

Harper's environmental dismantling has the potential to impact every Canadian intimately — from the greater likelihood that unwanted mega-projects will be approved without a proper environmental assessment process to the unaccounted (but costly) impacts on quality of life due to environmental degradation and climate change. If the climate scientists' models hold even partly true, future generations may look back in horror at the deliberate weakening of environmental protections for what we can show to be purely ideological reasons.

Endnotes

1 An enormous thanks to my senior supervisor, Dr. Michael Howlett, who has been instrumental in his guidance throughout my academic career. A special thanks to my partner Anne Lena Ouellet for her help and patience in the editing of this piece.

2. Michael Bauer, Andrew Jordan, Christoffer Green-Pedersen, and Adrienne Heritier. "Dismantling Public Policy: Preferences, Strategies, and Effects." *Oxford University Press*. Oxford, U.K. 2012, 5.

3. To analyze the government's motivations for environmental policy dismantling, I use Peter deLeon's simple framework for policy termination. DeLeon's reason for writing his article was to discover if political motivations were outweighing and even excluding the "rational" program evaluation methods of economy and efficiency. In other words, is ideology becoming the overwhelming, or in many cases, the only evidence supporting dismantling. For more information on the framework see: Peter DeLeon "Policy Evaluation and Program Termination." *Review of Policy Research* 2, no. 4, 1983: 631–647.

4 Peter Kent's testimony at Subcommittee on Bill C–38 (Part III) of the Standing Committee on Finance on May 7, 2012.

5 Shawn McCarthy and John Ibbitson. "Ottawa to Unveil Sweeping Changes to Environmental Oversight." *The Globe and Mail*, April 16, 2012.

6. The language has been used since 2009, ranging from CEAA amendments in the 2010 budget, 2011 seven-year review, 2012 standing committee, and CEA Act, 2012.

7. Only mentioned in seven-year review of CEAA, but as pertaining to the costs for the project proponents and not the government.

8. Government of Canada. "Jobs, Growth, and Long-term Prosperity. Economic Action Plan 2012." Federal Budget for FY 2012–13.

9. Canadian Environmental Law Association. "Legal Analysis of the Report of the Standing Committee on Environment and Sustainable Development Regarding the Canadian Environmental Assessment Act." 2012, 14.

10. Arlene Kwasniak. "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation and a Path Forward." 20 *Journal of Environmental Law & Practice* 1. 2009, 4.

11 *Ibid*, 10.

12 *Ibid*, 23.

13. Not in the seven-year CEAA review, standing committee on CEAA or in the budget and relating speeches.

14. See Jacques Whitford's paper "Environmental Assessment Crisis in Canada: Reputation versus Reality?"

15. Arlene Kwasniak. Op. Cit., 25.

16. Mark Haddock. "Comparison of the British Columbia and Federal Environmental Assessments for the Prosperity Mine." *Northwest Institute*. July 2011, 3.

17. Blakes Law. "Environmental Law Bulletin." July 2012.

18. Arlene Kwasniak. Op. cit., 8.

19. Canadian Environmental Law Association. "Bill C–38 Federal Budget Bill Review and Implications." June, 2012, 12.

20. Ibid, 12.

21. All data from Government of Canada, Canadian Environmental Assessment Agency. "Effectiveness of the Environmental Assessment Track Process under the Canadian Environmental Assessment Act," p. 19. Data had to be adapted as the new definition of "standard" EAs does not fit exactly with the section 25 panel review that I attributed the data to. Excludes screenings, which have been dramatically reduced after the 2010 amendments to the CEAA

22. Canadian Environmental Law Association. "Legal Analysis of the Report of the Standing Committee on Environment and Sustainable Development Regarding the Canadian Environmental Assessment Act." 2012, 3.

23. Robert Gibson. "In full retreat: The Canadian government's new environmental assessment law undoes decades of progress" Impact Assessment and Project Appraisal, 30, no. 3, September 2012, 181.

24. Canadian Environmental Law Association. "CELA Analysis of CEAA 7-year Review." March 2012, 4.

25. *Ibid*, 4.

26. West Coast Environmental Law. "The 7-year Review of CEAA- allegedly completed in just 7 weeks". January 10, 2012.

27. House of Commons. "Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources." 2012. http://publications.gc.ca/collections/collection_2012/parl/XC50-1-411-01-eng.pdf

28. Energy Policy Institute of Canada. "Canadian Energy Strategy Framework: A Guide to Building Canada's Future as a Global Energy Leader," 2012. http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Document-Aug-1.pdf

29. House of Commons. Op. Cit. See NDP and Liberal Party Dissenting Reports.

30. Quotes were used by CELA from the official committee report.

31. Robert Gibson. "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress." *Impact Assessment and Project Appraisal* 30, no. 3, September 2012, 179.

32. Op cit. CELA, 4.

33. Robert Gibson. Op Cit., 180. Emphasis added.

34. *Ibid*, 181

35. Greenpeace. "Published letter from EFI to Ministers Kent and Oliver." Can be found at: http://www.greenpeace.org/canada/Global/canada/pr/2013/01/ATIP_Industry_letter_on_enviro_regs_to_Oliver_and_Kent.pdf

36. Joe Oliver. "Open Letter From the Minister of the Environment." 2012.

37. Robert Gibson. Op. Cit., 181

38. Michael Bauer, Andrew Jordan, Christoffer Green-Pedersen, and Adrienne Heritier. Op. Cit., 43.