



Canada's New Environmental Landscape

Presented by JoAnn P. Jamieson

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Big Changes

- Past 2 years, federal government working to upgrade environmental and regulatory processes
- In February, 2018, introduced two significant pieces of legislation. If passed, Bills C-68 and C-69 will:
 - significantly amend the *Fisheries Act*;
 - overhaul Canada’s environmental assessment regime;
 - broaden navigable waters legislation; and
 - replace the National Energy Board with the “Canada Energy Regulator”.

Big Aims

- Better rules to protect the environment, fish and waterways
- Rebuild public trust in decision-making regarding energy and resource developments
- More timely and predictable project reviews
- Promote reconciliation with Indigenous peoples:
 - through early and inclusive engagement,
 - respect for constitutionally-protected rights and TK
 - Involvement in decision-making

Restoring lost protections for fish and fish habitats



... back to what we HADD



Bill C-68 *An Act to amend the Fisheries Act and other Acts in consequence*

- Aims to provide a framework for the proper management and control of fisheries and the conservation and protection of all fish and fish habit.
- Most significant features:
 - removes the prohibition on causing “serious harm to fish”, which focuses on permanent harm to fish and fish habitat;
 - restores the express prohibitions against killing fish (except by authorized fishing); and
 - restores the prohibition against the harmful alteration, disruption or destruction of fish habitat (“**HADD**”);

Current *Fisheries Act*

- Removal of the HADD provision in 2012 significantly narrowed the scope and nature of activities covered by the protection. This is because the “serious harm” provision:
 - focuses on protecting only commercial, recreational or Aboriginal fisheries”;
 - the degree of harm permitted is much higher (actual fish deaths or permanent alteration or destruction of habitat);
 - the requirement to demonstrate that habitat is permanently altered or destroyed has allowed more damage because if there is a possibility of future restoration – however remote – it can be argued that the habitat alteration or destruction is not permanent.

Bill C-68 – Designed to Increase Protection of Fish and Fish Habitat

- Purposes of Act amended to provide a framework for:
 - the proper management and control of fisheries; and
 - the conservation and protection of fish and fish habitat, including by preventing pollution;
- Expands the definition of “fish habitat” to “water frequented by fish....”, which will result in many more water bodies in Canada falling under regulatory oversight.
- Modernizes the permitting process by:
 - expanding the authority to make regulations authorize/permit works to include both individual and classes of works and “designated projects”;
 - granting the power to establish standards and codes of practice regarding the avoidance of death of fish or HADD; conservation of fish and fish habitat, and the prevention of pollution.

Permitting Process and Codes of Practice

- With the reintroduction of the HADD provision, the government has said it intends to enact regulations that will designate which projects require a federal assessment and permit.
- Certain types of works, undertakings or activities would be permitted to proceed without federal assessment or permits, but would still have to comply with codes of practice established by regulation.
- This new permitting framework and codes of practice are not yet published and are still in the consultation phase.

Other Notable Bill C-68 Amendments

- Powers enabling the Minister to take action to address declining fish stocks
- New power to designate environmentally sensitive areas but also power to authorize work, if satisfied with avoidance and mitigation
- “Fish habitat banks”, which allows for conservation projects in same area to offset project impacts
- Public registry for regulatory instruments, guidelines, orders, authorizations and permits,

Factors to be Considered by Ministry

- When making regulations or orders or when exercising powers related to authorization and permits, the Ministry must consider:
 - Contribution to productivity of relevant fisheries that is likely to be affected by the decision
 - Measures and standards to avoid, mitigate or offset fish death or HADD; and
 - Cumulative effects of carrying on the proposed works
- When making decisions, the Minister may also consider:
 - The precautionary approach and an ecosystem approach;
 - Scientific information;
 - The sustainability of the fisheries at issue;
 - Community knowledge; and
 - Social, economic and cultural factors

Indigenous Peoples

- Number of provisions related to the rights of Indigenous peoples and the utilization of TK including:
 - Specific reference to protection of Indigenous rights under Section 35 of the *Constitution Act, 1982*;
 - Mandatory requirement to consider any adverse effects on section 35 rights;
 - Mandatory requirements to consider traditional knowledge; and
 - Confidentiality of traditional knowledge provided under the *Fisheries Act*.
- Authority for the Minister to enter into agreements with Indigenous governing bodies relating to fisheries and fisheries management (formerly restricted to provinces and territories).

Reception of Bill C-68

- Generally well received, especially return of the HADD provision
- Canadian fish populations have declined by 52% from 1970 -2006. Seen as big step in terms of tools for restoration of depleted species.
- Project proponents cautiously optimistic re: better certainty in permitting process.
- Concern remains in terms of sufficient funding of new framework, as well as enforcement and monitoring of violations.

Bill C-69 *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act*

- Two days later, Bill C-69 was introduced for first reading.
- Enacts the *Impact Assessment Act* , which would repeal the CEAA, 2012.
- Enacts the *Canadian Energy Regulator Act*, which would repeal the *National Energy Board Act*.

Expanded Role of Indigenous Peoples

- Most significant illustration of federal government platform to reconcile with Indigenous peoples to date.
- Legislative requirements to consider impact to Indigenous rights and culture.
- Elevates roles of Indigenous traditional knowledge on footing with scientific.
- Provides seat at decision-making tables through mandatory appointments to advisory committees and appointments to the CER.

New Impact Assessment Process



Impact Assessment Act

- Creates a new Impact Assessment Agency of Canada (“**IAA**”)
- The IAA will become the single authority responsible for conducting all federal impact assessments unless referred to a review panel.
- NEB and the CNSC will no longer have unilateral authority to conduct reviews on their own. NEB ceases to exist.
- Broader scope of assessment to understand how proposed project may also affect health, social and economic issues.

New Strategic and Regional Impact Assessments

The Act establishes three levels of IA:

- **Project-level IAs** - will be conducted by Agency or a review panel.
- **Regional IAs** - are optional and designed to be used to assess baseline conditions and the cumulative impacts of projects and activities in a defined region.
- **Strategic IAs** - will be used to achieve goals in matters of national interest. Intended to evaluate “big-picture” issues such as climate change, biodiversity and species at risk and cumulative effects.

New Early Planning Phase

- Creation of a mandatory early planning phase to promote early engagement of the public and Indigenous peoples.
- Proponent submits a project description, posted by Agency and public invited to comment. Agency offers to consult with potentially affected Indigenous groups
- Agency provides proponent with a summary of issues. Proponent responds with a “notice” which sets out how the proponent intends to address the issues. Notice posted once Agency is satisfied.
- Planning phase must be completed within 180 days.

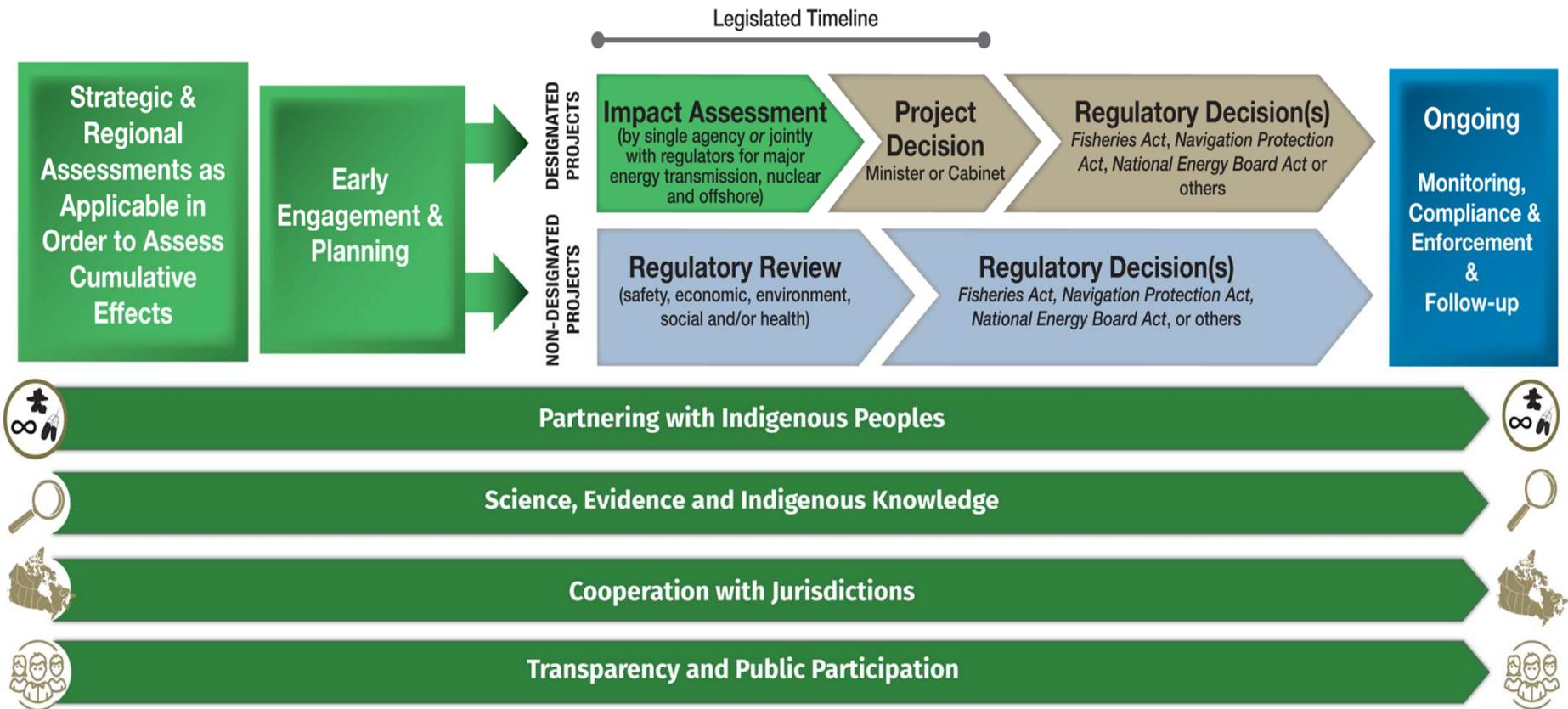
Designated Project List

- Question of which projects will be subject to a federal IA has not yet been determined.
- Concept of a “designated project list” will be retained.
- Currently seeking input on the current project list under CEAA, 2012 - *Consultation Paper on Approach to Revising Project List*.
- Expected to be expanded given that one of the criticisms of CEAA, 2012 was the narrow scope.

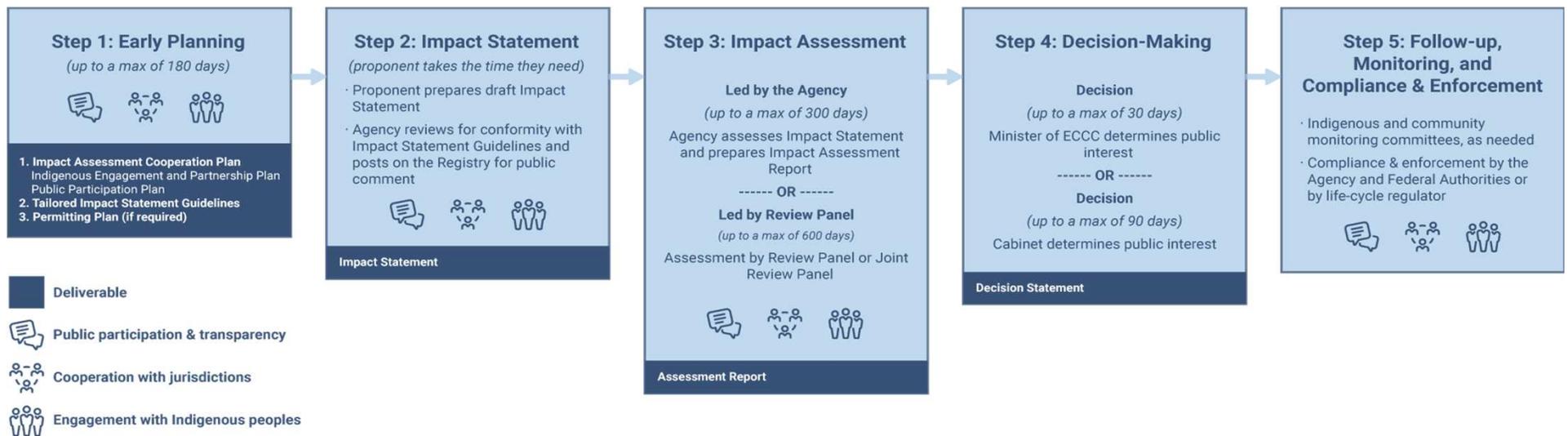
Expanded Factors for Impact Assessment

- Additional factors that must be consider during IA including:
 - Alternative means of carrying out the project;
 - Social, economic and health effects;
 - Contribution to sustainability;
 - Impact on Indigenous groups and section 35 rights
 - Traditional knowledge and considerations related to Indigenous cultures;
 - Whether the project contributes or hinders Canada ability to meet its climate change commitments;

Impact Assessment Process



Three Main Phases of Impact Assessment



*Regional and strategic assessments would be proactively conducted outside of individual project reviews. This will help inform project assessments, manage cumulative impacts, and support decision-making.

Decision Making

- IA culminates in a decision by either the Minister or Governor in Council on whether a proposed project is in the public interest.
 - Ministerial decisions (including referral to Cabinet) must be made within 30 days;
 - Cabinet decisions within 90 days.
- Eliminates the previous decision-making language of whether the project is “likely to cause significant adverse environmental effects”.

Decision Making – Public Interest

- In determining whether a project is in the “public interest”, the Minister or Cabinet is required to consider:
 - the extent to which the project contributes to sustainability;
 - the extent of the adverse effects;
 - the implementation of appropriate mitigation measures;
 - the impact that the project may have on any Indigenous Group or the rights of Indigenous peoples; and
 - the extent to which the effects of the project may hinder or contribute to the government’s ability to meet its environmental objectives and its commitments in respect of climate change
- Economic factors notably not listed.

Review Panel Report

- A review panel's report will not make a recommendation
 - Rather, it is only required to set out the effects that are likely to be caused by the project and to indicate the extent to which they are adverse
- This means the government – rather than an independent tribunal – will be responsible for weighing the costs and benefits of a project and making a decision as to whether it should proceed

Timelines

- IAA establishes specific legislated timelines for the major steps of the review process
 - IAs led by Agency reduced from 365 to 300 days
 - Review panel IAs reduced from 720 to 600 days
 - Proponent response time no longer excluded
- However, those timelines:
 - do not include the early engagement process;
 - can be paused by the Minister for prescribed reasons (to be determined); and
 - can be extended indefinitely by Cabinet at the Minister's request

Overall Impressions of the New IA Process

- New process appears to have responded to concerns regarding public participation, scope of assessments and the role and consideration of Indigenous rights and interests.
- However, timing and duration of assessments not directly addressed and consideration of economic factors are notably absent.
- CEAA, 2012 continues to apply until new legislation comes into effect. Transitional provisions for projects currently undergoing EA.

Canadian Energy Regulator Act

- The “modernization” of the NEB meant its demise.
- Stated goal is now to create a “truly modern, world class energy regulator”
- New CER will provide regulation of:
 - pipelines, abandoned pipelines, and traffic, tolls and tariffs relating to the transmission of oil or gas through pipelines;
 - international power lines and certain interprovincial power lines;
 - renewable energy projects and power lines in Canada’s offshore; and
 - access to lands.

The Canadian Energy Regulator

- CER will continue to be based in Calgary but no mandatory residency requirement on full-time hearing commissioners.
- Administrative functions will be separated from adjudicative functions.
- Will be a Board of directors and a separate slate of hearing commissioners, each of which will be required to include at least one Indigenous person.

Significant Changes

- The CER will have jurisdiction over renewable energy projects in off shore areas.
- Any member of the public may participate in hearing process. No longer restricted to person who are directly affected.
- Cabinet will no longer have the discretion to overturn a decision of the regulator not to certify a pipeline project.
- All decisions must consider the adverse effects on the rights of Indigenous peoples.

Timelines for Decisions

- Decisions on applications not subject to an impact assessment under the new *Impact Assessment Act* will be subject to timelines of a maximum:
 - 450 days for certification of a pipeline;
 - 300 days for an international power line;
 - 300 days for an offshore renewable energy project or power line; and
 - 180 days for licences for the exploration of oil and gas.
- For major projects that would be subject to the new impact assessment process, a maximum deadline of two years would be imposed.

Joint Impact Assessment

- New energy projects requiring an impact assessment would undergo an integrated process between Impact Assessment Agency and CER
 - The Agency is responsible for conducting its impact assessment and coordinating consultations with Indigenous peoples in collaboration with the CER
 - CER responsible for making public interest determinations under the *Canadian Energy Regulator Act*

Navigable Waters



Canadian Navigable Waters Act (“CNWA”)

Key changes include:

- A comprehensive definition of “navigable water” that broadens the scope of federal regulatory power;
- A new approval scheme for minor and major works on any navigable water, including those that are not listed on the schedule;
- New criteria and process for adding navigable waters to the schedule;
- A new list of assessment factors the Minister must consider when deciding to issue an approval; and
- Enhanced enforcement powers with respect to obstructions to navigable waters; and

Key Changes continued

- Additional protections for waterways of significance to Indigenous peoples;
- Mandatory consideration of any adverse effects on the rights of Indigenous peoples;
- Increased transparency requirements for any project that may interfere with navigation;
- Opportunities for community members to comment on proposed works; and
- The requirement for proponents to make efforts to resolve issues raised before an authorization is given.

Significance of the CNWA

- *Navigable Waters Protection Act* is one of the oldest Canadian environmental laws.
- Amended in 2009 and again in 2012 when it was renamed the *Navigation Protection Act*. Focus of amendments was on navigation of waterways that support commercial or recreation activity.
- List of scheduled waters was short. Regulatory approval only required for works if on list.
- CNWA greatly expands the waterways and the activities that will require regulation.

Definition of “Navigable Waters”

- CNWA will be the first to propose a detailed statutory definition of “navigable waters”
- The proposed definition will capture any body of water:
 - that is used or is reasonably likely to be used by vessels (in full or in part, and for any part of the year) as a means of transport or travel for commercial or recreational purposes, or by Indigenous peoples exercising their Indigenous rights; and
 - where there is public access (by land or water), where there are two or more waterfront owners, or where the Crown is the sole waterfront owner
- A person may make a request to have a navigable water added to the CNWA Schedule

New Factors To Be Considered

- CNWA introduces new factors that the Minister must consider when deciding whether an application for an approval should be approved
 - the impact on navigation of the work in combination with other works;
 - any traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister,;
 - any comments that the Minister has received from interested persons;
 - the record of compliance of the owner of the works; and
 - and any other factors that the Minister considers relevant.

Enhanced Enforcement Powers

- CNWA gives the Minister enhanced enforcement powers, including powers to direct an owner of a work or a person in charge of an obstruction or potential obstruction to take action, and to recover the costs from the owner of the works or the person in charge
- New offenses have been added
- Potential penalties, fines and limitation periods for offences and violations have all been significantly increased under the CNWA

What's Next?

- Bills C-68 and 69 through second readings. Now with Standing Committee for review and potential amendments.
- \$1 Billion over next 5 years to support new impact assessment regime and CER as well as bolster scientific and technical capacity in federal departments and agencies.
- Back to what we HADD?