

ANOTHER BIG BUDGET BILL, MORE BIG CHANGES

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This summer, we wrote about changes to Canada's environmental legal landscape introduced by Bill C-38, and their significance to the *Canadian Environmental Assessment Act (CEAA)* and the *Fisheries Act*.

CEAA, 2012 is now in force, with regulations designating projects requiring environmental assessment (EA) in place. *Fisheries Act* amendments are coming into force in two phases. Phase one has already occurred, with no date set for Phase two.

In the midst of this overhaul of environmental laws, Ottawa introduced Bill C-45, the *Jobs and Growth Act, 2012* for First Reading on October 18, 2012, introducing further amendments to *CEAA, 2012* and the *Fisheries Act*, most significantly, substantial changes to the *Navigable Waters Protection Act*.

Is your project in? (*Canadian Environmental Assessment Act, 2012*)

CEAA, 2012 was enacted in much the same form as first proposed in Bill C-38. The old 'triggers,' including, for example, federal funding, *Fisheries Act* and *Navigable Water Protection Act* permits for EA, are eliminated. Now, only 'designated projects' are required to submit a project description to the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board.

Designated projects are major projects listed on the previous Comprehensive Study List. There has been much discussion as to whether the designated project list accurately reflects those projects that should be required to undergo environmental assessment. The federal government has stated plans to gather public and stakeholder comments on the designated projects before making amendments.

Phasing in (*Fisheries Act*)

Amendments to the *Fisheries Act* have received a lot of attention and generated an equal amount of confusion, particularly on how amendments are coming into force. Bill C38 amendments are set to occur in two phases. Already in force, Phase I amendments are relatively minor.

Phase Two includes more controversial changes, including protecting commercial, recreational and Aboriginal fisheries, instead of fish habitat, and increasing potential fine amounts. For first offences (individuals) minimum fines range from \$15,000 to \$1 million for indictable offences; for small revenue 'corporations' (including municipalities) from \$75,000 to \$4 million; and for all other corporations, \$500,000 to \$6 million. Fine ranges would double for subsequent offences.

The proposed definition of 'Aboriginal fisheries' put forward in Bill C-38 focused on fishing by Aboriginal people for ceremonial purposes. In an attempt to address concerns, Bill C-45 will alter the definition to include fishing "for the purposes set out in a land claims agreement entered into with the Aboriginal organization."

We expect significant controversy around the definition of Aboriginal fishery. Who defines an Aboriginal fishery? How will the proposed definition impact Treaty and Aboriginal rights? Has the Crown adequately consulted Aboriginal people regarding impacts this revision may have on Aboriginal and Treaty rights?

Fewer waters in (*Navigable Water (Protection) Act*)

The latest budget bill proposed significant changes of its own. Bill C-45 introduces major amendments to the *Navigable Waters Protection Act (NWPA)*, the first being a name change.

The proposed act would no longer apply to all navigable waters. Amendments would dramatically narrow the

NWPA's oversight and review provisions to a much smaller number of prescribed navigable waters. The *NWPA* currently requires that every project on a waterway in Canada receive federal government approval. Proposed amendments under Bill C-45 would narrow the application of the *NWPA* to just 100 lakes and coastal areas and 62 major rivers from among millions crisscrossing Canada.¹

Proposed amendments set out the application and approvals process necessary for construction, placement, alteration, repair, rebuilding, removal or decommissioning of a work "in, on, over, under, through or across any navigable water that is listed in the schedule" to the revised statute.²

The proposed amendments

- institute a fee system to recover costs;
- allow administrative penalties to be levied;
- add additional offences to the enforcement provisions; and
- expand the types of 'minor' or 'designated' works (yet to be defined) that are exempt from the impact assessment and approvals process (although not the other requirements of the Act).

To obtain written approval, an owner of a project on a designated waterway must file a notice with the Minister of Transport and pay a fee, (even if the work has already begun or has been substantially completed).³ In turn, the Minister will assess whether the project "is likely to substantially interfere with navigation," taking into account any relevant factor, including:⁴

- the characteristics of the navigable water in question;
- the safety of navigation;
- the current or anticipated navigation in that water;
- the impact of the work (for example, its construction, placement, alteration, repair, rebuilding, removal, decommissioning,

¹ The number of lakes larger than three square kilometres is estimated at close to be 31,752 by the *Atlas of Canada*, with 561 lakes with a surface area larger than 100 km². There are between two and three million Canadian lakes of all sizes, and many more streams and rivers.

² Section 3 of *NWPA*, as amended by C-45.

³ Sections 5(1)-(3) of *NWPA*, as amended by C-45.

maintenance, operation or use) on navigation; and

- the cumulative impact of the work on navigation in that water.

An owner of a work impacting a non-listed navigable waterway can choose to 'opt in' to the review process.⁵

Yet to be defined, designated (or minor) works will not require Ministerial approval but must still comply with the requirements of the act.⁶ As part of previous revisions to the *NWPA*, which took effect in March 2009, the Minor Works and Waters Order enabled certain low risk works (i.e., cottage docks, erosion control works, aerial and submarine cables, water intakes, etc.) that met certain criteria to be pre-approved. The revised act will include more classes of minor works, covering specific low-risk construction. The full list of proposed amendments is posted on the Transport Canada website.

In addition, the Minister may designate any coastal area, lake or river (or parts of those waters) listed in the schedule as 'minor waters,' exempting projects from the formal approvals process.⁷

Amendments include duty to notify the Minister if a work causes (or is likely to cause) serious and imminent danger to navigation, as well as duty to take corrective action. If the owner

fails to take steps, the government can step in, take action and pass on costs to the owner.

As with *CEAA* and the *Fisheries Act*, new penalty provisions are proposed for the *NWPA*, including administrative environment penalties.

Any person who contravenes a provision to be designated by regulation is liable to a fine of up to \$5,000 for an individual and up to \$40,000 in any other case. These penalties complement existing enforcement provisions in the act.

Over the next year, the Standing Senate Committee on Fisheries and Oceans will study issues relating to the federal government's evolving policy for managing Canada's fisheries. Despite extending the deadline to next September, there are no scheduled meetings of the committee at this time. DFO has told the committee the Department is planning a major restructuring of its work and approach.

The coming months will be interesting. The new federal environmental regulatory approach covers less of the environment but includes higher penalties for those areas it does protect, putting significant weight on command and control for environmental protection. Experience in Ontario has shown us

that weak regulatory oversight in times of budgetary restraint can have tragic results, providing a cautionary note as the federal government develops its new policies to protect Canadian fisheries and waters. ♦



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4 Section 5(4) of *NWPA*, as amended by C-45.

5 Section 4 of *NWPA*, as amended by C-45. In the press release, Transport Canada explains "The proposed amendments will ... allow proponents of works in unlisted waters to opt-in and seek approval of their proposed work to give them additional legal certainty by allowing them to choose."

6 Section 10 of *NWPA*, as amended by C-45.

7 Section 28(2)(b) of *NWPA*, as amended by C-45.

8 Sections 12(1)-(2) of *NWPA*, as amended by C-45.

9 Section 39 of *NWPA*, as amended by C-45.

CEAA 2012: THE NEW REALITY FOR FEDERAL ENVIRONMENTAL ASSESSMENT

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The *Canadian Environmental Assessment Act* was originally proclaimed in 1995 (*CEAA 1995*). The general purpose of this legislation

was to ensure that the environmental effects of projects were assessed and

that they would not result in significant adverse environmental effects before the federal government took any action to enable a project to proceed to implementation.

Recently, federal environmental assessment legislation has undergone substantive changes. *The Canadian Environmental Assessment Act, 2012 (CEAA 2012)* was proclaimed in force on July 6, 2012. *CEAA 1995* and associated

regulations were repealed and replaced with a significantly different regime.

The following outlines some key considerations and requirements of *CEAA 2012*.

Projects subject to CEAA 2012

Under *CEAA 1995*, a federal environmental assessment was required if the federal government:

- was the proponent for a project;