

Federal Government Discussion Paper on the Reviews

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Federal Response to the Environmental Assessment, the National Energy Board, the *Navigation Protection Act* and *Fisheries Act* Reviews

The Government of Canada is currently reviewing several federal environmental and regulatory processes (see [here](#)):

- federal environmental assessment processes;
- the National Energy Board (the “NEB”);
- the *Fisheries Act*; and
- the *Navigation Protection Act*

which has resulted in the release of several reports. For an overview of these reports, see our previous [blog post](#).

As a next step in this process, the Government of Canada released its [discussion paper](#) outlining the changes it is considering as a result of these reports. **Public comments on the discussion paper are being accepted until August 28th at <http://canada.ca/environmentalreviews>.**

Several shortcomings of our existing environmental and regulatory processes are identified in the discussion paper. These include the limited opportunities for public participation, difficulty of accessing information, inadequate validation of scientific and Indigenous expertise, and insufficient explanations of decisions. As well, it is noted that individual projects are often reviewed without an understanding of the broader environmental and development context in an area. The discussion paper also highlights the importance of reconciliation with Indigenous peoples to guide consultation and to recognize their rights in environmental and regulatory processes.

The Government of Canada indicates that any changes to federal environmental and regulatory processes must be guided by five principles (page 7):

- Fair, predictable and transparent environmental assessment and regulatory processes that build on what works.
- Participation of indigenous peoples in all phases that advances the Government’s commitment to the United Nations Declaration on the Rights of the Indigenous Peoples and reconciliation.
- Inclusive and meaningful public engagement.

- Timely, evidence-based decisions reflecting the best available science and Indigenous knowledge.
- One project – one assessment, with the scale of assessment aligned with the scale and potential impacts of the project.

The discussion paper is divided into two main sections: rebuilding trust in the project assessment system, and proposed program and legislative changes

Rebuilding Trust in the Project Assessment System

In this section of the discussion paper, seven “crosscutting areas of change” (page 8) are discussed. These are:

- **Cumulative effects**

It is proposed that national environmental frameworks to inform regional assessments be developed. Other possible changes to address cumulative effects include conducting strategic and regional assessments and developing an integrated open science and data platform.

- **Early engagement and planning**

It is proposed that assessments begin with a planning phase before project design elements are finalized in order to develop effective engagement strategies and foster collaboration.

- **Transparency and public participation**

The discussion paper proposes eliminating the standing test used by the NEB. As well, it is proposed that participant funding be improved, there be greater transparency on decisions, and that monitoring and compliance activities be inclusive.

- **Science, evidence and Indigenous knowledge**

To ensure equal and open access to high quality information, an open science and data platform to access and integrate the available science, evidence and Indigenous knowledge is proposed.

- **Impact assessment**

Impact assessments may be broadened to consider environmental, economic, social and health effects, and be subject to a gender-based analysis plus. It is proposed that a single government agency conduct impact assessments.

- **Partnering with Indigenous peoples**

This includes proposals for co-development of frameworks for collaboration and greater participation, as well as consideration and protection of indigenous knowledge.

- **Cooperation with jurisdictions**

The discussion paper proposes more cooperation to advance the principle of “one project-one assessment” and to cumulative effects. Unfortunately, this includes continuing to allow substitutions of project assessments.

Proposed Program and Legislative Changes

The proposed program and legislative changes are meant to address concerns with environmental assessment, the NEB, the *Fisheries Act* and the *Navigation Protection Act*.

Impact Assessment Process

The law governing federal environmental assessment was significantly altered by legislative changes made in 2012. The existing environmental assessment law was repealed and a new piece of legislation – the *Canadian Environmental Assessment Act, 2012* – was put into place and drastically reduced the number and scope of federal environmental assessments.

The discussion paper makes several proposals which are designed to address some of the shortcomings of current federal environmental assessment processes. These include:

- **Broadening the scope of assessment** to include environmental, social, economic, and health impacts. While we agree this is a positive step, it is essential that these impacts be considered with the clear goal of **sustainability** kept in mind.
- **Establish a single government agency** for conducting impact assessments. In the case of major energy transmission, nuclear, and offshore oil and gas projects, it is proposed that joint assessment occur (i.e. the assessment agency and the lifecycle regulator) as part of a single, integrated process.
- **Review the project list** to determine what projects will be subject to or excluded from assessment. We would like to see movement away from the unduly restrictive list approach to triggering assessments. Rather, we recommend a combined list approach (as taken in CEAA, 2012) and a decision-based approach (as taken in the previous CEAA) be adopted as it will apply to a broader range of undertakings. As well, it is essential that activities in National Parks be subject to assessment to ensure adherence to the ecological integrity purpose of the *Canada National Parks Act*.

- **Proposed changes to process** include requiring an early planning phase and integrating enforceable assessment conditions. The discussion paper proposes that legislated timelines be maintained albeit with discretion to approve exceptions.
- **Substitution of provincial processes is proposed to continue.** We would recommend that this proposal not be accepted. Rather, cooperative joint federal/provincial/territorial assessment is a preferred approach.
- **Decision-making is to be retained by Cabinet** to determine whether a project is in the public interest. We are concerned that proposal will result in an excessively politicized assessment process.

National Energy Board

The NEB is responsible for regulating oil and gas pipelines that cross provincial or international borders. The discussion paper proposes several changes which are meant to modernize the NEB and rebuild “trust in Canada’s lifecycle energy regulator so that safe and credible projects can proceed” (page 20). The proposed changes include:

- providing opportunities for policy dialogues outside of project hearings;
- developing a separate model to deliver timely and credible energy information;
- expand NEB authority to regulate renewable energy projects and associated power lines in offshore areas;
- increase public participation opportunities (including dropping the requirement to demonstrate standing as a participant); and
- change the wording from determining **public interest** to explicitly include environmental, safety, social and health considerations.

Happily, the discussion paper does not appear to espouse the recommendation made in the [Review Panel Report](#) to adopt a two-stage decision-making process. The recommended two stage process consisted of a one year process to determine alignment with national interest by the Federal Cabinet prior to detailed project review or licensing decisions, followed by a full environmental assessment and licensing process. It difficult to conceive how a meaningful determination of public interest can be made prior to completion of an impact assessment not to mention the overall incompatibility of this approach with a sustainability-driven impact assessment.

Fisheries Act

Legislative changes in 2012 saw the replacement of the well-established HADD provision (i.e. the prohibition against harmful alteration, disruption or destruction of habitat) with a lesser prohibition

against causing serious harm to fish. As well, the protections offered by the Fisheries Act were narrowed to only commercial, recreational or Aboriginal fisheries (as opposed to all fish habitat).

A significant proposal in the discussion paper is that HADD protections be restored. Several other proposals are made which are meant to restore protections on fish habitat. These include adoption of modern resource management and planning principles (such as cumulative effects, precautionary approach and ecosystem-based management); clarification of which situations require *Fisheries Act* authorizations; and the development and enforcement of code of practice. The discussion paper also proposes that the public have transparent access to information about activities impacting fish and fish habitat.

Navigation Protection Act

With legislative changes in 2012, the *Navigable Waters Protection Act* was renamed the *Navigation Protection Act* and its scope of applicability was significantly reduced. Rather than universal application to all navigable waters in Canada, the act became applicable to only 164 waterways (as listed in a schedule to the act) representing less than 1% of the waterways in Canada. As well, the legislative changes decoupled the Navigation Protection Act from federal environmental assessment processes (previously a requirement for approval under the act necessitated a federal environmental assessment).

Disappointingly, the discussion paper does not make any proposals to reverse the legislative changes made in 2012. The discussion paper proposes only to “improv[e] the process for adding navigable waters to the Schedule, ... regulat[e] obstructions and certain classes of works” and develop a compliant mechanism for works on unscheduled navigable waters (page 21). The Schedule is proposed to remain in place with the result that the applicability of the Act will remain significantly reduced.

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