

July 13, 2017

An Overview of the Environmental and Regulatory Reviews Discussion Paper – Let the Discussion Begin

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Document Commented On: [Environmental and Regulatory Reviews Discussion Paper, Government of Canada, June 2017](#)

On June 29, 2017, the Government of Canada released a [Discussion Paper](#) outlining a series of “system-wide changes” the Government “is considering to strengthen Canada’s environmental assessment and regulatory processes”. The changes are directed at the Government’s commitment to “deliver environmental assessment and regulatory processes that regain public trust, protect the environment, introduce modern safeguards, advance reconciliation with Indigenous peoples, ensure good projects go ahead, and resources get to market” (at 3).

The Discussion Paper outlines proposed changes to the federal environmental assessment and *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#), energy regulation under the *National Energy Board Act*, [RSC 1985, c N-7](#), protection of fish and fish habitat under the *Fisheries Act*, [RSC 1985, c F-14](#), and safeguarding navigation on waterways under the *Navigation Protection Act*, [RSC 1985, c N-22](#).

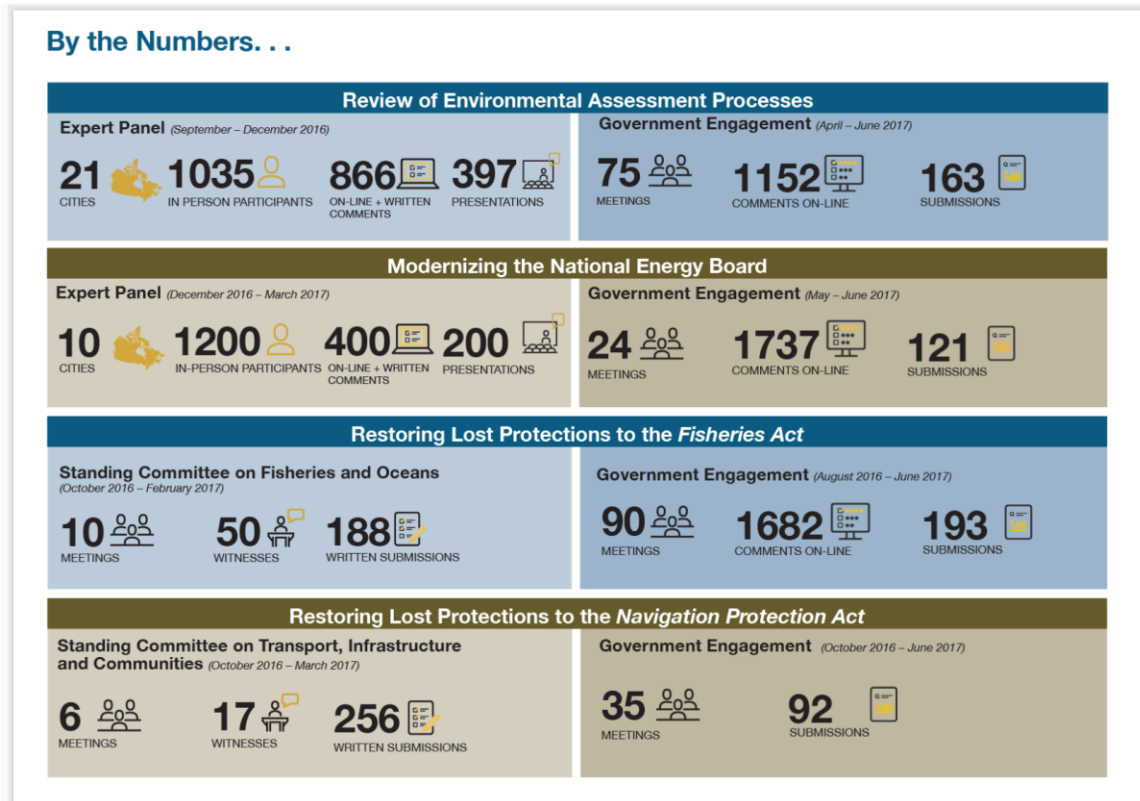
The purpose of this post is to provide a general overview of the changes to the environmental assessment and regulatory processes identified as under consideration in the Discussion Paper. More detailed consideration of specific aspects of these proposed changes is left to forthcoming posts.

A Few Preliminary Thoughts

Before providing this overview, it seems appropriate to offer three preliminary thoughts.

First, the Discussion Paper is the next step in a review of federal environmental and regulatory processes commenced by the Government of Canada in June 2016. This review was made up of four separate processes: (1) a review of the federal environmental assessment processes; (2) modernizing the National Energy Board; (3) restoring lost protections and incorporating modern safeguards to the *Fisheries Act*; and (4) restoring lost protections to the *Navigation Protection Act*. Expert Panels (see [here](#) and [here](#)) were appointed to provide advice and recommendations relating to the review of the federal environmental assessment processes and modernizing of the National Energy Board. A [Multi-Interest Advisory Committee](#) was put in place to advise the Expert Panel on the review of the federal environmental assessment processes. Two separate Standing Committees considered the issues associated with restoring lost protections to the *Fisheries Act* and the *Navigation Protection Act* respectively.

As the table below (extracted from the Discussion Paper at 3) shows, the resulting processes involved hundreds of meetings held in 31 different cities and thousands of in-person, on-line and written comments reports (see, [here](#), [here](#) and [here](#) for submissions made by University of Calgary Law faculty to the Expert Panel on the review of the federal environmental assessment processes; [here](#), [here](#), [here](#) and [here](#) for expert opinions provided by University of Calgary Law faculty members to the Expert Panel on EA; and [here](#) for a brief submission to the Standing Committee in relation to the *Fisheries Act* changes).



The resulting reports and recommendations provided to the Government were substantial. The Expert Panel for the Review of Environmental Assessment Processes (the “Expert Panel on EA”) produced a 124 page [Final Report](#) (see [here](#), [here](#) and [here](#) for ABlawg posts commenting on aspects of this Report; and [here](#) for my written submission to the Canadian Environmental Assessment Agency on the Report) while the main report of the [NEB Modernization Expert Panel Report](#) totalled 87 pages (see [here](#) for an ABlawg post commenting on this report). The [Report of the Standing Committee on the *Fisheries Act*](#) totalled 76 pages while the [Report of the Standing Committee on the *Navigation Protection Act*](#) tabled a 52 page report.

Yet, beyond stating very generically that thanks to the advice and recommendations provided by the expert panels and parliamentary committees—along with “additional inputs to government directly”—the Government of Canada is “ready to shape a path to deliver on our commitments” (at 4) and providing the occasional quote from reports alongside the text, the Discussion Paper does not engage with the advice and recommendations provided through these extensive, and expensive, processes. The changes under consideration in the Discussion Paper at times follow, and at other times seemingly disregard, in whole or in part, the advice and recommendations put forward in the various reports, but the rationale for doing so is not explained. Also unclear is how information gathered outside the expert panels and parliamentary committee processes —

including “feedback from Canadians provided to Government through on-line engagement, face-to-face meetings, views submitted directly to departments, comments from provinces, territories and Indigenous peoples, and practical lessons learned over the past 18 months” (at 6) — factored into the contemplated changes put forward in the Discussion Paper. Instead, the Discussion Paper adopts a format that provides a general list of ways in which the current system can be improved alongside a list of changes that are being considered.

This leads to the second general comment on this Discussion Paper — it is short and the changes being considered are framed very generally. In many instances more detail is required before the effect of the potential changes can be fully understood. And while the Discussion Paper is explicit in seeking views to help fill in some of this detail, the questions are very general and open-ended (e.g. how do we respectfully and meaningfully incorporate Indigenous knowledge? (at 12); how do we provide greater confidence in the science behind project assessments? (at 12); what are the most important steps we should take to improve cooperation across jurisdictions? (at 17)). These are the very questions that were, or should have been, asked at the beginning of the review process that commenced over a year ago, rather than those that remain to be answered in a Discussion Paper intended to serve as a prelude to the bringing forward of a “comprehensive suite of changes” in the fall of 2017 (at 7).

The final general comment relates to the seven principles identified in the Discussion Paper as guiding changes to the environmental assessment and regulatory processes. These principles are as follows:

- fair, predictable and transparent environmental assessment and regulatory processes that build on what works;
- enhanced participation of Indigenous peoples to advance Canada’s commitment to the *United Nations Declaration on the Rights of Indigenous Peoples*;
- inclusive and meaningful public engagement;
- timely and evidence-based decision-making; and
- one project - one assessment, with the scale of assessment aligned with the scale of the project and its potential impacts.

Taken together, these principles guide the Government towards creating fair, predictable and transparent environmental assessment and regulatory processes which provide opportunities for inclusive and meaningful participation, from the Indigenous peoples and the public, and lead to timely and evidence-based decision-making. But to what end? The stated principles do not direct the changes substantively towards the overarching goal of protecting the environment or achieving environmental sustainability. Perhaps not surprisingly, therefore, these substantive principles are missing from the resulting discussion of the proposed changes. The only mention of sustainable development is on page 22 of the Discussion Paper, and then only in an extract of a quote from the Committee Report relating to fish and fish habitat. The precautionary principle is mentioned (again on page 22) but only in relation to the discussion of enhanced protection for Canada’s fish and fish habitat. The principles of inter- and intra-generational equity are absent from the discussion. So too is the polluter pays principle.

It would seem to go without saying that next generation environmental assessment and regulatory processes need to be guided by substantive environmental principles and that any changes to the existing frameworks should be guided by these principles—but it should not literally go without saying. Change to environmental assessment and regulatory processes must

of course be guided by principles relating to sound procedure, but to be meaningful those procedural changes must be measured against and, and therefore guided by, best-practice environmental principles.

The Proposed Path Forward

The Discussion Paper outlines a series of system-wide changes under consideration by the Government of Canada. The proposal includes the following seven crosscutting areas of change:

- Addressing Cumulative Effects;
- Early Engagement and Planning;
- Transparency and Public Participation;
- Science, Evidence and Indigenous Knowledge;
- Impact Assessment;
- Partnering with Indigenous Peoples; and
- Cooperation with Jurisdictions.

Key changes under consideration in relation to each of these cross-cutting areas are worth mentioning here (with the changes relating to impact assessment summarized in the following section).

In relation to cumulative effects, the proposed approach includes developing and strengthening national environmental frameworks — such as the Pan-Canadian Framework for Clean Growth and Climate Change — to inform regional assessments. The proposed approach also includes conducting strategic assessments, to explain how environmental frameworks apply to activities subject to federal jurisdiction, and regional assessments, to guide planning and management of cumulative effects, identify potential impacts on the rights and interests of Indigenous peoples, and inform project assessments.

The Government of Canada is also considering an early, proponent led, planning and engagement phase to both support better project proposal design and more effective assessments, and seek consensus on the project assessment process. Government representatives will engage directly with Indigenous peoples in order to discuss and understand potential project impacts. This early planning and engagement phase will then result in a publicly available initial list of issues to be considered in an assessment, upon which feedback will be sought. It will also allow for the development of guidance to the proponent relating to what will be assessed and how, the type of information required, the nature of interests and rights that need to be considered and the expected timeline to arrive at a decision.

In relation to public participation, open opportunities for meaningful public participation in assessments and regulatory reviews, the elimination of the ‘standing’ test used by the NEB, and improved participant funding for Indigenous peoples and the broader public are all under consideration. Proposed changes to allow for greater transparency include increasing user-friendly on-line public access to project information generated during environmental and regulatory reviews, including follow-up, monitoring, compliance and enforcement, and greater transparency on the reasons for environmental assessment and regulatory decisions, together with timely feedback as to how public input was considered. The Discussion Paper also mentions that inclusive monitoring and compliance activities, allowing life-cycle regulators and permitting

departments to work closely with Indigenous peoples, communities, and landowners, are under consideration.

The changes contemplated in relation to Science, Evidence and Indigenous Knowledge include providing Canadians with better information to both understand and influence the impact of proposed development. This will be facilitated by a proposed move towards an open science and data platform with available science, evidence and Indigenous knowledge. Also under consideration is incorporating Indigenous knowledge with other sources of evidence and reinforcing rigour through peer reviews of and evidence provided in the assessment phase.

With a view to cooperating and forming partnerships that recognize Indigenous rights throughout these processes, the Discussion Paper states that several matters are under consideration. These include: creating space to enable increased Indigenous involvement, including through Indigenous-led assessments, in a manner that is responsive to Indigenous rights, jurisdiction and decision making; the creation of a single government agency with increased capacity to coordinate consultation and accommodation; allowing for the sharing of administrative authority and management responsibility with Indigenous peoples as is done with other jurisdictions; engaging early and seeking to achieve free, prior and informed consent through processes based on mutual respect and dialogue; and increasing the participation of Indigenous peoples in assessment and regulatory processes, including on assessment boards and review panels themselves. How these various proposals might work together is not explored in the Discussion Paper.

And finally, several changes relating to cooperation with jurisdictions are also under consideration. Notably, this includes more comprehensive cooperation with interested jurisdictions (including provinces, territories and Indigenous jurisdictions) to support the one project – one assessment principle. This includes making legislative provision to allow for substitution of project assessments that align with federal standards and working with these other jurisdictions to guide planning and management of cumulative effects.

Proposed Program and Legislative Changes

The Discussion Paper also describes several legislative changes being considered to the *Canadian Environmental Assessment Act, 2012*, the *National Energy Board Act*, the *Fisheries Act* and the *Navigation Protection Act*. Key features of these changes are described below.

Impact Assessment and the *Canadian Environmental Assessment Act, 2012*

The Discussion Paper states that the Government of Canada is considering “a new approach to environmental assessment for designated projects” (at x). The key governance changes identified in this new approach include the establishment of a single government agency to both conduct federal assessments and coordinate Crown consultations in relation to those projects. In relation to major energy transmission, nuclear and offshore oil and gas projects, the proposal is that this new federal assessment agency will conduct the reviews jointly with the life-cycle regulators for these categories of projects. However, final decision making, as to whether or not it is in the ‘public interest’ that a project precede, is to remain with Minister(s) or Cabinet to “ensure” accountable government. Proponents are also assigned a role under this proposal. They will lead an early planning phase with direction from government. The proposal also contemplates the creation of advisory committees for Indigenous peoples, stakeholders and experts.

As to what will be assessed, the Discussion Paper proposes maintaining the current Project List approach but adding a mechanism with clear criteria to periodically review and update the list to “ensure those types of major projects that have the greatest potential impacts in areas of federal jurisdiction are assessed” (at 18). The proposal also contemplates clear criteria and a transparent process to allow projects that “could have adverse impacts on areas of federal jurisdiction” and which are on the Project List to be assessed and to allow projects that are on the Project List to be excluded. What type of criteria, or process, might be put in place to review the Project List or allow projects to be included or excluded from the Project List is not explored in the Discussion Paper.

The Discussion Paper proposes that the scope of assessment be broadened to include both positive and negative environmental, economic, social and health impacts. It also proposes the use of the [Gender-Based Analysis Plus](#) (GBA+) analytical tool in assessments to better understand impacts on communities and an explicit requirement to assess impacts on Indigenous peoples. Reinforcing the need for rigour, the Discussion Paper also refers to peer reviews of science and evidence in the assessment phase.

To further the “one project – one assessment” principle, the Discussion Paper proposes the development of cooperation agreements with “interested jurisdictions”, allowing for substitution where those processes align with federal standards. Significantly, Indigenous governments are recognized as potential “interested jurisdictions”, with processes designed to ensure Indigenous jurisdiction, law and practises are recognized. The proposal extends to increasing the flexibility to allow the Government of Canada to “defer to or harmonize with environmental assessment processes created pursuant to Indigenous governments” (at 19).

The proposals in the Discussion Paper around compliance and enforcement retain the authority for life-cycle regulators to integrate, enforce and monitor impact assessment conditions resulting from reviews under their jurisdiction conducted jointly. In addition, while maintaining authority for enforceable conditions generally, the Discussion Paper also indicates that the Government of Canada is exploring a mechanism to amend project conditions to support adaptive management and technological advances. A role for Indigenous peoples, communities and landowners in monitoring and compliance activities is also said to be under consideration. As to timelines, the Discussion Paper indicates that legislated assessment timelines will be maintained but with flexibility built in for exceptional circumstances.

Modernization of the National Energy Board

The Discussion Paper identifies several governance related changes under consideration in relation to the NEB. These changes include separating the roles of the Chief Executive Officer and Chairperson of the Board and creating a corporate-style executive board. Also under consideration is the creation of separate hearing commissioners to review projects and provide regulatory authorizations. The diversity of the board and hearing commissioners will be enhanced, with particular attention to increasing Indigenous representation, with the requirement that board members and commissioners be resident in Calgary eliminated.

Increased opportunities for public participation in technical hearings together with an advocate to support landowners and alternatives to formal adjudicative processes are also under consideration. As is the case throughout the Discussion Paper, a greater role for Indigenous

peoples is flagged, with more room for dialogue with Indigenous peoples on energy policy, capacity building to help coordinate Crown consultations, and an expanded role of Indigenous peoples in the monitoring of pipeline and other energy infrastructure.

Restoring Lost Protections to the *Navigation Protection Act*

The principal change identified in relation to the *Navigation Protection Act* is the introduction of a more transparent process, with clearly developed criteria, for adding navigable waters to the list of waterways subject to the Act. The regulation of obstructions and certain classes of works on Canada's navigable waters is also under consideration. The development of a complaint mechanism relating to works on unscheduled navigable waters that give rise to concerns about the public right of navigation is also being considered.

Restoring Lost Protections to the *Fisheries Act*

Amongst the several changes relating to the *Fisheries Act* proposed in the Discussion Paper, the most notable is the return of the prohibition against the harmful alteration, disruption or destruction (HADD) of fish habitat without approval. Other key proposed changes include enhanced participation of Indigenous peoples in the conservation and protection of fish and fish habitats, planning and integrated management that incorporates modern resource management principles, clarification of when *Fisheries Act* authorizations are needed for projects and the identification of measures to avoid and mitigate harm to habitat through development and enforcement of standards and codes of practice. Increased reporting requirements for project proponents around activities affecting fish and fish habitat along with the provision of transparent access are also under consideration.

Where to From Here?

The Government of Canada is now seeking comments prior to August 28, 2017 on the legislative changes flagged for consideration in the Discussion Paper. From there we are told that the government will reflect on the input it receives, from this and other consultation and engagement with the provinces and territories, Indigenous peoples and a variety of stakeholders, to inform proposed changes to Canada's environmental assessment and regulatory processes in the fall of 2017. This means that time is short even though the Discussion Paper lists an extensive number of changes to the environmental assessment and regulatory processes currently under consideration. Let the discussion begin.

This post may be cited as: Sharon Mascher "An Overview of the Environmental and Regulatory Reviews Discussion Paper – Let the Discussion Begin" (13 July, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/07/Blog_SM_Discussion_Paper.pdf

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