ENVIRONMENTAL LAW CENTRE

NEWS BRIEF

IN THIS ISSUE

AN INTRODUCTION TO THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012*

By Brenda Heelan Powell, *Staff Counsel*

Prior to the recent passage of the omnibus budget bill, federal environmental assessment in Canada was governed by the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*). The omnibus budget bill repealed the previous *CEAA* and replaced it with the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*). The new *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*)[1] – along with the *Regulations Designating Physical Activities*, the *Prescribed Information for the Description of a Designated Project Regulations* and the *Cost Recovery Regulations* - came into force on July 6, 2012.

The new federal environmental assessment process

The new federal environmental assessment process adopts a project list approach for determining which projects will be subject to environmental assessment. Under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities* (*RDPA*) or designated by the Minister of Environment on a discretionary basis may be subject to federal environmental assessment.

A project that is not on the *RDPA* but is designated by the Minister of Environment on an *ad hoc* basis **must** undergo a federal environmental assessment.[2] As well, a limited number of projects on the *RDPA* are linked to either the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB) and **must** undergo a federal environmental assessment by the CNSC or NEB as appropriate.[3]

All other projects on the *RDPA* are linked to the Canadian Environmental Assessment Agency (CEA Agency) and **may or may not** undergo a federal environmental assessment. Proponents of such projects must submit a project proposal to the CEA Agency, the contents of which are dictated by the *Prescribed Information for the Description of a Designated Project Regulations*. The CEA Agency has 10 days to review the project proposal for completeness. After the project proposal is declared complete, the CEA Agency then has 45 days to screen the project. This is **not** a form of environmental assessment but rather a determination as to whether or not a federal environmental assessment ought to occur.

Once the CEA Agency has determined that a federal environmental assessment is required, one of two kinds of environmental assessment may occur: a standard environmental assessment[4] or assessment by review panel.[5] Both kinds of federal environmental assessment must consider several factors:[6]

- the environmental effects of the project;
- the significance of the environmental effects of the project;
- comments from the public;
- mitigation measures that are technically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- the requirements of the follow-up program in respect of the project;
- the purpose of the project;
- alternative means of carrying out the project that are technically and economically feasible, and the environmental effects of any such alternative means;
- any change to the project that may be caused by the environment;
- relevant regional studies carried out under the *Act*; and
- any other matter relevant to the environmental assessment.

Once the environmental assessment is complete, the appropriate body (the CEA Agency, CNSC, NEB or the review panel) must prepare a report, which is used to determine whether or not the project will cause such effects.[7] If the project is determined to cause significant adverse environmental effects, the matter is referred to the federal Cabinet to decide whether or not those effects are justified in the circumstances.[8] Finally, a decision statement which indicates the decision made in relation to the project (including any conditions that must be met by the project proponent) is issued.[9]

How does *CEAA 2012* compare to the previous *CEAA*?

There are several significant differences between the previous *CEAA* and *CEAA 2012*. The number and scope of assessments conducted under *CEAA 2012* will be reduced compared to the previous *CEAA*. There are also significant procedural differences between the previous *CEAA* and *CEAA 2012*, including changes to the types of environmental assessment, who conducts the assessments and public participation opportunities. As well, *CEAA 2012* introduces legislated timelines and the mechanisms of substitution and equivalency.

Changes to the number and scope of assessments

The previous *CEAA* applied to all projects that had a federal trigger (unless specifically excluded). This meant that a federal environmental assessment was required for all projects which triggered *CEAA* by virtue of involving:

- the federal government as proponent;
- federal lands;
- a prescribed federal permit; or
- federal financial assistance.

In contrast, under *CEAA 2012*, only those projects designated by the *Regulations Designating Physical Activities* may be

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subject to a federal environmental assessment. In addition, the Minister has the discretion to designate a particular project for federal environmental assessment on an *ad hoc* basis.

The *RDPA* links each particular project category to a particular federal authority (currently, these are the CEA Agency, CNSC or NEB). Projects linked to the CNSC or NEB **must** undergo a federal environmental assessment (8 of 39 designated project categories are linked to either the CNSC or the NEB). The remaining project categories are linked to the CEA Agency and **may or may not** be required to undergo a federal environmental assessment.

For those project categories linked to the CEA Agency, a federal environmental assessment might not occur for two reasons. First, the Agency may determine that a federal environmental assessment is not required. Second, the federal government may decide not to conduct its own environmental assessment on the basis that the project is being assessed using a provincial process that is substituted for or deemed equivalent to the federal process.

Ultimately, the effect of these changes to federal environmental assessment law means that fewer projects will be assessed. Fewer projects will fall into the purview of *CEAA 2012* than with the previous *CEAA*. Further, even those projects which do fall into the purview of *CEAA 2012* may be excused from a federal environmental assessment at the discretion of the CEA Agency or the Minister.

Aside from reducing the number of federal environmental assessments, *CEAA 2012* also reduces the scope and content of federal environmental assessments. Federal environmental assessments are now confined by a narrow interpretation of federal jurisdiction. The consideration of environmental affects under *CEAA 2012* is limited to effects on fish and fish habitat, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. As well, a federal authority[10] must consider changes to the environment that are "directly linked or necessarily incidental" to that federal authority's exercise of power in relation to the project. This contrasts to the previous *CEAA*, which considered effects to all aspects of the environment (land, water, air, organic and inorganic matter, all living organisms and interacting natural systems).

While the factors that must be considered in the course of a federal environmental assessment remain largely unchanged from the previous *CEAA*, there are a few significant differences. The previous *CEAA* required consideration of the **need for the project** and **alternatives to the project**. There is no longer a requirement to consider these factors in the course of a federal environmental assessment despite both factors being key considerations for achieving sustainable development. As well, the requirement to consider the **capacity of renewable resources** that are likely to be significantly affected by the project to meet present and future needs is removed from *CEAA 2012*.

Procedural Changes under *CEAA 2012*

As mentioned above, there are two kinds of environmental assessment under *CEAA 2012*: a standard environmental assessment or assessment by review panel. This contrasts with the previous *CEAA*, which had several forms of environmental assessment: screenings, comprehensive studies, panel reviews or mediation.

Under the previous *CEAA*, numerous federal departments were responsible for conducting environmental assessments. In contrast, under *CEAA 2012*, a federal environmental assessment may be conducted only by the CEA Agency, CNSC, NEB or review panel.[11]

Legislated timelines for completion of an environmental assessment have been introduced by *CEAA 2012*.[12] The *Act* requires that a standard environmental assessment be completed within 365 days, an environmental assessment by the NEB be completed within 18 months and an environmental assessment by review panel be completed within 24 months.[13] The clock starts running once the notice of commencement has been posted on the CEAA Registry website or once the matter is referred to a review panel. The time limit may be extended, at the discretion of the Minister, for up to three months. The clock is stopped for any period of time in which the project proponent is collecting information or undertaking a study with respect to the project.

The previous *CEAA* required that environmental assessments were to provide opportunities for public participation. The term **public** was not restricted in any manner. In contrast, under *CEAA 2012*, public participation in environmental assessment processes conducted by the NEB or a review panel is limited to interested parties. An **interested party** is defined as any person who is directly affected by the project or has relevant information or expertise.

Under *CEAA 2012*, a federal environmental assessment may be avoided by allowing a provincial assessment process to be substituted or deemed equivalent. In the case of substitution, the federal government considers the provincial environmental assessment and makes its own decision (i.e., the provincial assessment alone fulfills the requirements of *CEAA 2012*). In the case of equivalency, the federal government relies entirely upon the provincial environmental assessment including the ultimate decision (i.e., the project will be exempt from *CEAA 2012*). The mechanisms of substitution and equivalency under *CEAA 2012* are a marked departure from the use of coordination and harmonization under the previous *CEAA*.

Transition from previous *CEAA* to *CEAA 2012*

What happens to the federal environmental assessments that were ongoing at the time *CEAA 2012* came into force? The answer depends upon the type of environmental assessment that was being conducted under the previous *CEAA*.

Review panels started under the previous *CEAA* continue in accordance with the new provisions of *CEAA 2012*.[14] This includes meeting the new timelines set by *CEAA 2012*.

Comprehensive studies continue under the requirements of the previous *CEAA*.[15] For comprehensive studies commenced prior to July 2010, a report must be submitted within 6 months of *CEAA 2012* coming into force (i.e. by January 6, 2013 because *CEAA 2012* came into force on July 6, 2012). For comprehensive studies commenced after July 2010, a report must be submitted within a 365 day period in accordance with the *Establishing Timelines for Comprehensive Studies Regulations* under the previous *CEAA*.

Screenings of projects that are designated by the Minister continue under the requirements of the previous *CEAA*.[16] These screenings must be completed within 365 days of *CEAA 2012* coming into force. All other screenings ceased upon *CEAA 2012* coming into force.[17] •

[1] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.
[2] Section 15, *supra.* note 1.
[3] Sections 13 and 15, *supra.* note 1.
[4] Conducted by the CEA Agency, the CNSC or the NEB.
[5] See section 38 of *CEAA 2012*. The decision to conduct the environmental assessment by way of review panel is made at the discretion of the Minister. It should be noted that the Minister cannot refer a project linked to the CNSC or the NEB to a review panel.
[6] Section 19, *supra.* note 1.
[7] Section 52, *supra.* note 1. The decision-maker depends upon which responsible authority is conducting the environmental assessment. If the assessment is conducted by the CEA Agency, then the Minister makes the decision (s. 27). If the assessment is conducted by the CNSC or the NEB, then that agency makes the decision (s. 27) unless the NEB is considering a pipeline application under s. 54 of the *National Energy Board Act* in which case the federal Cabinet makes the decision (s. 31).
[8] Section 52, *supra.* note 1.
[9] Section 54, *supra.* note 1.
[10] Section 2, *supra.* note 1, defines "federal authority". A federal authority includes Ministers, government agencies, parent Crown corporations, departments or departmental corporations, and designated bodies.
[11] Currently, the only designated authorities are the CEA Agency, CNSC and NEB. The Act leaves open the possibility of other federal authorities being designated by the *RDPA*.
[12] Under the previous *CEAA*, there were no timelines set by the Act itself. However, the *Establishing Timelines for Comprehensive Studies Regulations* did place timelines on the completion of comprehensive studies.
[13] If a review panel fails to meet this timeline, the review panel is terminated and the environmental assessment is completed by the CEA Agency (ss. 49 and 50, *supra.* note 1).
[14] Section 126, *supra.* note 1.
[15] Section 125, *supra.* note 1.
[16] Section 124, *supra.* note 1.
[17] For example, see the letter from the National Energy Board dated July 16, 2012 at https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/130635/831979/A2V0F4_-_Jobs,_Growth_and_Long-term_Prosperity_Act_-_Canadian_Environmental_Assessment_Act,_2012.pdf?nodeid=832118&vernum=0&redirect=3&redirect=4.

The ELC's Model Environmental Assessment Laws Project

The ELC is currently developing model provincial and federal environmental assessment laws. It is the ELC's goal that the model laws will be used by both provincial and federal governments to improve Canada's environmental assessment processes. The model environmental assessment laws will incorporate environmentally sound principles, enabling sustainable decision-making to become part of Canada's landscape.

The ELC thanks its funders - Alberta Ecotrust Foundation and the Alberta Law Foundation – for supporting this project.

CEAA AND *CEAA 2012* AT A GLANCE

	CEAA	***CEAA 2012***
Applies to...	Activities with federal triggers federal government as proponent, federal lands, a prescribed federal permit or federal financial assistance	Project list *Regulations Designating Physical Activities* and Ministerial discretion to designate a project on *ad hoc* basis
Conduct of Assessment by...	Numerous responsible authorities	CEA Agency, NEB, CNSC or panel
Types of Assessments	Screening, comprehensive study, panel review or mediation	Standard environmental assessment or panel review
Scope of Assessment	Environmental effects changes caused in the environment which includes land, water, air, organic and inorganic matter, all living organisms and interacting natural systems	Environmental effects environmental effects limited to federal lands, aboriginal peoples, fish and fish habitat, aquatic species at risk, migratory birds, and changes to the environment that are "directly linked or incidental" to a federal authority's exercise of power
Content of Assessments	Section 16 provides a list includes consideration of environmental effects and their significance, mitigation measures, public comments, alternatives to the project and need for the project	Section 19 provides a list includes consideration of environmental effects and their significance, mitigation measures and public comments no consideration of need for project or alternatives to project
Public Participation	Public	Interested parties directly affected, or relevant information or expertise
Overlap of Jurisdiction	Co-operation between jurisdictions	Substitution or equivalency of provincial process
Timelines	None except those found in the *Establishing Timelines for Comprehensive Studies Regulations* which set timelines for completion of a comprehensive study	Legislated timelines for completion of the assessment Standard environmental assessment: 365 days Panel review: 24 months NEB: 18 months

FISH OUT OF WATER: *FISHERIES ACT* CHANGES REFLECT DIVERGENCE OF SCIENCE AND LAW

By Jason Unger, *Staff Counsel*

Enforcement of environmental laws is notoriously difficult. The prosecutor is faced with conveying to the court evidence of a scientific nature in an effort to prove the aspects of the offence, beyond a reasonable doubt. Because there is science, there is uncertainty. For their part defendants need only raise a doubt about the science and facts around a case and they will be acquitted. Trials often devolve into competing experts. This is why clear, enforceable environmental laws are so important.

As environmental laws go, the *Fisheries Act* has been viewed as one of the more powerful environmental protection tools due to the phrasing and scope of its prohibitions. Enforcement of these provisions had become quite effective, with the science in prosecutions being well established and the courts consistently interpreting and applying the Act. With recent passage of the Budget Bill (Bill C-38), the *Fisheries Act* has seen its protective nature significantly whittled away.[1] As discussed below, the amendments effectively nullify habitat protections (albeit contingent on a Cabinet order) and narrowly focus on prescribed fisheries. Even beneficial boosts to fines under the *Act* reflect a minimal gain when considering the enforcement capacity of the Department of Fisheries and Oceans in the Prairie and Northern region.

The former *Fisheries Act*: Clean water, good habitat protection

The two central prohibitions of the *Fisheries Act* that were viewed as fundamental to fisheries protection (and through this environmental protection) relate to the deposit of deleterious substances in waters frequented by fish (s.36) and to the protection of fish habitat against harmful alteration, destruction or disruption from "works and undertakings" (s.35).

When a person (or company) violates s.36 and is charged, the Crown must prove that the person released a substance that is deleterious to fish in fish bearing waters (or in waters that lead to fish bearing waters). The term "deleterious" is defined as:[2]

- any substance that, when added to water, would render it deleterious to fish or fish habitat;
- water containing substances in a quantity and concentration that is changed from its natural state that makes the water deleterious to fish or fish habitat; or
- substances prescribed as deleterious.

The definition of deleterious is somewhat circular in this regard, as a deleterious substance is simply reframed as something that is "deleterious to fish." The meaning of "deleterious to fish" is not set out in the *Act* but Environment Canada, which administers and enforces this portion of the *Act*, uses standard test procedures to determine whether a deposit is deleterious. These standards effectively establish what is "deleterious to fish." The standards typically involve acute lethality tests prescribed by Environment Canada for different species.[3]

The provision is protective insofar as it prohibits the release of substances notwithstanding the dilutive capacity of the receiving water body. Ignorance of this provision has been seen on several fronts, from municipalities dumping provincially approved effluent into water bodies[4] contrary to the *Act* to consultants not understanding the operation of the provision.[5]

While protective, the provision could apply a higher standard in reference to what is "deleterious." For example, instead of using acute toxicity, the test may determine a level of impairment to fish physiology that may be deemed deleterious. This would require changing the standard away from one that is not applied consistently and clearly by the courts.

Previously, proposed amendments to section 36 arrived in 2007 by way of Bill C-45, which would have replaced the *Fisheries Act* if it had passed. The prospect of amending s.36 raised concerns among some environmental lawyers, insofar as the changes to the definition of "deleterious" may have resulted in an altered and potentially less protective judicial interpretation.[6] The changes from the 2007 Bill were not brought forth into the Budget Bill.

The other section of keen interest from an environmental protection standpoint is section 35. Section 35 has also seen broad application, insofar as it prohibits works and undertakings that harmfully alter, disrupt or destroy fish habitat (the "HADD" provision). "Fish habitat" is broadly defined in the *Act* to mean:[7]

> spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

The nature of habitat disturbance covered by this provision is broad, as displayed by the jurisprudence. Suffice it to say, if one is working in or around fish habitat, the prohibition (and potentially the *Canadian Environmental Assessment Act* – or *CEAA*) was likely to be triggered.

Budget Bill changes: habitat under siege

The deleterious deposit provisions of the *Fisheries Act* remain (largely) intact. One noteworthy change is that the *Act* is altered to enable the Minister to:

- create regulations allowing for deleterious deposits to take place; and
- prescribe classes of waters and substances that are not prohibited.

Under the former *Act* these regulations were passed at the Cabinet level (by Order in Council).[8]

Protection of fish habitat, on the other hand, is significantly undermined. The breadth of potential application of the HADD prohibition and its linkage with *CEAA* (as a trigger for environmental assessment) made it a primary target for law reform for those in industries impacting fish habitat. Law reform lobbying appears to have been successful, as the *Fisheries Act* is set for a change from the HADD provision to a provision that prohibits "serious harm" to "fish that are part of a commercial, recreational or Aboriginal fishery or to the fish that **support** such a fishery."[9] [emphasis added] Serious harm to fish is defined as "death of fish or any ***permanent*** alteration to, or destruction of, fish habitat." [emphasis added]

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The change from the HADD provision is not immediate and occurs on a date fixed by cabinet order.[10] Until this date the HADD prohibition applies and is even expanded to include "activities."[11] In this way the Budget Bill is effectively expanding the nature of HADD prohibitions but then removing these changes upon the passage of the requisite Order in Council.

As part of the "interim HADD" prohibition, other amendments occurred under the budget that expanded the types of activities, works or undertakings that could proceed without violating s.35(1). Under the previous HADD prohibitions only those parties with a Ministerial authorization or carrying on activities covered by cabinet regulations could lawfully cause a HADD.[12] The interim HADD provision expands this to instances where:[13]

- the activity, work or undertaking is a "prescribed" work, activity or undertaking and is carried out in a prescribed fashion in prescribed waters;
- the Ministry has authorized the work;
- a "prescribed person" authorizes the work with prescribed conditions;
- the serious harm is a result of doing anything that is otherwise permitted under the *Act*; or
- the activity is carried out in accordance with the regulations.

As mentioned, once an Order in Council fixing the date for the new s.35(1) to come into effect is issued, both the old and interim HADD provisions will be replaced with the abovementioned "serious harm" provision.

This provision effectively undermines scientifically meaningful habitat protections under the *Act*. By requiring a finding of permanence and removing prohibitions against disruption of habitat, legislative intent is clearly focused on longer term impacts on fish habitat. The "permanence" of alteration or destruction of habitat is not defined. What is permanent? What habitat cannot be restored? As discussed below, the provision will likely result in no protection of fish habitat at all as it appears the provision may be practically unenforceable.

Take for instance temporary dredging of a reach of a stream where high quality habitat exists for fish reproduction. The proponent has undertaken appropriate steps to determine whether the habitat can be restored and it can be. The proponent then proceeds, without authorization, to undertake the activity. Under the "serious harm" test the activity is not prohibited nor does it need to be authorized. As it is not authorized, there exist no conditions to restore the habitat. Has the party violated the *Act*? The proponent can always claim it is not a permanent change to habitat and the Crown would be hard pressed to prove that the change is indeed permanent. But without a condition requiring restoration, who will be responsible for ensuring the habitat is restored? Apparently no one.

Perhaps jurisprudence will clarify this, but even with requisite conditions being placed on an authorization fish may be denied significant portions of their habitat for extended periods of time. This is undoubtedly going to impact fisheries in the geographic location of habitat loss. Will restoration, even if it is required, be successful?

From whole systems to prescribed fisheries

The Budget Bill also amended the *Fisheries Act* to focus specifically on Aboriginal, recreational and commercial fisheries and fish that "contribute to" or "support" a fishery.[14] This focus is built into prohibition against "serious harm" as set out above as well as guiding general administration and authorizations under the *Act*.[15] In defining what constitutes a "fishery" there is reliance on the licencing system for that fishery. This is a divergence from the previous focus of a "fishery," which the *Act* defined as an area or location where tools are used to take fish. This definition is not removed from the *Act*, but the prohibitions and administration of the *Act* are refocused on the specific fisheries named.

The issue of whether the *Act* is limited to commercial or economically driven fisheries has been considered by the courts. For instance, a split BC Court of Appeal in *R. v. MacMillan Bloedel Limited* acquitted the defendant in that case on the basis that a "fishery" was not established.[16] Craig J.A. dissented in the case and took a more ecosystem-based approach, citing Justice Martland of the Supreme Court who has noted "the power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system."[17] The majority approach in *MacMillan Bloedel* has subsequently been rejected by courts in both the NWT and Ontario.[18] A decision of the NWT Supreme Court cited the nature of a fishery as a public resource and noted that "to protect fish and fish habitat is to protect the resource (fishery)."[19] The courts have found that, as a public resource, the federal government is not constrained to managing fisheries of a "commercial enterprise."[20]

Amendments to the *Fisheries Act* attempt to narrow the application of the *Act* in contrast to this broader judicial view of a fishery. Defining what is a commercial or recreational fishery under the new *Act* occurs pursuant to regulations under the *Act* and delegates to the licencing jurisdiction, i.e., the province.[21] (Presumably if a province wanted to license brook stickleback or water fleas - crustaceans that may be included under the definition of fish - as a commercial or recreational fish, that would just be fine.)

The nature of how a "fishery" is to be interpreted by the judiciary is also likely to cause a narrowing of the application of the *Act*. For example, "serious harm" prohibitions apply not only to fishery species but also those species of fish that "support" fishery fish. The question

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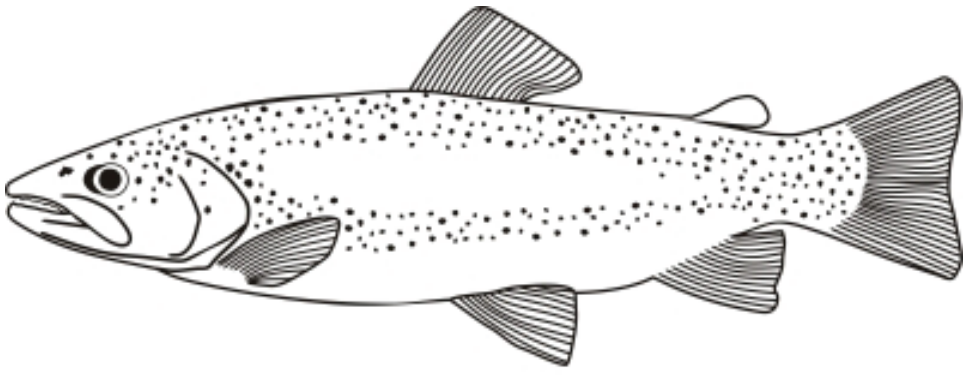

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becomes a scientific one in terms of support, and will only be answered through numerous judicial interpretations (assuming a new s.35(1) is enforced at all). Is 10% of a commercial fish's normal diet significant enough to establish "support"? Is 1%? 50%? Scientifically it is clear that certain copepods (crustaceans of significant importance to the food chain) support commercial or recreational fisheries. The "serious harm" provision may apply to these freshwater crustaceans (which are within the purview of fish under the *Fisheries Act*), but evidentiary problems arise again, as once the harm is done there is little likelihood of proving said harm.

Whatever the right standard of "support" might be, it seems that the intent of the amendments is to step back from treating the fishery resource as a "whole system." That said, perhaps the judiciary will continue to recognize the relevance of an ecosystem approach to fisheries management.

Increased fines but diminished habitat enforcement

The Budget Bill did increase fines for those who violate the HADD/serious harm prohibitions multiple times or for corporate offenders, which is laudable.[22] Unless enforcement capacity in the Central and Artic Region allows for rigorous application and prosecution of offences the fines may be less like "teeth" and more akin to dentures that have no owner. •

Image: Tina Phillips / FreeDigitalPhotos.net

[1] Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 41st Parl., 1st session, (2012) Royal Assent 2012-06-29, online: Parliament of Canada <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5514128>. See also the amended *Fisheries Act*, RS.C. 1985, c. F-14, online: Department of Justice Canada, <http://laws-lois.justice.gc.ca/PDF/F-14.pdf>.
[2] See section 34(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14.
[3] See Environment Canada, *Biological Test Method Series*, online: Environment Canada <http://www.ec.gc.ca/faunescience-wildlifescience/default.asp?lang=En&n=0BB80E7B-1>.
[4] The Town of Beaverlodge was fined $20,000 for violation of the *Fisheries Act* for releasing wastewater effluent which was deleterious to fish and which was approved by Alberta Environment. see Environment Canada, "Enforcement Notifications" August 27, 2008, online: Environment Canada <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=CCAA8EDB-1>
[5] See *Siksika Nation Elders Committee and Siksika Nation v. Director; Southern Region, Regional Services, Alberta Environment, re: Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.). Erratum changes included, at para 159, online: Alberta Environmental Appeals Board, <http://www.eab.gov.ab.ca/dec/05-053-054-R-Erratum.pdf>.
[6] See Bill C-45, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries* 1st Sess., 39th Parl., (2007) online: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2590531>.
[7] *Fisheries Act, supra* note 2 at s.34(1).
[8] *Supra* note 1 at s. 143(2).
[9] *Ibid*. at s.142(2).
[10] *Ibid*. at s.156.
[11] *Ibid*. at s. 142(1). This reflects a positive change as some jurisprudence had taken a narrow interpretation of what constitutes a work or undertaking.
[12] See the earlier provision of the *Fisheries Act*, R.S.C. 1985, c. F-14, s.35(2), in force from 2002-12-31 to 2012-06-28, online: Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/F-14/section-35-20021231.html>.
[13] *Supra* note 1 s. 35(2) of the amended *Fisheries Act*, online: Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/F-14/page-11.html#docCont>.
[14] See s.6 of the amended *Fisheries Act*, *supra* note 1, which dictates Ministerial consideration of "the contribution of the relevant fish to the ongoing productivity of" a fishery in administration of various aspects of the Act. Also see s. 142(2) of the Budget Bill which prohibits the work, undertaking or activity that results in serious harm to "fish that support" a fishery. 15 Budget Bill, *supra* note 1 at s.135.
[16] 1984 CanLII 740 (BC CA), <http://canlii.ca/t/249vr> retrieved on 2012-08-21.
[17] See *Northwest Falling Contractors Ltd. v. The Queen*, 1980 CanLII 210 (SCC), [1980] 2 SCR 292, <http://canlii.ca/t/1z48k>.
[18] *R. v. BHP Diamonds Inc.*, 2002 NWTSC 74 (CanLII), <http://canlii.ca/t/5fqd> retrieved on 2012-08-21 and Ontario Superior Court in *R. v. Zuber*, 2004 CanLII 2549 (ON SC), <http://canlii.ca/t/1hgs7> retrieved on 2012-08-21.
[19] *R. v. BHP Diamonds Inc.*, 2002 NWTSC 74 (CanLII), <http://canlii.ca/t/5fqd> retrieved on 2012-08-21.
[20] See *R. v. Zuber, supra* note 18 at para 34.
[21] By operation of the *Alberta Fishery Regulations*, 1998, SOR/98/286 and the *Fisheries (Alberta) Act*, R.S.A. 2000, c. F-16.
[22] See s. 40 of the *Fisheries Act, supra* note 2.

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SINGLE REGULATOR OR FRANKEN-CHILD?

By Adam Driedzic, *Staff Counsel*

Halloween: A fine time to birth the Frankenstein child of the Alberta government's Regulatory Enhancement Project (REP). An overview of the REP is available online.[1] In brief, the goal of the project is to increase provincial competiveness in attracting energy investment, largely through more efficient regulation. The two key documents on this website are the Report and Recommendations of the Regulatory Enhancement Task Force released in 2010[2] and a Discussion Document released in 2011.[3]

The major change will be the creation of a "single regulator" responsible for energy activities. This in-utero creature has no official name but it has been called the "Superboard" at least once.[4] The single regulator will continue the functions of the Energy Resources Conservation Board (ERCB) for project approval, operations and abandonment. It will also take over functions performed by Alberta Environment and Sustainable Resource Development (AESRD) related to energy projects (see chart on page 8). Basically, the single regulator will step into the shoes of AESRD decision-makers where the project is an energy project. The same regulatory obligations and powers that exist under environmental and public lands legislation will continue to exist. Legislation to create the single energy regulator is a top priority for the fall 2012 legislative session.

The Discussion Document outlines what the new legislation could include. There are some surprises: I'll choose one. The Task Force Report, which proposed the single regulator, was specifically focused on upstream oil and gas.[5] In situ oil sands were considered on the basis that they are more like conventional oil than mining, but there was no indication that oil sands mining was fit for a streamlined approval process and not one mention of the word coal.

The 2011 Discussion Document opens with a declaration that coal and oil sands are in. This shift is inevitable in light of the chosen legislative approach. The ERCB will be rendered extinct, so its current functions have to go somewhere. The Discussion Document goes further and states that non-energy minerals could be phased in.

A briefing on the anticipated legislation that I attended in September 2012 suggests more surprises. The statute will be skeletal. It will provide for the formation and the mandate of the regulator, with further details left to regulations.

The formation of the regulator will be more of a business model. (see chart on page 8). The role of 'the board' will be just that – to provide direction to staff responsible for routine operations. Non-routine application hearings will be conducted by professional Commissioners. The new format could be a welcome change for hearing participants. The trade-off, however, is that direction for the agency is coming from persons without involvement in decisions that involve land, water and environmental issues.

The regulator's mandate will be overtly to develop resources, with specific qualifiers around safety and environmental responsibility. In contrast, the Discussion Document would have continued the current practice of having the regulator consider whether proposed projects were in the "public interest."[6] The hearing process in particular was to enable the regulator to "make informed decisions in the public interest."[7] Duties to act in the public interest were to be extended to individual board members.[8] The decision to omit the "public interest" mandate is deliberate—the result of a lack of clarity around this term during stakeholder engagement sessions. The intention is for regulations made by Cabinet to require the regulator to follow government policy. Examples would include compliance with regional plans or considering cumulative effects in project applications. This could be a welcome change to the current practice of hardwiring broad social, economic and environmental considerations into the statute, yet it provides no guidance as to what these considerations should be.

Regulations made by the regulator would address technical standards (akin to the ERCB Directives) and procedural requirements (akin to ERCB Rules of Practice). The briefing I attended suggests an increased focus on "first instance" decisions.[9] We should expect increased clarity around participant roles, including opportunities for involvement of more stakeholders at earlier stages. Statements of Concern may be filed on applications

and used to determine whether applications are non-routine, or should go to hearings or alternative dispute resolution. Complex applications that require technical input would go to hearings earlier. Hearings will be mandatory where persons may be "directly affected" by the decision on the application. What amounts to "directly affected" will be interpreted according to regulations. Regulations will provide new tools to ensure that decisions are consistent with policy, for example prescribing classes of persons who may participate or seek reviews and reconsiderations. The result may be "slightly broader" hearing rights. Draft regulations may be released for comment when the bill is tabled.

I sense that building the single regulator is like building a new creature from old bones. We have some parts that must fit somewhere and some ideas as to where, but we've never seen one alive. Want some extra legs? Add non-energy minerals. Dare to leave out a big bone? Abandon the public interest mandate. Scared to experiment? Keep a "directly affected" test for standing.

Ultimately, we won't know how this creature works until it walks the earth. The single regulator is intended to be operational by the summer of 2013. •

[1] Regulatory Enhancement Project, Alberta Energy, Government of Alberta; <http://www.energy.alberta.ca/initiatives/regulatoryenhancement.asp>.
[2] *Enhancing Assurance: Report and recommendations of the Regulatory Enhancement Task Force to the Minister of Energy* (December 2010), *ibid.* [Task Force Report].
[3] *Enhancing Assurance: Developing an Integrated Energy Resource Regulator* (May 2011), *supra*, note 1. [Discussion Document].
[4] Sean Parker, *Alberta's Energy Superboard*, Legal Counsel Newsletter (Summer 2011), McLennan Ross LLP, online: <http://www.mross.com/law/Publications/Legal+Counsel+Newsletter?contentId=2164>.
[5] Task Force Report, *supra* note 2, see Scope of the Regulatory Enhancement Project (Appendix B); see also the Foreword.
[6] Discussion Document, *supra* note 3, at pages 12, 14 and 18.
[7] *Ibid.*, page 18.
[8] *Ibid.*, page 10.
[9] Government of Alberta, Session on Regulatory Enhancement Project, September 24, 2012, Calgary, Alberta. No published materials or records were available at the time of this writing.

Intended functions of the single regulator

Mines and Minerals Act part 8
- Exploration (geophysical activity)

Environmental Protection and Enhancement Act
- Environmental approvals
- Reclamation
- Remediation
- Financial Securities for mines
- Environmental Assessment (potentially phased in)*

Water Act
- Water licenses
- Water approvals

Public Lands Act
- Surface access to public land

All relevant Acts
- Reporting and compliance requirements
- Investigation and enforcement powers

Novel functions
- Enforcement of surface access agreements

Functions not transferred to the single regulator:

- Alberta Energy will retain responsibility for granting mineral tenures.
- Surface Rights Board will retain responsibility for access to private land.

Functions of concern:

Neither the Task Force Report nor the Discussion Document addresses the functions of the Environmental Appeals Board and Public Lands Appeals Board. These tribunals review decisions of AESRD that would be taken over by the single regulator. Appeals to these tribunals could be replaced by self-review by the single regulator.

* See Discussion Document, as referred to in note 3 of this article, page 14.

FROM THE EDITOR

By Leah Orr, *Communications Coordinator*

Changes abound these days at the Environmental Law Centre. One of the more exciting changes is a recent addition to the ELC family. Kim Kiel started as our Fundraising Coordinator in the summer and has been creating and implementing a plan to broaden the ELC's reach and increase the financial sustainability of our organization. We're very happy to have her on board.

You'll be hearing more directly from Kim soon, but in the meantime a little bit about her and what she's working on:

Prior to becoming the Environmental Law Centre's Fundraising Coordinator, Kim managed the Environmental Grants Program for Alberta Ecotrust Foundation and was the Education Director for a national environmental charity. She has over twelve years of experience working for other environmental nonprofits and government departments in outreach and communication positions. She brings her skills as a communicator, presenter and certified facilitator to her post and looks forward to connecting with our current and future supporters and our broader community.

The ELC celebrates its 30th anniversary this year, so one of Kim's first projects is the "30 in 30 Campaign," which aims to collect 30 new donations in 30 days. Please help us celebrate our anniversary with a generous gift. For more information or to make a donation, contact Kim at kkiel@elc.ab.ca or 1-800-661-4238. •

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