



# Making the Grade: A Report Card on Canada’s Proposal for Strengthening Environmental Laws and Processes

On June 29, 2017, the federal government released a [discussion paper](#) outlining its proposal for how to strengthen Canada’s environmental assessment (EA) processes, modernize the National Energy Board (NEB) and strengthen protections under the *Fisheries Act* and *Navigation Protection Act*.

How do the government’s proposed changes measure up to leading-edge environmental law? We graded the discussion paper against the [12 Pillars of Next-Generation Environmental Assessment](#), which are based on the expertise of EA experts across the country, as well as our recommendations on [modernizing the National Energy Board](#), restoring lost protections and strengthening the *Fisheries Act* and *Navigation Protection Act*, and our recent [report on co-governance models for regional cumulative effects management](#).

## Environmental Assessment

Overall Grade = C-

12 Pillars of Next-Generation EA	Grade	Comments
<p><b>1. Sustainability as a core objective</b></p> <p>All assessments should ensure the long term health of the environment and social values, and the equitable distribution of risks, impacts and benefits.</p>	D	<p><b>Considerable room for improvement</b></p> <p>EA would consider economic, social, health and environmental impacts and benefits of proposed projects, but no mention of sustainability-based goals, decision-criteria or trade-off rules. Decisions would be based on undefined “public interest” rather than net benefits. No mention of considering alternatives. Proposal for Gender-Based Analysis Plus is important and welcome, but compromised without identification of substantive objectives that must be met.</p>
<p><b>2. Integrated, tiered assessments starting at the strategic and regional levels</b></p> <p>Participatory and sustainability-based assessments occur at the regional, strategic and project levels, and each of those levels inform the other.</p>	B-	<p><b>Positive, but incomplete. Summer school required</b></p> <p>Proposed national environmental frameworks and strategic (SEA) and regional assessments (REA) are positive. No mention of tiering SEA and REA with regulatory processes not subject to assessment, or of legislated tiering of strategic, regional and project EA. No mention of strategic assessments for broader policy issues or legislative requirements to conduct SEA of plans, policies and programs.</p>
<p><b>3. Cumulative effects assessments done regionally</b></p> <p>Cumulative effects assessment is regional, focuses on environmental health, and looks to the past, present and future.</p>	A-	<p><b>Emphasis on REAs a welcome change</b></p> <p>Emphasis on focusing on cumulative effects at the regional level is positive. However, no mention of how to ensure REAs are done. Also little mention of consideration of timeline of cumulative effects.</p>

12 Pillars of Next-Generation EA	Grade	Comments
<p><b>4. Collaboration and harmonization</b> Jurisdictions harmonize their assessments to the highest standard, collaborating on processes and decisions wherever possible.</p>	C	<p><b>Substitution undermines collaboration aspirations</b> More comprehensive cooperation with other jurisdictions is welcome, but allowing for substitution of project assessments with provinces and territories under any criteria is against next-gen EA.</p>
<p><b>5. Co-governance with Indigenous Nations</b> Collaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples.</p>	A-	<p><b>Aspirations are encouraging, but more work required on implementation</b> Many good recommendations, including seeking Indigenous peoples' free, prior and informed consent, seeking consensus in early planning phase, and regional collaboration. But mandatory timelines are likely to undermine collaboration efforts, and there's no mention of shared decision-making or alternative dispute resolution.</p>
<p><b>6. Climate assessments to achieve Canada's climate goals</b> A climate test ensures that projects keep Canada on track to meeting its climate change commitments and targets.</p>	B	<p><b>Strategic climate assessment welcome, but more work required</b> A strategic assessment of the Pan Canadian Framework is a welcome start. However, more detail is needed on what goes in legislation to ensure we meet the 2050 Paris Agreement targets, and strategic direction is required for how to get there.</p>
<p><b>7. Credibility, transparency and accountability throughout</b> Legislation sets out criteria, rules and factors to guide assessments and discourage politicized decisions. An independent body conducts assessments and the public has the right to appeal decisions.</p>	D	<p><b>Vast room for improvement. Summer school required</b> Greater accessibility of information and reasons for decision welcome, but keeping decision-making in the hands of Minister or Cabinet based on public interest sounds like status quo. No right of appeal or mention of how to enforce transparency of decisions on Cabinet.</p>
<p><b>8. Participation for the people</b> Meaningful public participation is early, ongoing, accessible and dynamic. It occurs at all levels of assessment and has the ability to influence outcomes.</p>	B+	<p><b>Changes positive, but room for improvement</b> Eradication of standing test and allowing all public to participate is welcome, as is early planning phase and increased funding. But more options for deliberative dialogue are required, as are hearings with cross-examination where appropriate, and rights of appeal to a tribunal. Mandatory timelines undermine meaningful participation.</p>

12 Pillars of Next-Generation EA	Grade	Comments
<p><b>9. Transparent and accessible information flows</b></p> <p>All relevant information is easily accessible to the public, is shared between different levels of assessment and remains available for future use.</p>	A-	<p><b>Largely positive, more detail needed</b></p> <p>User-friendly online public access to EA information, including follow-up and compliance with conditions, is welcome. Little mention of information-sharing between different tiers of EA, and with regulators. Commitment to an open science and data platform, as well as incorporating Indigenous knowledge is positive.</p>
<p><b>10. Ensuring sustainability after the assessment</b></p> <p>After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance and enforcement.</p>	C	<p><b>Weak overall, but some positives</b></p> <p>Enforceable conditions of approval and of collaborative approaches to monitoring are positive, but no mention of adaptive management not being a mitigation measure or of follow-up information contributing to learning or being used at the regional and strategic levels.</p>
<p><b>11. Consideration of the best option from among a range of alternatives</b></p> <p>Assessments consider alternative scenarios, including the “no” alternative.</p>	I	<p><b>Incomplete</b></p> <p>No mention of consideration of alternatives or alternative means to the project.</p>
<p><b>12. Emphasis on learning</b></p> <p>The assessment regime fosters opportunities for learning, to ensure more informed and better decisions now and into the future.</p>	I	<p><b>Incomplete</b></p> <p>Mention of the need for a searchable public database that includes follow-up information, but does not discuss EA and follow-up information contributing to learning.</p>

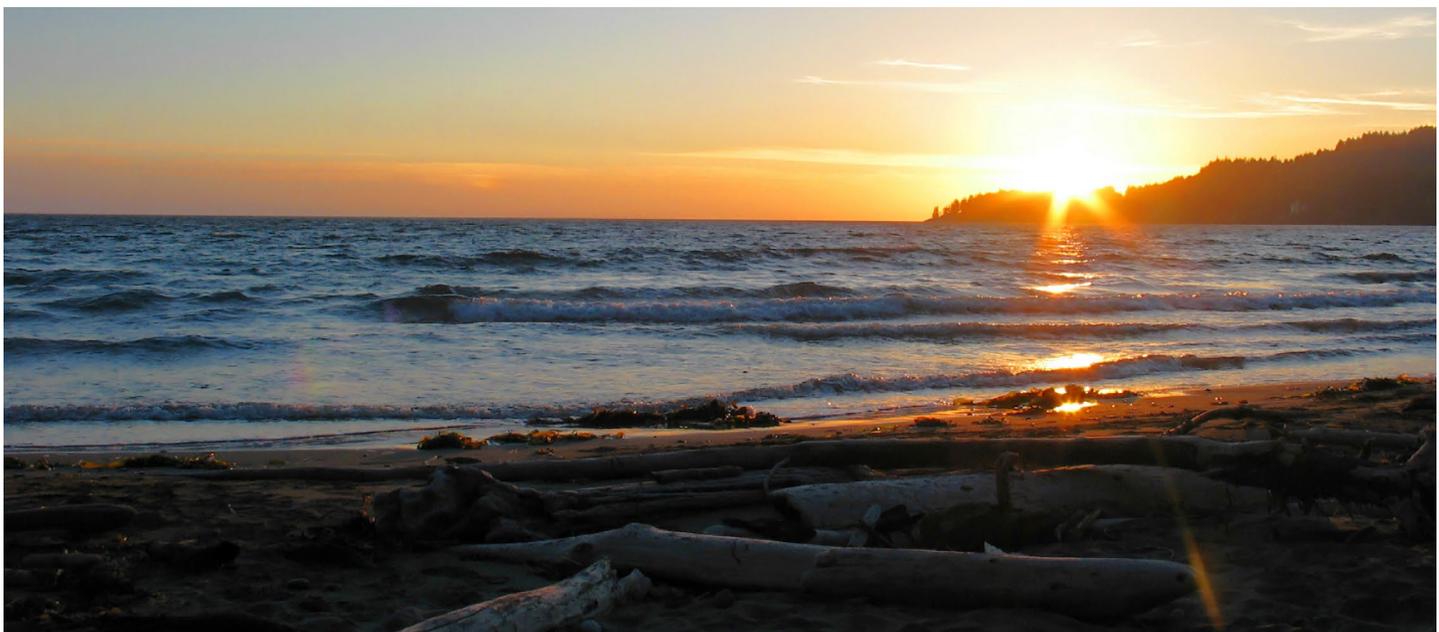


Photo: Peter M Graham

# National Energy Board

Overall Grade = B-

Recommendation	Grade	Comments
<p>1. Remove the responsibility for conducting environmental assessments from the NEB and vest it in an improved Environmental Assessment Agency, which would also be responsible for strategic and regional EA.</p>	<p><b>B</b></p>	<p>The creation of a single government agency responsible for impact assessment is welcome. However, the proposed model still gives regulators for major energy transmission (e.g., pipelines) and nuclear projects an inappropriately privileged role in the impact assessment processes and project decisions through joint assessments.</p>
<p>2. NEB analysis should focus on the economic need for and technical viability of a project, including the risk of stranded assets consistent with decarbonization goals. The NEB review would be an input into a broader sustainability assessment.</p>	<p><b>F</b></p>	<p>We were looking to see the NEB’s role in impact assessment narrowly focused on its areas of expertise – with an enhanced focus on decarbonization and climate impacts – leaving broader determinations of a project’s contribution to sustainability and the public interest to an independent commission with broad expertise. This is absent from the discussion paper.</p>
<p>3. Legislation should include guiding principles and factors to consider when deciding whether to issue a certificate, including climate change policy and international obligations, impacts on Indigenous rights and title, consistency with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and impacts on local residents and municipalities.</p>	<p><b>C-</b></p>	<p>The discussion paper does not contain a commitment to enshrining substantive goals (guiding principles) for impact assessment and regulatory review in legislation beyond a vague reference to the public interest. Guiding principles noted in the discussion paper are important and welcome but incomplete and of no legal impact.</p>
<p>4. The public should be afforded the opportunity and means to meaningfully participate throughout all stages of NEB regulatory processes, and should have the ability to influence decisions. All applications for NEB-regulated projects should include public hearings. All hearings must allow for oral cross-examination.</p>	<p><b>B+</b></p>	<p>Commitments to increasing public participation and dropping the “standing” test that excluded members of the public from NEB processes are very welcome, but the specific NEB reforms proposed are light on detail.</p>

Recommendation	Grade	Comments
<p>5. The NEB should improve its lifecycle oversight by meeting or exceeding the Commissioner of the Environment and Sustainable Development’s recommendations and collaborating with Indigenous peoples in establishing and enforcing conditions and monitoring.</p>	<p><b>B</b></p>	<p>Commitment to inclusive monitoring and compliance activities in close collaboration with Indigenous peoples, communities and landowners welcome but light on detail. No reference to the Commissioner of the Environment and Sustainable Development’s recommendations.</p>
<p>6. The NEB should incorporate plans and policies to decarbonize Canada’s energy resources, and the development of those plans and policies should be subject to rigorous and open strategic environmental assessments that are overseen by an independent assessment authority.</p>	<p><b>C+</b></p>	<p>Commitment to strategic assessments of environmental frameworks, to explain how they apply to federally regulated activities (starting with climate change) is welcome. But this work won’t affect pipeline projects currently under review.</p>
<p>7. The NEB, in collaboration with Indigenous peoples and other federal departments and agencies, should be responsible for follow-up, monitoring, compliance and enforcement, and should provide detailed information to the assessment authority. This information should be posted on a public, searchable database that retains information for all time.</p>	<p><b>A-</b></p>	<p>Commitment to inclusive monitoring and compliance activities in close collaboration with Indigenous peoples, communities and landowners is welcome, as is increasing user-friendly online public access to information including follow-up, monitoring compliance and enforcement. Light on details about how outcomes of monitoring will be acted on.</p>
<p>8. In turn, the assessment authority should provide the NEB with information and recommendations related to NEB lifecycle regulation of proposals based on the outcomes of the environmental assessment, as well as any strategic and regional assessments that have been conducted.</p>	<p><b>B</b></p>	<p>Government proposal has the potential to ensure good integration and information flow between project environmental assessment and regulators, but it would be better to accomplish this goal without giving the NEB an unduly privileged role in the assessment process itself.</p>
<p>9. The production of energy information and reference scenarios, including the NEB’s Energy Futures reports, should require scenarios that include emissions reduction targets consistent with international obligations, in a manner consistent with best international practices.</p>	<p><b>I</b></p>	<p>Little detail is provided about the new proposed “separate model to deliver timely and credible energy information to Canadians.”</p>

Recommendation	Grade	Comments
10. The energy information function of the NEB should be housed in an independent body, whose function is to provide objective information for regional strategic planning as well as project-level reviews. This can be thought of as a Statistics Canada for Energy.	<b>B+</b>	Commitment to developing a separate model to deliver timely and credible energy information to Canadians is welcome but no details are provided.
11. NEB members should include representation of diversity, including regional and sectoral diversity.	<b>A-</b>	Clear commitment to enhancing diversity is welcome but few details are provided.
12. The NEB should remove the Calgary residence requirement for permanent board members.	<b>A</b>	The discussion paper recommends removing the Calgary residence requirement.
13. NEB recommendations must be subject to a statutory right of appeal.	<b>F</b>	No statutory right of appeal is proposed.
14. Cabinet decisions must be subject to appeal, and provide full reasons that provide justification, transparency and intelligibility, consistent with those required by administrative law.	<b>B-</b>	Commitment to greater transparency on reasons for environmental assessment and regulatory decisions, and timely feedback on how public input was considered, is welcome. No right of appeal, however, is proposed, limiting oversight of environmental assessment and regulatory decisions.
15. Decision-making should start at a regional and strategic level, which would then feed into project-level reviews in which the NEB economic need test is one input into the determination of which option is the most likely to lead to the greatest equitably distributed net benefits to the environment, communities and the long-term economy.	<b>C</b>	A commitment to a substantive sustainability test is absent from the discussion paper. Also, contrary to our recommendation, the NEB continues to have an inappropriately privileged role in assessment of the public interest, which is better left to an independent agency with a broader expertise and mandate. However, proposed national frameworks and regional assessments are welcomed.
16. Nation-to-nation collaboration should happen from the earliest stages of every process through to decision-making and follow-up, in strategic and regional EA planning, as well as project-level reviews, including setting the scope and hearing schedule. Nation-to-nation collaboration should be consistent with UNDRIP.	<b>A-</b>	Commitments (e.g., to UNDRIP and recognizing Indigenous jurisdiction, laws, practices and governance systems) are significant and welcome but legislated timelines will continue to be an issue with federal government proposal. Positive recommendation for an early planning phase for environmental assessment is compromised by putting the proponent in the drivers seat of this process.

## *Fisheries Act*

Overall Grade = B

Recommendation	Grade	Comments
1. Make sustainability the foundation of the legislation.	<b>I</b>	<b>Incomplete</b> Incorporating principles of modern resource management and planning would improve this law, but an overall focus on sustainability is missing – for now?
2. Restore and strengthen habitat protections – including restoring the prohibition on the harmful alteration, disruption or destruction of fish habitat (HADD).	<b>A</b>	The government is listening to scientists, the public and its own staff; restoring the prohibition on HADD is essential. It is past time to restore this key lost protection, and to modernize habitat protection through the changes proposed in the Planning and Integrated Management section of the proposal.
3. Improve governance and decision-making.	<b>B+</b>	Welcome news to learn of the government’s proposals to partner with Indigenous peoples, partner and collaborate more generally including the formation of a collaborative committee to advise on fish habitat protection, improve science, and provide transparent information on fish and fish habitat protection. Opportunity to earn top marks depending on the actual legislative wording for each proposal.
4. Ensure resources and capacity are in place to effectively administer, implement and enforce a new <i>Fisheries Act</i> .	<b>A</b>	New infusions of funding and personnel are already in place to remedy the lack of fish habitat enforcement in recent years. These changes, plus the new proposals to enhance enforcement of the Act, will go a long way to better manage threats to Canada’s fish and aquatic ecosystems.
5. Include a legal requirement to rebuild fish stocks.	<b>D</b>	This widely accepted proposal for legal reform is absent from the government’s plans.



Photo: Sam Beebe

Recommendation	Grade	Comments
<p>6. Ensure legislative changes are introduced as soon as possible and are not delayed due to completion of the other federal environmental legislative proposals.</p>	<p>I</p>	<p><b>Incomplete</b></p> <p>Silence on the exact timetable of legislative changes is a cause for concern. Support for restoring lost habitat protections is overwhelming. The government could have acted immediately after the election to make good on this promise, but chose to consult instead. Now the results of the consultation are crystal clear. There is no longer any excuse for delay in amending the Act to restore lost protections and introduce modern safeguards at the earliest possible opportunity.</p>

### *Navigation Protection Act*

Overall Grade = F

Recommendation	Grade	Comments
<p><b>1. Full legal protection for navigable waters</b></p> <p>Ensure that small- and mid- size navigable waters receive full legal protection and development on navigable rivers cannot proceed until any impacts on public navigation rights and the associated environmental amenities are addressed.</p>	<p>F</p>	<p><b>Failure to restore lost protections</b></p> <p>The Act formerly known as the <i>Navigable Waters Protection Act</i> contained important legal protection for all Canada's navigable waters. In 2012, Bill C-45 eliminated those protections for over 99% of Canada's lakes and rivers. Enhanced mechanisms for adding waters to the project list will not come close to restoring those lost protections.</p>
<p><b>2. Consideration of environmental factors</b></p> <p>Clarify the relationship between navigation and the <i>Canadian Environmental Assessment Act</i>, and ensure that environmental impacts on navigable waters are fully evaluated.</p>	<p>F</p>	<p><b>Failure to ensure consideration of environmental factors</b></p> <p>The discussion paper not only fails to recommend restoring lost protections under the Act, but it also fails to mention triggers for environmental assessments when a project will impede navigation.</p>
<p><b>3. Protection of public and Aboriginal rights and sustainability are core objectives</b></p> <p>While the public right to navigate has always been central to the Act, a modern Act should be clearer that its purpose is to ensure the sustainable public right to the use and enjoyment of navigable waters as well as protecting and sustaining Aboriginal rights related to navigable waters.</p>	<p>I</p>	<p><b>Incomplete</b></p> <p>Discussion paper is silent on the purpose of the Act.</p>