WILLMS & SHIER ENVIRONMENTAL LAWYERS LLP

Report

ENVIRONMENT • ABORIGINAL • ENERGY

Special Report — Budgets 2012

# Ottawa moves quickly to refocus federal environmental assessment process

Ottawa has used its omnibus budget Bill C-38 to repeal the current *Canadian Environmental Assessment Act* (*CEAA*) and replace it with a streamlined, more development-friendly version. Federal environmental assessments (EAs) will be limited to a much narrower range of projects, fewer agencies will be involved, tighter timelines imposed, and ministerial discretion dramatically increased.

Under its "one project, one review" approach, the Minister of the Environment must, upon request, allow a provincial process to substitute for a federal EA – though not federal decision-making – if satisfied that the substantive requirements of the *CEA Act 2012* will be met. The Governor in Council may also exclude a project from application of the Act if it determines that a province will undertake an equivalent assessment.

The new EA legislation is included in Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*, which was tabled for First Reading on April 26, 2012. The omnibus 421-page budget bill also makes significant amendments to the *Fisheries Act*, the *Canadian Environmental Protection Act,1999* (*CEPA*), the *Species at Risk Act* (*SARA*), and the *National Energy Board Act* (*NEB Act*). Together, the lengthy amendments will fundamentally restructure the federal government's role in environmental protection.

**Grounds for federal EAs shrink significantly**

All the statutory criteria that currently trigger EAs have been eliminated. Federal EAs will be conducted only for those projects designated by regulation – through a listing process – or if required by the Minister. Once designated, an abbreviated EA process will only determine whether a project is "likely to cause significant adverse environmental effects that fall within the

*(Continued on page 3)*

## Inside this issue ...

Every spring, federal and provincial governments chart their priorities for the coming year through their annual budgeting process. In recent years, this dollars and common sense exercise has provided an opportunity/excuse to tinker with established environmental programs and policies. Whether governments are chopping budgets, revamping legislation, announcing new pet projects or eliminating old ones, the changes can be significant. We've pored through the ponderous budget documents and the follow-up budget bills line-by-line to sift out some of the key environmental highlights.

## Budget bill does much more than refocus EA ...

Bill C-38 also makes significant amendments to a number of other federal environmental statutes, including

- The ***Fisheries Act*** — refocusing the Act on commercial, recreational and Aboriginal fisheries rather than habitat protection, streamlining the authorizations issued, allowing certain provisions to be delegated to another federal department or a province, and revamping the enforcement provisions (see full story on **page 5**)
- The ***Species at Risk Act*** — allowing authorizations with longer terms, clarifying the authority to renew authorizations, setting time limits for the issuance and renewal of permits, and permitting the National Energy Board (NEB) to issue a certificate when required to do so by the Governor in Council
- The ***National Energy Board Act*** — allowing the Governor in Council to make the decision about the issuance of certificates for major pipelines, establishing time limits for regulatory reviews under the Act, enhancing the powers of the NEB Chair and the Minister "to ensure that those reviews are conducted in a timely manner," and establishing an administrative monetary penalty system
- The ***Canada Oil and Gas Operations Act*** — giving the National Energy Board federal jurisdiction over navigation in respect of pipelines and power lines that cross navigable waters
- The ***Canadian Environmental Protection Act, 1999*** — revising the disposal at sea provisions and giving the Minister of the Environment the authority to renew permits in prescribed circumstances
- The ***National Round Table on the Environment and the Economy Act*** — eliminating NRTEE on the grounds that the Round Table is no longer needed now that "a mature and expanded community of environmental policy stakeholders has demonstrated the capacity to provide analysis and policy advice for the Government of Canada"
- The ***Parks Canada Agency Act*** — allowing the Agency to enter into agreements with other ministers or bodies to assist in the administration and enforcement of the Act, eliminating the requirements for annual corporate plans, reports and audits, and requiring the Environment Minister to review management plans at least every ten years
- The ***Kyoto Protocol Implementation Act*** — repealing the Act to formally end Canada's participation in the United Nations Framework Convention on Climate Change.

## Federal Budget has big impact on environmental programs

Ottawa is using its *Economic Action Plan 2012* to make a number of other changes to its environmental programs and policies. The Plan will require both Environment Canada and Parks Canada to cut costs and "achieve efficiencies" by consolidating and streamlining their administrative functions, program management, planning, and reporting requirements. They will also be required to forge partnerships in the areas of environmental enforcement and monitoring to eliminate redundancies and reduce costs. Over the next three years, Environment Canada must pare $88.2 million from its budget, while Parks Canada will lose $29.1 million. In addition, the Plan

- expands the eligibility for the accelerated capital cost allowance for clean energy generation equipment to include a broader range of bioenergy equipment
- applies the Metal Mining Effluent Regulations under the *Fisheries Act* to non-metal diamond and coal mines
- allocates $50 million over two years to support the *Species at Risk Act*
- compensates property owners and municipalities in Port Hope and Clarington for losses related to the clean-up of low level radioactive waste
- implements the Canada-United States Action Plan on Regulatory Cooperation designed to align the regulatory approaches in the areas of agriculture and food, transportation, chemical management, the environment, and other cross-sectoral areas.

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legislative authority of Parliament, or that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that is required for the carrying out of the project."

**Consolidating authority & setting deadlines**

Currently, responsibility for EA is shared by some 40 federal agencies. In the future, EAs for most projects will be delegated to the Canadian Environmental Assessment (CEA) Agency. The Canadian Nuclear Safety Commission and the National Energy Board will be responsible for projects within their mandates, such as nuclear projects, and interprovincial/ international pipelines and power lines.

The current structure of assessments will be replaced by just two kinds of reviews: either a standard EA or a review panel. Then, to ensure EAs are more predictable and timely, a number of deadlines will be imposed.

- upon receipt of an adequate project description, the CEA Agency must decide within 45 days whether a federal EA is necessary
- standard EAs led by the CEA Agency must be completed within 12 months
- panel reviews conducted under the *CEA Act 2012* must be completed within 24 months, while those under the *NEB Act* must be finished within 18 months.

The Minister of the Environment may extend a timeline by up to three months. Further extensions may be granted by the Governor in Council. These timelines apply to the deliberations of government agencies, and do not affect the amount of time a project proponent needs to gather information. In addition, the government has indicated that legally binding timelines will also be set for key regulatory permitting processes under the *Fisheries Act*, *SARA*, the *Navigable Waters Protection Act*, *CEPA* and the *Nuclear Safety and Control Act* (*NSCA*).

**Limiting intervenors to "interested parties"**

According to s.24 of the *CEA Act 2012*, the responsible authority must ensure that the public is provided with "an opportunity to participate" in the EA. This will include a 20-day comment period during the initial screening period after an online notice is posted, as yet undefined public participation during a standard EA, and a chance to comment on draft EA reports near the end of the process. The government must also establish participant funding programs and will continue to post project information and decisions on the Canadian Environmental Assessment Registry Internet site.

If a certificate is to be issued under s.54 of the *NEB Act*, the right to participate is limited to an "interested party." Under s. 2(2), a person is an "interested party" if he or she is "directly affected by the carrying out of the

**Considering a shorter list of environmental effects**

According to s.5(1) of the *CEA Act 2012*, federal authorities will only consider environmental changes that are "within the legislative authority of Parliament," namely changes affecting

- fish as defined in s.2 of the *Fisheries Act* and fish habitat as defined in s.34(1) of that Act (the latter being a provision that will be amended by another section of Bill C-38)
- aquatic species as defined in s.2(1) of the *Species at Risk Act*
- migratory birds as defined in s.2(1) of the *Migratory Birds Convention Act, 1994*
- any other component of the environment that may be set out in Schedule 2 at some time in the future.

To assess a project's impacts on Aboriginal peoples, a review panel or authority must also consider the effect of environmental changes on

- health & socio-economic conditions
- physical & cultural heritage
- the current use of lands and resources for traditional purposes, and
- any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Under s.19(3), the EA of a designated project may also take into account "community knowledge and Aboriginal traditional knowledge."

designated project" or has "relevant information or expertise." Whether or not one is deemed an "interested party" is left to the discretion of the responsible authority overseeing the EA (under s.15(b)) or the review panel (under s.38).

**Adding an enforcement component**

As promised, the new Act incorporates a number of "stronger environmental enforcement and compliance tools" that should fill a major gap in the administration of federal EAs. Federal inspectors will be given the authority to examine whether or not conditions set out in an EA decision statement are met. If proponents of major projects fail to comply with the conditions set out in the decision statements, they could face proposed penalties ranging from $100,000 to $400,000.

Less serious contraventions of the *CEA Act 2012*, *NSCA*, and the *NEB Act* would be subject to administrative monetary penalties. These could range from $25,000 to a maximum of $100,000 for the *NSCA* and the *NEB Act.* Penalties under the *CEA Act 2012* will be established through regulation.

Federal authorities will also undertake follow-up programs to verify whether the environmental effects predicted in EAs are accurate and to determine if mitigation measures are working as intended. In addition, Ottawa will introduce legally enforceable conditions for permits issued under *SARA* and authorizations under the *Fisheries Act*. This means proponents will have to comply with the conditions set out in these permits and authorizations or face penalties.

**What are the next steps?**

Once the *CEA Act 2012* receives Royal Assent, the government will need to develop a number of regulations – including the designated project list, EA procedures and requirements, and participant funding rules – to make the new Act operational. Transition provisions cover those projects where an EA has been started under the existing Act, but not completed. For example, EAs of "low-risk" projects will cease when the *CEA Act 2012* comes into force "to ensure resources are allocated to the review of major projects." Comprehensive studies will be completed under the current Act as if it had not been repealed, in accordance with the 365-day timeline currently set out in regulations.

However, under s.126, the new *CEA Act 2012* will apply to ongoing review panels. This will mean the EA of the controversial Enbridge Northern Gateway project will likely fall under the new Act, the list of eligible intervenors will be slashed, the timeline will be compressed, and the Cabinet will be given the authority to overrule the Review Panel's final recommendation if it sees fit.

**Ottawa will support Aboriginal consultation during EAs ...**

The government's "Responsible Resource Development" initiative, released just prior to Bill C-38, contains a number of measures to "ensure that Aboriginal groups are more fully engaged in the environmental assessment and regulatory permitting process from beginning to end and that possible impacts on their potential or established Aboriginal or Treaty rights are given due consideration in decision-making." To this end, the government says it will

- integrate Aboriginal consultations into the new EA and regulatory processes
- provide funding specifically to support consultations with Aboriginal peoples to ensure their rights and interests are respected
- designate a lead department or agency as a single Crown consultation coordinator for each major project review
- negotiate consultation protocols or agreements with Aboriginal groups to establish more clearly what the expectations and level of consultation should be in project reviews
- negotiate memoranda of understanding with provincial/ territorial governments to align their EA processes and improve the involvement of Aboriginal groups, project proponents and government organizations.

To support consultations with Aboriginal peoples related to projects assessed under the *CEA Act 2012*, the federal *Economic Action Plan 2012* proposed allocating $13.6 million over two years to the CEA Agency.

## Ottawa cuts habitat protection from federal *Fisheries Act*

The federal budget Bill C-38 proposes sweeping changes to the habitat and environmental protection provisions of the *Fisheries Act*, granting the Minister wider discretionary authority, and allowing a number of powers to be delegated to other federal or provincial agencies. The amendments will restrict management and enforcement provisions to only those activities that impact commercial, recreational or Aboriginal fisheries. Bill C-38, the *Jobs, Growth and Long-term Prosperity Act,* was introduced for First Reading on April 26, 2012, and quick passage is anticipated.

The current authorization process for projects under the Act would be revamped into three categories. Through regulation, the Minister would be given the power to identify "ecologically significant areas" for fisheries, and proponents for projects in these areas would be required to submit plans for review. Authorizations will not be required for projects occurring in waters that do not support the recreational, commercial or Aboriginal fisheries. Medium-risk projects would be subject to a permit-by-rule system, where a proponent must meet certain published standards. For instance the Minister could adopt by reference fisheries protection standards, established by a province or industry, which are recognized as best practices. Finally, project reviews would not be required for designated classes of low-risk works or for projects in certain classes of waters.

The Minister could delegate certain day-to-day management powers, including some authorizations under the Act, to other ministries and federal agencies – such as the National Energy Board or the Canadian Nuclear Safety Commission – or hand these off to provincial authorities, if provincial regulations are deemed equivalent. The Department would also be able to enter into agreements with third parties – such as conservation groups or professional organizations – to carry out and "further the purposes of the Act."

**Maximum fines and penalties will rise**

The compliance provisions of the Act have been rewritten, revising the powers of inspectors, implementing minimum penalties and raising the maximum fines for individuals, corporations and "small revenue" corporations. For example, a subsequent conviction on indictment can bring a penalty as high as $12 million and, for an individual, a term of imprisonment of up to three years. In addition the time limit for proceedings by way of summary conviction for an offence under this Act has been extended from two years to five. There is also a new "duty to notify" requirement that states that proponents shall report an occurrence that results in the harmful alteration, disruption or destruction of a fishery.

However, the extent to which some of these tougher penalties will ever apply is unclear. Under new s.43(1)(5), the government may make regulations "exempting any Canadian fisheries waters" from the application of ss.20 and 21 (which cover fishways, dams and obstructions), s.35 (which prohibits harm to certain fisheries) and s.38(4) (the new duty to report). In addition the

**Ottawa to refocus *Fisheries Act* on fisheries "that matter" ...**

Ottawa says the current *Fisheries Act* is "indiscriminate and unfocused and [does] not reflect the priorities of Canadians." It pledges, instead, to "minimize restrictions on everyday activities that have little to no impact on Canada's fisheries," while protecting only those fisheries that Canadians value.

A **commercial fishery** is a fishery for the purposes of sale, trade, or barter, under license, whether individual or communal.

A **recreational fishery** is a fishery for personal use or sport.

An **Aboriginal fishery** covers fish caught for food (including subsistence), social or ceremonial purposes. Aboriginal groups may fish under all three of these categories.

administration and enforcement of ss.36(3) to (6), which deal with the deposit of a deleterious substance (and the authorization of such deposits), can be delegated to another minister.

**Stripping "habitat" from the Act**

As had been rumoured for months, the government is eliminating habitat protection from s.35(1) of the *Fisheries Act*. As the provision currently reads, "no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat." The proposed amendment would restrict this prohibition to "any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery." This is followed by a lengthy list of exceptions for those works, undertakings or activities prescribed in regulation, undertaken in accordance with prescribed conditions, authorized by the Minister and/or authorized by "a prescribed person or entity."

"The government has been clear that the existing policies do not reflect the priorities of Canadians," says the Minister of Fisheries and Oceans Keith Ashfield. "We want to focus our activities on protecting natural waterways that are home to the fish Canadians value most instead of on flooded fields and ditches."

As a result of these amendments, the current Policy for the Management of Fish Habitat, including the "no net loss" principle, will be reviewed and revised to reflect the Department's focus on managing threats to recreational, commercial or Aboriginal fisheries. However, the Minister will retain the power to draft regulations to address habitat destruction, the incidental killing of fish and aquatic invasive species that may threaten these fisheries.

**Ceding enforcement to the provinces**

In its retreat from the day-to-day duties of environmental management, Ottawa will be able to delegate responsibility for certain provisions of the Act to a province or even a third-party stakeholder. Section 4.1 (1) permits the Minister to enter into an agreement "to further the purposes of this Act," including an agreement facilitating

- joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs
- the exchange of scientific and other information
- public consultation or the entry into arrangements with third-party stakeholders.

Such agreements could also cover programs, projects, standards, guidelines, codes of practice and even public consultations currently handled by Ottawa. In addition, if it is deemed that provincial statutes are "equivalent in effect to a provision of the regulations," under new s.4.2 (1) Ottawa can declare that certain provisions of *Fisheries Act* or its regulations no longer apply in that province. Forthcoming regulations will establish the conditions under which the Minister may enter into or renew these kinds of agreements.

## Ontario uses 2012 budget to introduce myriad of environmental amendments

Ontario is amending a number of its key environmental statutes, including the *Endangered Species Act* and the *Fish and Wildlife Conservation Act*, to cut red tape and speed approvals and permits. The proposed amendments are included in the lengthy schedules to Bill 55, the *Strong Action for Ontario Act (Budget Measures), 2012*. In other budget-related actions, the province is phasing out the Ontario Clean Energy Benefit for major consumers using over 3,000 kWh per month, cutting the budgets of the Ministries of Environment and Natural Resources, and revising the fees it collects for water takings, Environmental Compliance Approvals and the related Environmental Activity and Sector Registry, and hazardous and liquid industrial wastes.

By including the legislative amendments in a budget bill, the province is exempt from the consultation requirements of the *Environmental Bill of Rights, 1993* (*EBR*) and does not have to post them on the Environmental Registry for public review and comment. Using such omnibus legislations to amend environmental laws has attracted the criticism of the Environmental Commissioner of Ontario (ECO). At best it "complicates the *EBR* process", says the ECO. "At worst, it can obstruct the public's right to participate in environmental decision making."

### MOE & MNR to do more with less in 2012/13

While the budgets of almost all Ontario ministries and agencies either held the line or received modest increases for 2012-13, the Ministries of the Environment and Natural Resources were both hit with significant cutbacks. An addendum to the budget, the Report on Expense Management Measures, provides a detailed list of budget cuts planned over the next three years. For example, MOE will lose $30 million that was to be used to fund community demonstration projects, municipal water sustainability planning, and education and public awareness in support of the *Water Opportunities and Water Conservation Act, 2010*. However, the regulations that would have required municipalities to develop these plans are not in place and these resources will be reallocated to other government priorities. The Drive Clean Office, which manages Ontario's mandatory vehicle-emissions inspection and maintenance program, will be fully funded by its own revenue and operate according to a Delegated Administrative Authority (DAA) model.

| MNR & MOE Budgets ($ millions) | | | | |
|---|---|---|---|---|
| | 2009/10 | Actual 2010/11 | Interim 2011/12 | Plan 2012/13 |
| MOE | $375 | $521 | $536.2 | $485.7 |
| MNR | $685 | $705 | $713.2 | $687.1 |

In order to "transform the stewardship and conservation of Ontario's natural resources in the most fiscally responsible way," the province will amend key parts of MNR's legislation, regulations, policies and guidelines to allow streamlining and to automate permitting processes and requirements. Legislative amendments will enable a shift to 'permit by rule' rather than individual authorizations, and empower the Minister to delegate certain approvals to third parties. MNR is to pull back from detailed review and approval of site-specific activities, and deliver its resource management activities with a stronger regional focus and fewer field offices. In addition, its science and delivery activities will be shifted from a species-by-species approach to a risk-based ecosystem/regional approach.

Among the more contentious changes are proposed amendments to Ontario's *Endangered Species Act* that would

### Ontario's budget bill amends the following environmental statutes …

- *Endangered Species Act* to extend deadlines, augment exemptions, increase Ministerial discretion and streamline approvals and permitting
- *Fish and Wildlife Conservation Act* to delegate the power to issue certain licences and to authorize exemptions in accordance with new regulations and standards
- *Lakes and Rivers Improvement Act* to coordinate water-management planning with construction approval for dams and other structures on a lake or river
- *Niagara Escarpment Planning and Development Act* to enable joint review and public consultation on the Greenbelt Plan, the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan
- *Crown Forest Sustainability Act* to provide some flexibility in forest management planning, to permit the Minister to develop exceptions to the requirements of the CFSA, to change the term and extension of forest resource licences, and to permit the charging of certain cost-recovery fees
- *Ontario Forest Tenure Modernization Act* to give the minister the authority to make loans to Ontario local forest management corporations, with the approval of the Minister of Finance
- *Kawartha Highlands Signature Site Park Act* to remove the management advisory board of the park, on a date to be determined by the Minister
- *Provincial Parks and Conservation Reserves Act* to provide more flexibility in areas such as park management planning (by removing time limits for the duration, examination and amendment of management direction plans) , and to provide for new permits for private, non-commercial land use
- *Public Lands Act* to make it possible for the Minister to delegate selected functions to persons outside government, to remove Crown liability for all actions of the delegate, and increase exemptions through regulation for obtaining work permits on public lands.

protect from prosecution individuals engaged in various infrastructure projects, including the installation and operation of various green energy and waste management systems. Section 10 of the Act would be amended to exempt the following systems or facilities:

- a communications system
- an electric power system, oil or gas pipeline, alternative energy system or renewable energy system
- a transportation corridor or transportation facility
- a waste management system
- water works, wastewater works, drainage works, stormwater works and associated facilities.

Additional exemptions are provided to a person who is engaged "in maintaining, repairing or replacing infrastructure," or in "a non-commercial activity on lands, other than public lands, that are within 50 metres of the person's primary residence or in any other area prescribed by the regulations." Some critics are concerned that the latter exemption could be expanded to cover all private landowners. The amendments also extend a number of deadlines, including the deadlines for preparing recovery strategies and publishing government response statements. In some cases, the deadlines are pushed back indefinitely. Finally, the Minister has been granted much greater powers to grant exceptions under s.18 of the *Endangered Species Act*.

| Meet Willms & Shier Legal Experts at these Upcoming Events | | |
|---|---|---|
| May 8 | Air & Waste Management Association, Ontario Section 2012 Noise Conference | **John Willms** presents on the legal implications of NPC-300. |
| May 24 | Ferro Canada Inc. Symposium | **Marc McAree** discusses environmental due diligence for contractors and sub-contractors that carry out environmental remediation work. |
| May 28 | Society of Public Insurance Administrators of Ontario (SPIAO) | **Marc McAree** discusses the latest developments in environmental law and environmental risk management for governmental bodies, including municipalities, boards, commissions and conservation authorities. |
| May 29 | Brownfields Marketplace Summit Series - Groundwater Contamination | **Donna Shier** discusses the impact of new regulations on groundwater testing and new groundwater standards. |
| May 30 | Ontario Bar Association, Environmental Law Section | **Marc McAree** co-chairs a three-part seminar series, titled *The Anatomy of an Environmental Civil Action*, and will be a speaker at the second session on September 20, 2012. |
| June 18-19 | The Canadian Institute, The Fundamentals of Aboriginal Law | **Juli Abouchar** co-chairs this event and leads a post-course workshop on the challenges of developing an impact benefit agreement from scratch. |

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