Review of the Reviews

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Reports released for 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). These include reviews of:

- federal environmental assessment processes;
- the National Energy Board;
- the *Fisheries Act*; and
- the *Navigation Protection Act*.

These reviews arise from dramatic changes made to federal environmental laws and processes in 2012 via omnibus budget bills (see here and here). Since February of this year, several reports looking at these matters have been issued. This blog post provides an overview of these reports.

Environmental Assessment Processes

In April, the Expert Panel reviewing federal environmental assessment processes issued its report (the "EA Report"). Federal environmental assessment laws and processes were significantly altered by the 2012 legislative changes. 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. Notable changes to federal environmental assessment included:

- removal of "triggers" such as federal decisions to issue approvals under the *Fisheries Act* and the *Navigable Waters Protection Act* (as it then was) and replacement with a list of activities subject to environmental assessment;
- limiting scope of environmental effects to be considered in a federal environmental assessment to impacts on fish, aquatic species at risk, migratory birds; impacts on federal lands; interprovincial impacts; impacts on aboriginal peoples; and impacts incidental to a federal authority exercising its power or performing a duty;
- centralization of responsibility for federal environmental assessments to the Canadian

Environmental Assessment Agency except for those matters under the jurisdiction of the National Energy Board and Canadian Nuclear Safety Commission;
- reducing opportunities for public participation to “interested parties” (i.e. directly affected, or has relevant information or expertise); and
- imposing strict timelines on the environmental assessment processes.

As stated by the Review Panel (EA Report, page 12):

While *CEAA 2012* improved EA processes for some, it also sowed the seeds of distrust in many segments of society: it imposed unrealistically short timelines for the review of long, complex documents by interested parties; it vastly reduced the number of projects subject to review; and it placed more accountability for some assessment decision-making in the political realm. In essence, *CEAA 2012* fuelled some of the dissension around project assessment today.

Following this, the Review Panel made numerous, substantive recommendations for improving federal environmental assessment laws and processes. To underscore the significant shift from focused consideration of the bio-physical environment to consideration of all impacts on the pillars of sustainability (environment, economy, social, cultural and health) environmental assessment is called **impact assessment** (“IA”) (I would have preferred the term **sustainability assessment**). The Review Panel stressed the importance of transparent, inclusive, informed and meaningful processes.

The changes proposed by the Review Panel are too numerous to review here but are some highlights:

- sustainability should be central to IA and the decision to proceed with a project should be based upon that project’s contribution to sustainability;
- strategic and regional IA should be used to guide project IA;
- where multiple IA processes apply, the primary mechanism for coordination should be cooperation and substitution would be available only on the condition that the highest standard of IA will apply (unlike the current act, equivalency would not be an option);
- a single IA authority should be established as a quasi-judicial body and have full authority to undertake a full range of facilitation and dispute resolution processes;
- a project IA will be required if:
    - on the project list (to be revised),
    - not on the list but likely to have a consequential impact on federal matters, or
    - the IA accepts a request from either a project proponent or person/group;
- there will be three phases to a project IA: planning phase (resulting in a conduct of assessment agreement), a study phase (completion of the studies outlined in the conduct of assessment agreement), and a decision phase (resulting in a decision statement with clear, outcome-based conditions along with mandatory monitoring and follow-up programs);
- regional IA will be used to establish thresholds and objectives on matters of federal interest

in a region, and will be used to inform and streamline project IA;
- while a strategic IA should be used to provide guidance on how to implement existing federal policies, plans and programs in a project or regional IA, the Review Panel does not recommend that the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* be amended; and
- public participation is identified as a "key element" in IA processes and therefore legislation should enable early and ongoing public participation along with a participant funding program that is commensurate with meaningful participation.

While the devil is in the details, the recommendations made in the EA Report – if implemented – will result in improved and sustainability focused federal environmental assessment laws and processes. However, this does not mean that we cannot have even stronger environmental assessment laws and processes above and beyond those recommended in the EA Report.

For instance, the approach for triggering project IA in the EA Report is unduly restrictive by adhering to a list approach augmented by those projects with "consequential impacts" on federal matters. Rather, a combined list approach (as taken in *CEAA, 2012*) and a decision based approach (as taken in the previous *CEAA*) should be adopted as it will apply to a broader range of undertakings. As well, a right to appeal both interim (process) and final decisions made by the IA agency to an independent tribunal would result in a more effective federal process as compared to the right to appeal to Federal Cabinet as recommended in the EA Report.

For more detail, our recommendations can be found here and recommendations by the Canadian Environmental Network can be found here.

National Energy Board

On May 15, 2017, the National Energy Board Modernization Expert Panel issued its report (the "NEB Report"). The National Energy Board (the "NEB") is responsible for regulating oil and gas pipelines that cross provincial or international borders. Prior to 2012, the NEB could determine that a proposed pipeline was not in the public interest and accordingly deny its approval. However, with the legislative changes in 2012, the NEB now makes a recommendation to the Federal Cabinet for either denial or approval (along with proposed conditions); the final determination is made by the Federal Cabinet. Another significant change with the 2012 amendments is that the NEB became responsible for conducting the environmental assessment of proposed pipelines under its jurisdiction. As well, strict timelines for conducting environmental assessment and approval processes were put into place.

The NEB Report indicates that the NEB has "fundamentally lost the confidence of many Canadians" (page 7). There are concerns that the NEB has been captured by the oil and gas

industry and that it is an “organization that limits public engagement particularly since the legislative changes enacted in 2012, does not explain or account for many of its decisions, and generally operates in ways that seem unduly opaque” (page 7).

Numerous recommendations designed to address these concerns are made in the NEB Report. One recommendation is that the NEB be significantly restructured into two separate bodies:

- A new, independent **Canadian Energy Information Agency**, separate from both policy and regulatory functions, accountable for providing decision-makers and the public with critical energy data, information, and analysis.
- A modern **Canadian Energy Transmission Commission**, which would replace the National Energy Board, governed by a Board of Directors, with decisions rendered by a separate group of Hearing Commissioners.

Recognizing that the NEB currently operates in a “national policy vacuum” (page 18), the NEB Report indicates the importance of a regulatory system that aligns with a clearly defined and coherent national strategy to realize energy, economic, social, and environmental policy objectives.

In addition to a significant restructuring of the NEB itself, the NEB Report also recommends a fundamental change in decision-making on proposed major projects. A two stage process is recommended:

- Prior to detailed project review or licensing decisions, there should be a one year process to determine alignment with national interest by the Federal Cabinet. To determine whether there is alignment with the national interest, the Federal Cabinet should consider consultation and accommodation of Indigenous peoples; alignment with national economic, energy and environmental policy; consistency with provincial emissions limitation strategies; economic benefits; and strategic impact assessments.
- Once the determination of national interest is made, then there would be full environmental assessment and licensing using a two year Joint Canadian Energy Transmission Commission/Canadian Environmental Assessment Agency Hearing Panel process.

While I can appreciate wanting to know whether or not a project is a “no go” at an early stage (prior to expending money on detailed assessments), it difficult to conceive how a meaningful determination of public interest can be made prior to completion of an IA.

This approach espoused in the NEB Report is not aligned with the EA Report which recommends sustainability-driven IA which rejects or approves a project based on its contribution to sustainability. This requires a significant shift from focused consideration of the bio-physical environment to consideration of all impacts on the pillars of sustainability (environment, economy,

social, cultural and health).

The NEB Report also stresses the importance of real and substantive participation of Indigenous peoples, on their own terms and in full accord with Indigenous rights, aboriginal and treaty rights, and title, in every aspect of energy regulation. The importance of better relationships with landowners, on whose land infrastructure sits, is also recognized in the NEB report.

For those who are interested, the government is accepting comments on this report until June 14, 2017 at .

Fisheries Act

The Standing Committee on Fisheries and Oceans issued its *Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries* (the "**Fisheries Report**") in February. 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).

The Fisheries Report made several recommendations with a view to enhancing the protection of fish and fish habitat in Canada. Notable recommendations include:

- reinstatement of the HADD provision and removal of the concept of serious harm to fish from the act;
- refine the definition of HADD to limit its vulnerability to inconsistent application and to remove its restrictions on fisheries management by the government;
- take an ecosystem approach to protection and restoration of fish habitat by adopting sustainability principles, protecting ecological integrity of fish habitat and protecting key areas of fish habitat;
- expand the HADD provision to all ocean and natural freshwater habitats to ensure healthy biodiversity;
- clearly define "fish habitat" and the parameters of what is considered a violation of the act; and
- put sufficient protection provisions into the Fisheries Act that act as safeguards for farmers and agriculturalists, and municipalities.

Another key recommendation is that the department "renew its commitment to the "No Net Loss"

and “Net Gain” policies with a renewed focus, effort and resources on restoration and enhancement of fish habitat and fish productivity”. As well, the recommendations propose reconsideration of issuance of *Fisheries Act* approvals as a trigger for federal environmental assessment processes (with legislative changes in 2012, this previously existing trigger was eliminated).

Other recommendations made by the Standing Committee focus less on legislative changes and more on administrative matters such as increasing funding for ecosystem research, investing in a public and accessible database system, meaningfully resource the monitoring, compliance and enforcement components of the department, and hiring more field and enforcement personnel.

Overall, the Standing Committee indicates that “the proposed amendments included in this report reflect the values of ecosystem-based management, sustainable development, the precautionary principle and co-management in addressing fish habitat protection and fisheries management.”

Navigation Protection Act

The Standing Committee on Transport, Infrastructure and Communities issued its report entitled *A Study of the Navigation Protection Act* (the “NPA Report”) on March 23, 2017. With legislative changes in 2012, the *Navigable Waters Protection Act* was renamed the *Navigation Protection Act* and its scope of applicable 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 than1% 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).

The Standing Committee essentially recommended that the legislative changes implemented in 2012 remain in place (Recommendation 1):

maintain the Schedule but rapidly improve the process of adding waterways to the Schedule by making it easily accessible, easy to use and transparent and that a public awareness campaign be put in place to inform stakeholders of the process

The Standing Committee also recommended that Transport Canada be involved in the decision-making process for environmental assessments of pipelines and electrical transmission lines that cross navigable waters. Critically, this recommendation falls short of re-coupling approvals under the act with federal environmental assessment processes.

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