Big Changes In Federal Environmental And Fisheries Regulation

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The current Liberal Federal Government is moving full-swing in its promised amendments to the legislation governing the federal environmental assessment process and the environmental protection provisions related to the Federal Fisheries power. On February 6, 2018, the Federal Government introduced Bill-68, An Act to Amend the Fisheries Act and Other Acts in Consequence. Two days later Bill C-69, An Act to Enact the Impact Assessment Act and the Canadian Energy Regulator Act, to Amend the Navigation Protection Act and to Make Consequential Amendments to Other Acts was introduced. Both Acts entail significant changes to current federal legislation, with perhaps the most significant changes relating to the current federal environmental assessment regime. The amendments are also intended to go some way in fulfilling the Government of Canada's stated objective of reconciliation with its Indigenous peoples.

Prior to the 2012 amendments, the Fisheries Act was consistently described as the most powerful tool in the federal environmental regulation toolkit. According to Minister Dominic LeBlanc's press release announcing the introduction of Bill C-68 and the Fisheries and Oceans Canada backgrounder, the amendments are intended to restore lost environmental and habitat protections and to incorporate modern safeguards to protect fish and fish habitat. The significant changes include:

- restoring a comprehensive protection against harming any fish or fish habitat;
- strengthening the role of Indigenous peoples in project reviews, monitoring and policy development;
- recognition that decisions can be guided by principles of sustainability, precaution and ecosystem management;
- promoting restoration of degraded habitat and rebuilding of depleted fish stocks;
- creating full transparency for projects through a public registry.

Perhaps the most significant of these changes as they relate to the natural resource sector is

the move back to a broad scope of federal oversight of projects or activities that might impact any fish or fish habitat. The 2012 amendments restricted protections to fish and habitat related to a commercial, recreational or aboriginal fishery.

It will also be interesting to observe how principles of sustainability and precaution will be interpreted and applies. Historically, these concepts have included a weighing economic benefit (or at least the cost impacts of regulation) against the potential for environmental harm.

Bill C-69 is a substantial remake of what is now the Canadian Environmental Assessment Act (CEAA) and the National Energy Board Act. It also contains amendments to the Navigation Protection Act (historically, the Navigable Waters Protection Act) and renames it as the Canadian Navigable Waters Act.

Some may recall the extent of cross-Canada consultations undertaken in the latest CEAA review process. It remains to be debated whether the recommendations of the CEAA review panel have been incorporated into Bill C-69, or whether the Government has decided to take an altogether different tack.

The most significant change is that Bill C-69 will create two new federal energy and resource sector regulatory authorities, the Canadian Environmental Assessment Agency (the "Agency") and the Canadian Energy Regulator, the latter of which will replace the current National Energy Board.

Other big changes include:

- emphasis on engagement of Indigenous peoples and consideration of rights and impacts affecting Indigenous peoples;
- making the Agency the lead on all federal project reviews of major projects, in concert with other federal agencies, provincial regulators and Indigenous authorities.

Assessments will be conducted on a multi-stage process, including the following steps:

Review of Initial Project Description: Based on a review of an initial project description to be provided by the proponent, the Agency will determine whether the project constitutes a "designated project" under the regulations and would therefore be subject to a more rigorous review process. If not, a summary review process will apply. If designated, the Agency will consult with the affected provincial government and Indigenous groups to determine the required assessment process. The proponent's consultation with affected Indigenous groups would take place at this stage.

Impact Assessments: The proponent prepares its environmental impact assessment after the Minister has issued impact statement guidelines based on the initial project description review.

Ministerial Review: Upon completion of the Agency's impact assessment, the project is referred to the Minister for determination of whether it is in the public interest. The Minister may refer the decision to Cabinet, presumably in the case of significant projects, those that are controversial, or those that are considered to be in the national interest. Although the Ministerial or Cabinet approval carries with it some political considerations, C-69 specifies criteria that must be considered. The reasons for decision must be made public, which aids in promoting transparency and accountability.

Sustainability: The proposed assessment process is described as being more focused on sustainability, including effects on employment, the economy in general, social health and welfare and effects on Indigenous peoples and their rights and cultures. Consideration of climate change issues is a requirement.

Indigenous Consultation and Public Participation: With the recent court decisions that have concluded that Indigenous consultations may take place within the context of a regulatory hearing and approval process, it is apparent that Bill C-69 intends to bring relevant elements of the Indigenous consultation process within the environmental assessment. According to Government statements, the intent is to create a process that results in early engagement of Indigenous peoples and the public-at-large.

Science-Based and Timely: The Government has emphasized the importance of decisions being grounded in sound science. Time limits are included in each stage of the process (although they can be stretched).

There are no real surprises in either Bill C-68 or C-69 when compared to policy statements made during the last election and the period following. However, the changes are not a return to the old status quo. They are significant and call for considerable thought and planning on the part of project proponents.

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