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The Environment, "Responsible Resource Development," and Evidence-Based Policy-Making in Canada

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Introduction

Evidence-based policy-making represents an effort to reform policy processes by prioritizing evidentiary decision-making criteria. It is intended to help make well-informed decisions about policies, programs, projects, and practices by putting the best available evidence at the heart of policy development and implementation (Nutley, Morton, Jung and Boaz, 2010 133). Sensitive to an over-emphasis on evidence and rationality in policy-making in the past, evidence-based policy-making seeks a compromise between political and technocratic views of policy-making. It focuses on improving the amount and types of information employed in public policy agenda setting, formulation and decision-making as well as the methods used in the assessment of that information. The expectation is that enhancing the information base for policy-making will improve the outcomes of the resulting policies (Howlett 2009).

At the back end of the policy cycle ((defined in terms of agenda setting, policy formulation, decision-making implementation and evaluation) (Hessing, Howlett and Summerville 2005)), the ongoing monitoring of results in the field will allow for the identification of problems and modification of policies to address them (i.e. policy learning), as will more comprehensive or summative evaluations at the completion of program stages or initiatives. In addition to its emphasis on the availability and quality of information and evidence, evidence-based policy-making stresses the importance of the "policy analytical capacity" (Howlett 2009) of governmental and non-governmental policy actors to make effective use of that information in policy development, implementation and evaluation.

Evidence-Based Policy-Making and the Environment

Environmental policy has always had a foundation in empirical evidence of environmental problems, their potential consequences, and the need for effective policy responses to prevent such outcomes or restore the damage that has occurred. In North America, the conservation and urban public health movements that began to emerge in the late 19th century were grounded in the growing knowledge of the connections between pollution and disease, and the need for the more rational management of renewable resources, particularly forests and fresh water. These new scientific understandings, in combination with the emergence professions and academic disciplines with the capacity to translate the evidence available to them into demands for public policy responses, provided the foundation for the initial legislative and institutional efforts to control pollution and manage natural resources more sustainability between the late Nineteenth Century and Great Depression. Scientific evidence also lay at the base of the modern (post-Second World War) environmental policy agenda ranging from local and regional issues like the conventional and toxic pollution of the Great lakes, acid rain and smog, to the recognition of global scale challenges like biodiversity loss, ozone depletion and climate change (Macdonald 1991,Benedickson 2007, Winfield 2012).

Notions of what might now be labelled evidence-based policy-making were deeply embedded in the institutional foundation of Canada's federal environment department, Environment Canada, established in 1971. The department's scientific and technical capacity was expected be the central pillar of its influence within the federal government. Reflecting this "knowledge is power" model, relative to other federal agencies Environment Canada had an exceptionally high portion of its budget and staff dedicated to science (Conway and Doern 1994, 74).

The question of the appropriate role of the federal government in environmental matters has been an ongoing source of federal-provincial conflict since Environment Canada's creation. Operational functions, especially the regulation of industrial pollution and assessments of the potential environmental impacts of major projects have always been contentious (Harrison 1996, Winfield and Macdonald 2007). On the other hand, there

has generally been a relatively strong consensus around Environment Canada's role in providing the science and information base for identifying and addressing environmental problems. Provincial environmental science capacity has always been relatively weak; what capacity there is tends to be related to operational requirements (i.e. investigations and law enforcement). Moreover, the general capacity that did exist at the provincial level was virtually eliminated as a result of the budget cuts to environmental agencies that flowed from the neo-liberal policy revolutions of the 1990s (Winfield 2002).

Environmental Assessment as Evidence Based Policy-Making

The concept of environmental assessment processes first emerged in North America in the late 1960s and early 1970s. Their emergence was seen to represent the final stage in the development modern legislative frameworks around environmental management. The 1968 US *National Environmental Policy Act* is generally regarding as the first statutory embodiment of an environmental assessment process. The Canadian federal government first developed Environmental Assessment Review Process (EARP) guidelines in 1973 (updated in 1977), and all of the Canadian provinces adopted environmental assessment legislation between the mid 1970s and early 1990s. The 1977 federal guidelines were replaced in 1984 with a Federal Environmental Assessment Guidelines Order. In the aftermath of the Supreme Court of Canada's landmark 1992 *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* ([1992] 1 S.C.R. 3) decision, which concluded that the application of the Guidelines Order was mandatory not discretionary, the order was supplanted the 1992 *Canadian Environmental Assessment Act* (CEAA). That legislation was proclaimed in force in 1995 and revised in 2003 following a parliamentary review of the Act (Douglas and Herbert 2003).

Environmental assessment processes were initially conceived of as information gathering exercises which would inform decision-making by governments. The first generation of environmental protection legislation adopted in North America from the beginning of the 20th century up to the early 1970s tended to be media-specific in its focus (i.e. water, air or land) and agencies reviewing proposed projects in terms of their potential environmental effects assessed them only through the lens of the specific

media and types of impacts on that media mandated by their legislation. By the late 1960s there was increasing recognition that this institutionally and substantively fragmented approach failed to provide meaningful assessments of the overall potential impacts of proposed projects.

Secondly, the media-specific approval processes did not consider the purpose or rationale for projects or whether they were justified relative to the significance of their overall impacts. Rather, they were focussed on the mitigation of specific impacts in relation to the media for which they were responsible. The question of the desirably of a project was rarely open for discussion. Once more a comprehensive picture of the potential benefits and impacts of a project was available, such questions inevitably came to the forefront, particularly from the perspective of communities who might be adversely affected by it. It soon came to be recognized that the assessment process could provide a forum through which these sorts of social conflicts between proponents and affected communities might be addressed in a structured and constructive manner that would enhance the legitimacy and therefore acceptance of the ultimate outcome, even from the perspective of constituencies who might disagree with the result (Berger 1977).

With the proclamation of CEAA in force in 1995, the application of the federal environmental assessment process became much more consistent than had been the case under the 1973 and 1977 EARP Guidelines and 1984 Order (Nikiforuk 1997). In turn federal assessments of provincially initiated or supported projects began to emerge a major source of federal-provincial conflict (Winfield and Macdonald 2008). The federal-provincial clashes were compounded by growing complaints from the natural resources development sector, particularly the mining industry, regarding the delays imposed by the process (Standing Committee on Natural Resources 1996).

In hindsight the development of environmental assessment processes can be seen as the archetypical attempt to apply what would now be referred to as evidence-based policy-making to environmental issues. As such the performance and fate of these

processes can provide important insights into both the strengths and potential weaknesses of evidence-based policy-making models. Such an analysis is particularly timely given that the "reform" of the environmental assessment process has been central to Harper government's approach to environmental policy.

The Harper Government and the Environment

Although the commitment of Canadian governments to evidentiary-grounded criteria (e.g. effectiveness in relation to policy goals, cost-effectiveness, and fairness of distributional impacts) over political considerations in the evaluation of policy options and outcomes has always been inconsistent, the Harper government has come to be regarded as demonstrating an unusual hostility to evidence-based policy-making over ideological or political factors. The government's approach is seen to be epitomized in the 2010 decision to terminate the long-form census. The census had provided the empirical basis for policy formulation and evaluation across a wide range of policy fields. Observers have highlighted by other actions as well, such as the government's anti-crime legislation, with its increased focus on imprisonment, despite strong evidence of the likely high costs and ineffectiveness of such an approach (CBC 2012, Waller 2012), and the government's conflicts with the Parliamentary Budget Officer over transparency in budgeting, expenditures and cost estimates (Champion-Smith, 2012).

Environmental policy has been particularly strongly affected by these directions, finding itself at an unfortunate junction between the government's general ambivalence about evidence-based policy-making and an apparent specific enmity for environmental issues. Consequently, the Harper government's approach to environmental matters provides an important case study on the fate of evidence-based policy-making in such circumstances, which may have implications for other fields of public policy as well.

The Harper Government's views on environmental matters seem to be driven by a number of different factors. The Prime Minister's long-standing personal reluctance to

address the climate change question, the dominant global environmental issue of the past two decades, is well-documented, Mr.Harper having once described the 1997 Kyoto Protocol under the United Nations Framework Convention on Climate Change (UNFCC) as “a socialist scheme to suck money out of wealth-producing nations” (Canadian Press 2007). The basis for this antagonism is unclear, particularly given the overwhelming scientific consensus on the mechanisms and likely impacts of climate change (IPCC 2007) and increasing economic consensus in favour of early preventative action (Stern 2007, NRTEE 2011).

More broadly, the government has generally adopted a zero-sum framing of the relationship between environmental protection and economic development, reflective of thinking pre-dating the World Commission on Environment and Development’s (a.k.a. the Brundtland Commission) 1986 introduction of the “sustainable development” concept of environmental and economic independence. The government has instead emphasized the role of environmental protection requirements as constraints on economic development noting, for example, that:

> “We will not – and let me be clear on this – aggravate an already weakening economy in the name of environmental progress…
> (There is a need for) “balancing of our responsibility as stewards of the environment and on the other hand, as creators of wealth and builders of industry and economic opportunity” (Prentice 2009)

> “In many cases, these projects would create thousands upon thousands of jobs for Canadians, yet they can take years to get started due to the slow, complex and cumbersome regulatory process.
>
> We believe reviews for major projects can be accomplished in a quicker and more streamlined fashion. We do not want projects that are safe, generate thousands of new jobs and open up new export markets, to die in the approval phase due to unnecessary delays.” (Oliver 2012)

This framing has provided the justification for the government's "Responsible Resource Development" initiative (Canada 2012) which in turn grounded the extensive revisions to environmental legislation, particularly the Canadian Environmental Assessment Act, contained in the 2012 budget implementation legislation. Moreover, the public statements by the Prime Minister (Harper 2012) and Minister of Natural Resources (Oliver 2012) suggest a view of economic development overwhelmingly focussed maximizing the development and export of natural resources, particularly fossil fuels, with an increasing emphasis on markets beyond the United States.

Implicit in this is an assumption of unimportance with respect to environmental issues. Rather the environment is seen as an area where the federal government can engage in a significant retrenchment without serious consequences for the economy, public health and safety or other considerations, and where action will only be taken where there are overwhelming political or economic imperatives to do so. One of the government's few significant actions on the environment to date, for example, was the 2010 decision to strengthen automobile emission standards to be consistent with the standards adopted by the newly arrived Obama administration in the United States. This was necessary to maintain access to the US market for Canadian automobile manufacturers. The assumption of unimportance, highlighted by the Prime Minister's decision not to join other world leaders in attending the June 2012 Rio+20 conference, and the government's dismissal of international criticism of Canada's environmental record and unconstructive role in recent international environmental negotiations (Woods 2012a) is consistent with the behaviour of other Canadian governments with strong neo-liberal ideological orientations with respect to the environment during periods of relatively low public salience of the issue (Kranjc 2000, Winfield 2012).

"Responsible Resource Development"

During the Harper government's (2006-2011) minority period moves to reduce environmental science and policy capacity were relatively limited and specifically targeted, focusing particularly on climate change science and policy capacity within

Environment Canada (CESD 2011). The dynamics of the minority government situation, in which all three opposition parties maintained a relatively strong focus on the climate change issue, and relatively resilient levels of public concern for the environment, particularly in Quebec, even in the aftermath of the 2008 economic downturn, imposed important constraints on the Harper government's potential scope of action (Strategic Counsel 2009; Nanos 2012).

The outcome of the May 2011 federal election, giving Mr.Harper a majority in the House of Commons for the first time, removed the institutional constraints of minority government. In November 2011, US President Obama's administration delayed approval of the proposed Keystone XL pipeline in response to environmental concerns over both the risks of spills associated with the pipeline itself and the oil sands projects whose products it was to carry to refineries in Texas and Louisiana. At the same time environmental and First Nation's objections began to threaten potential delays over the proposed Northern Gateway pipeline to transport of oil sands products to the BC coast and then by tanker to export markets. Both developments were perceived by the Harper government as threats to its core economic strategy, based on major expansions of production and exports from Alberta's oil sands (Harper 2012; Oliver 2012).

Even before the 2012 budget reductions, the government had been subject to considerable criticism for directing federal environmental scientists not to publicly discuss their research, or present their findings at conferences. Requirements for pre-approval from ministers' offices before speaking to the media were introduced in 2010 (PSAC 2012). The government's behaviour with respect to the communication of research findings by its scientific staff prompted, among other things, an editorial rebuke from the leading international science journal *Nature* (O'Hara, 2012).

From January 2012 onwards the federal government became dramatically more direct in its handling of the federal environmental information and knowledge base and the "policy analytic capacity" of federal institutions for environmental policy under the banner of "Responsible Resource Development" (Canada 2012). The government's approach can be organized around three key themes: the weakening of the knowledge and information base for policy-making via budgetary reductions to federal agencies

and elimination of specific sources of independent research and analysis; the 'reform' of mechanisms for EBPM through legislative changes, particularly with respect to the federal environmental assessment process; and the constraining of non-governmental sources of information and analysis, especially if their views are not in accord with the government's directions.

Budgetary Reductions and their Impact on Information, Knowledge and Policy Analytic Capacity

Budgetary reductions to the environment and natural resources agency information and science base and "policy analytic capacity" have emerged as a major theme in the government's approach. These reductions in capacity are occurring within the context of an overall direction by the government to eliminate 19,200 federal public service positions over the 2012-15 period to combat a budget deficit that the government argues is excessive (Nonato and Quan 2012). The details of the reductions to date are difficult to find as government itself has not provided a comprehensive breakdown of the layoffs (Parliamentary Budget Office 2012). The following analysis is derived from a review of the government's own budgetary documents (Department of Finance 2012) and departmental reports on plans and priorities (Environment Canada 2012) , public service unions (PSAC 2012, 2012a) reporting the receipt of layoff notices by their members and work by NGOs (Council of Canadians 2012).

Environment Canada faces a $222.2 million reduction in its operations and administration budget between 2011-12 and 2012-13, a loss of approximately 20 per cent relative to the 2011 total of $1.1 billion. This is projected to result in the loss of a total of 1211 full-time equivalent (fte) positions over next three years, amounting to approximately 20 per cent of the department's staff. Not surprisingly given the government's approach to the climate change issues, Climate Change and Clean Air is the most heavily affected area losing 522 ftes; followed by Substance and Waste Management (i.e. toxic substances and administration of the Canadian Environmental Protection Act (CEPA)) losing 279 ftes; Weather and Environmental Services will be

reduced by 202 ftes; Water Resources by 54 ftes; and internal services (administration, legal and information technology) by 77 ftes ((Council of Canadians 2012). In addition to the overall loss of capacity, the reductions will result in the elimination of substantial research infrastructure, such as the Ozone Monitoring Network (PSAC 2012).

The Department of Fisheries and Oceans will see its operational budget cut by $79 million, resulting in the elimination of a total 1072 ftes, principally in the Coast Guard (763 positions), but also in ecosystem and fisheries management staff (PSAC 2012a). Among the consequences is the closure of the Experimental Lakes Area, a high profile freshwater research centre noted for its work on the impacts of acid rain, chemical pollution and climate change (Nikiforuk, 2012; Galloway, 2012).

The Parks Canada Agency for its part, will see an ongoing budgetary reduction of $29 million and lose 638 positions, including positions related to ecological monitoring and integrity. Other agencies that have been identified as significantly affected include Statistics Canada, losing $33 million on an ongoing basis and 273 positions, Library and Archives Canada losing 105 positions (Nonato and Quan, 2012; Knowles 2012), the Canadian Food Inspection Agency (CFIA) with annual reductions reacing $56 million resulting in the closure of several food testing labs (PSAC 2012). Health Canada's annual budget is to be reduced by $200 million, resulting, among other things in the termination of funding to the Aboriginal Health Organization and the Women's Health Contribution Program. The latter step removes funding for six research networks including the Network on Women's Health and the Environment (Smith 2012).

The fate of the National Round Table on the Environment and Economy (NRTEE) has come to be seen to epitomize both the government's view of value of evidence-based policy making and its approach to dealing with sources of policy advice the are not in accord with its preferred directions. The NRTEE was established in1988 by then Prime Minister Brian Mulroney as part of the federal government's institutional follow-up to Brundltand report. The round table was a multistakeholder body mandated to conduct research and make recommendations on integration of environment and economic policy in Canada. NTREE originally reported directly to Prime Minister, although this

was downgraded to reporting to Minister of the Environment early in the Harper government (Boutros 2009).

Over its nearly twenty-five years of existence the round table undertook research and consultations and published reports and recommendations on a wide range of major federal and national environmental policy issues and came to be highly regarded for the quality of its work (Boutros 2009, Simpson 2012).The Conservative government specifically mandated NTREE to investigate options for meeting government's 2050 GHG emission reduction targets of 60-70% relative to 2006. The round table was also asked to assess the likely effectiveness of government's current strategy for meeting its 2020 targets (originally 20%, later 17% relative to 2006) (NRTEE 2012).

The elimination of the round table was announced as part of 2012 budget. The government was explicit in stating that its decision to close the round table was a response to the agency's recommendations that a price on carbon was essential to achieving the government's emission reduction targets and ensuring Canadian access to export markets that were likely to adopt carbon pricing systems of their own (NRTEE 2011). In justifying the decision Foreign Minister and former Environment Minister John Baird stated that:

> "I think the last thing the government needs to pay for is another report encouraging a carbon tax when Canadians have spoken up definitively that they do not want a carbon tax" (Woods, 2012)

Bill C-38, the Jobs, Growth and Long-Term Prosperity Act

The 2012 federal budget is not the first time major reductions in the budgets of environmentally-related federal institutions have occurred. The Chretien government's 1996 'Program Review' exercise, in particular, resulted a thirty per cent reduction in Environment Canada's operating budget, leading to significant losses of staff, and operational and scientific capacity (Toner 1996). What sets the Harper Government apart is that the 2012 budgetary reductions seem part of an overall strategy, apparently designed to diminish the knowledge base and capacity for environmental policy-making in Canada at the federal level. As such it suggests a situation that falls outside of

Howlett and Craft's (2012) typology of approaches to the generation and use of policy advice.

Although the 2012 budget reductions are the most obvious element of this approach, it has also included less direct moves with respect to the infrastructure for evidence-based policy-making. The legislative changes embodied the government's omnibus budget implementation Bill C-38 – *Jobs, Growth and Long-Term Prosperity Act* are particularly noteworthy in this regard. The bill substantively amended or, in some cases completely re-drafted, 69 pieces of legislation, dealing with matters ranging from climate change to pensions, privacy codes and cross-border law enforcement.

The package of amendments contained in Part 3 of the bill dealing with "Responsible Resource Development" are its most significant elements from an environmental perspective. The amendments follow through on the concerns regarding the approval of major energy related projects raised by the Minister of Natural Resources in his January 2012 "Open Letter" on Canada's commitment to diversify energy markets and "the need to further streamline the regulatory process in order to advance Canada's national economic interest" (Oliver 2012) and the April 2012 "Responsible Resource Development" initiative (Canada 2012).

Re-Writing the Canadian Environmental Assessment Act

The central element of the 'Responsible Resource Development' part of Bill C-38 is a complete repeal and replacement of the *Canadian Environmental Assessment Act* (CEAA) with new legislation. A review of CEAA was underway by the House of Commons Standing Committee on Environment and Sustainable Development as of the fall of 2011, but this was effectively short-circuited by the "Responsible Resource Development" initiative. As noted earlier, environmental assessment processes emerged in North America in the late 1960s and early 1970s, and can be regarded as an important mechanism for evidence based-policy-making in an environmental context.

Prior to Bill C-38 federal environmental assessments could be triggered under CEAA in one of four ways: a project occurred on federal lands; a project received federal funding; the proponent of the project was a federal government agency; or in order to proceed

the project required any one of a number of federal statutory approvals specified under a regulation made under the Act (a.k.a. the Law List Regulation). The “law list” triggers were the most controversial as they were the source of most federal environmental assessments off federal lands. The requirements to obtain permits from the Minister of Fisheries and Oceans for the “harmful alteration, disruption or destruction of fish habitat (HADD)” under section 35 of the *Fisheries Act*, and from the Minister of Transport for activities that may interfere with navigation under the *Navigable Waters Protection Act*, provided the most common basis for such assessments. An assessment under CEAA had to be completed before a project could proceed, including the issuing of the federal permits that may have triggered the assessment or the provision of federal funding.

It is important to note the triggering of a federal assessment did not mean that a full assessment would take place. Rather CEAA provided for different levels of assessment based on the significance of the project. In practice most assessments under the act were “screening” level reviews – preliminary reviews intended to identify any significant environmental concerns with a project. Only certain categories of major projects, such as large mines, dams, industrial and electric power projects, designated under a “Comprehensive Study Regulation” required fuller assessments once a federal review was triggered. A comprehensive study report, prepared by the proponent, was required to include an examination of purpose and need for project; “alternative means” of carrying out the project; consideration of potential environmental effects of the project, including malfunctions; and the cumulative effects of similar projects.

Final decision-making authority with respect to projects rested with the “Responsible Authority” under CEAA – i.e. the federal agency who was the proponent, funder, manager of the federal lands on which the project was to occur or issuer of the federal approval required under the Law List Regulation. In some circumstances projects could be referred to a review panel, appointed by the Minister of the Environment, which could hear evidence from the proponent, submissions from members of the public and ultimately issue a report and recommendations to the “Responsible Authority.” In 2008-09, the last year before the Harper government began its ‘reforms’ to the CEAA

process, there were over 5,000 screening level assessments, while only 10 comprehensive studies and 5 panel reviews were initiated (CEAA 2009).

The Harper "Reforms"

The Conservative government's 'reforms' of the approval process for major natural resource extraction projects began in 2007 with the establishment of the Major Projects Management Office, housed within Natural Resources Canada. The office was mandated to coordinate and expedite federal regulatory approvals for "major resource projects."

The government's revisions to the federal environmental assessment process began with its 2009 budget. The 2009 budget implementation legislation (Part 7) amended the *Navigable Waters Protection Act* (NWPA) to permit the federal Minister of Transport to redefine the types of projects and water bodies where approvals would be required under the act and thereby trigger federal environmental assessment requirements under CEAA. Automatic requirements for NWPA permits for bridges, booms, dams and causeways were made discretionary (Amos 2009) Shortly after the legislation received Royal Assent, the minister issued an order exempting all "minor works and waters" from the NWPA approval requirements. [1]

In addition, in the context of the fall 2008 economic downturn, calls for economic stimulus to counteract its effects, and municipal complaints about 'red tape' (i.e. requirements for CEAA screening level assessments before receiving federal funding for infrastructure projects), exemptions from CEAA were provided via regulation for a wide range of 'infrastructure' projects over two years. The exemptions covered projects such as waste disposal sites, public transit infrastructure, railway systems, highway interchanges or modifications, residential, medical, educational or commercial buildings, bridges, and sewage treatment plants funded through the federal government's *Building Canada Plan*. An "adaptation" regulation adopted at the same time provided for the substitution of provincial EA processes for federal assessments over the same period

[1] Bill C-45, a second Omnibus Bill related to the 2012 federal budget, introduced on October 18, 2012, would repeal the NWPA completely and replace it with a *Navigation Protection Act*. Permits from the Minister of Transport would only be required in relation to works affecting 97 designated waterways in Canada.

such that if a provincial assessment is completed then its conclusions would be accepted for federal purposes (Harper and Hales, 2009).

The number of screening level assessments under CEAA began to fall substantially following the implementation of the NWPA amendments and CEAA exemptions.[2] Although concerns had been raised about the effectiveness of the screening level assessment process, it did inject considerations into decision-making that otherwise would not be there, provided opportunities to consider the cumulative effects of small projects, and allowed Responsible Authorities to reflect on whether an apparently 'minor' project might warrant a more comprehensive study. As a result recommendations had been made by the Commissioner for Environment and Sustainable Development (affiliated with the Office of the Auditor General of Canada) to strengthen rather than weaken the process (CESD 2009a).

The government's 2010 budget implementation legislation directly amended CEAA to allow the Minister of the Environment to break the review of large projects into smaller components, thereby trigging a series of screening level assessments rather than a comprehensive study and potential panel review. The amendments, which also permitted the Minister of the Environment to exempt any aspect of a project from assessment altogether, effectively reversed a January 2010 Supreme Court of Canada decision (*MiningWatch Canada v. Canada (Fisheries and Oceans)* 2010 SCC 2, [2010] 1 S.C.R. 6 – a.k.a. the Red Chris Mine decision) against precisely such practices. The legislation also provided permanent exemptions for the types federally funded infrastructure projects temporarily exempted from CEAA through the 2009 regulations. Responsibility for comprehensive studies was transferred from the departmental "Responsible Authorities" to the Canadian Environmental Assessment Agency, except for large energy projects, where the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) were to have responsibility, depending on which agency's jurisdiction they fell (Hazell 2010, Driedzic and Bowman 2010).

[2] 2009-10 3732 screenings (INAC, DFO, AFFC, TC) 27 Comprehensive studies 1 panel review vs. over 5,000 screenings in 2008-09.

While the federal environmental assessment process escaped further "reform" in the Conservative government's 2011 budget, the revision of CEAA was the centrepiece of the its "Responsible Resource Development" initiative and 2012 budget implementation legislation. Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act*, repeals the existing act and replaces it with new legislation. [3]

The new legislation makes major changes to the ways in which federal assessments are triggered. Before the adoption of Bill C-38 federal assessment were triggered as a result of meeting specific tests set out in the legislation (i.e. there is a federal proponent, the project is to occur on federal lands or receive federal funding or requires a 'law list' designated federal approval). Projects meeting any of these criteria were subject to assessment unless they were specifically exempted.

Under the new act the requirement for a federal assessment will only apply to designated types of projects on a project list regulation (sections 2(1) and 84(a)) similar to the types of projects listed under the Comprehensive Study Regulation, although with some important exceptions (Ecojustice 2012a). Proponents now have to register their projects if they believe that they fall into one of the categories on the list. Ministers then have the discretion to determine whether an assessment is actually required, on the basis of reviews of the documents filed when the project is registered (sections 8-10).

Even where it is determined that an assessment is required, the resulting assessment will be much narrower than that required under the current Comprehensive Study Regulations (s.19). Except where there is a federal-provincial agreement to carry out a joint assessment, federal assessments will be limited to specific issues falling under federal jurisdiction, such as impacts on fisheries, aquatic endangered species and migratory birds (ss.2(1) and 5(1)). Final decision making-authority where significant effects are found is now with the Governor-in-Council rather than "Responsible Authorities" (who were in theory are the agencies with the most significant expertise about the primary impacts of a project). Any conditions on approvals are limited to a very narrow interpretation of federal jurisdiction (s.53).

[3] This assessment of the impacts of Bill C-38 on CEAA draws in particular on the work of Prof. Meinhard Doelle, Schulich School of Law, Dalhousie University.

In effect, the screening level assessment process for smaller projects are eliminated, the application of the federal assessment process to larger projects becomes discretionary, and even where such assessments were required they will only examine a very narrow range of issues, typically where federal regulatory approvals would be required. Considerations of the need and rational for projects, their overall environmental impacts, cumulative effects, social and economic consequences (except narrowly in relation to aboriginal peoples (s.5(1)(c)) contributions to sustainability and the availability of alternatives are eliminated from the process.

Other provisions of the revised statute have the potential to limit public participation in the process to those determined to have an “interest” in designated projects (s.2(1)), and provide a 1 year time limit for regular environmental assessments with the possibility of a three month extension. Environmental assessments under the responsibility of the NEB may take 18 months, and up to two years where a panel review is involved. Where panels go over the time limits the review will be terminated and completed by the Canadian Environmental Assessment Agency (ss.49-50). Finally, provincial processes may be substituted for the federal process either in general or on a project by project basis, except for projects falling under the jurisdiction of the NEB or CNSC (s.32).

The revisions to CEAA have been subject to extensive criticism from the parliamentary opposition, environmental non-governmental organizations, academics, and the environmental law practitioners in terms of the narrowing of the range of projects subject to assessment, dramatic shrinking of the scope of what assessments do occur, removal of federal ‘backstopping’ of provincial processes, failure to take into consideration the potential complexity of the environmental, social, and economic issues raised by major projects, failure to consider the potentially significant cumulative effects of smaller or ‘minor’ projects, and failure to provide adequate time for the provision of evidence or its consideration by review panels and decision-makers (Green Party 2012, WCEL 2012, Boutis and Boman 2012). Indeed the legislation has been described as “the end of the road for federal EA in Canada” (Doelle, 2012). The amendments may also undermine the increasingly important role that federal EA

processes have taken in the fulfilment of the federal government's "duty of consult" with aboriginal peoples where their interests or rights may be affected by proposed developments (Cassidy and Findlay 2007). If the "reformed" environmental assessment process is found to no longer meet the requirements of the duty, then project approvals would be at risk of legal challenge by affected aboriginal people and First Nations unless additional consultative processes are be pursued. Such outcomes would significantly delay further the approval of projects.

The Fisheries Act[4]

Bill C-38 makes major amendments to a number of other environmentally important statutes.[5] Among those most significantly affected is the federal *Fisheries Act*. Section 35 of the act, enacted in its pre-Bill C-38 form in 1977, prohibited the "harmful alteration, disruption or destruction of fish habitat (HADD)." Activities that could result in harm to fish habitat required a permit from the Minister of Fisheries and Oceans, triggering, (prior to the adoption of Bill C-38) among other things, a requirement for a federal environmental assessment before the issuance of such permits. Section 35 was widely regarded as the single most important source of protection for ecologically important aquatic areas such as wetlands, streams, rivers and lakes, estuaries and shorelines in Canada.

Bill C-38 amended section 35 of the act in several ways. The section now provides for exemptions from the general prohibition on HADD contained in the section via regulations to be made in the future. Secondly, it now limits the protection provided by section 35 to only the habitat of fish that are part of "commercial, recreational or aboriginal" fisheries (a distinction that given the interconnected nature of aquatic ecosystems fisheries scientists view as impossible (Macdonald, McRobert and Diamond 2012)). Finally, the general prohibition on HADD is replaced with a prohibition on "serious harm" which is defined in the amendments as "the death or fish or any permanent alteration to, or destruction of, fish habitat." In effect the amendments

[4] The author wishes to acknowledge the assistance of Daniel Hamson, LLB student, Osgoode Hall Law School in understanding the impact of Bill C-38 on the *Fisheries Act*.

[5] The legislation also amends the Ocean Dumping provisions of the *Canadian Environmental Protection* and provisions of the *Species at Risk Act*.

narrow the scope of the protection provided by section 35 to certain types of fisheries, and weaken the standard at which harm would be considered to have occurred. Other provisions of Bill C-38 permit the federal cabinet to exempt designated “Canadian Fisheries Waters” from section 35 and certain other sections of the *Fisheries Act* altogether.

The National Energy Board Act

Prior to the adoption of Bill C-38, under the *National Energy Board Act*, the NEB was responsible for granting approvals for interprovincial and international energy infrastructure such as pipelines and electricity transmission lines as well as “frontier” (i.e. northern) oil and gas activities. Through Bill C-38 the board’s role is reduced to making recommendations regarding approvals to the Governor in Council, which now has final decision-making authority. The provisions have been criticized as permitting the federal cabinet to override the findings of an independent expert tribunal, “politicizing” an otherwise independent regulatory process. The amendments also limit rights to participate in NEB hearings to those “directly affected” by a given project, limit the scope of hearings to factors “directly related” to a project as opposed to any upstream or downstream effects and place time limits on NEB consideration of projects (15 months). The legislation permits the board to issue permits under the *Navigable Waters Protection Act* for pipeline and power line crossings and for habitat destruction under the *Species Act Risk Act* (EcoJustice, 2012) as well. The board has historically had no institutional capacity or expertise in either of these areas.

The Kyoto Protocol Implementation Act

Finally, Bill C-38 repealed the *Kyoto Protocol Implementation Act* (KPIA). The KPIA was introduced as a Liberal private member’s bill and enacted in 2007, over the objections of the Conservative government while it was a minority. The legislation required that the government develop and table annual plans regarding the fulfilment of Canada’s obligations under the 1997 Kyoto Protocol. In addition, the National Round Table on the Environment and Economy and the Commissioner for Environment and Sustainable Development (CESD) were mandated to report regularly on the government’s progress

in implementing the plans it tabled. The legislation had the effect of compelling the government to develop and make public plans for reducing Canada's greenhouse gas emissions, in the process requiring it to admit that it was abandoning the Kyoto Protocol targets for much weaker targets, and face a succession of reports from the NRTEE and CESD detailing the failures of those plans to meet either the Kyoto obligations or the weaker goals the government had set for itself (NRTEE 2009; CESD 2009, 2011).

Overview of the Legislative Changes as they affect EBPM

In terms of evidence-based policy the overall direction of the legislative changes contained the government's 2009, 2010 and 2012 budget implementation legislation reveal a number of important themes:

- A dramatic narrowing of the range of projects subject to environmental reviews and of the range of information gathered and considered in those reviews that do occur, particularly through the changes to the CEAA and NEB processes.
- A narrowing of the range of responses, such as terms and conditions on approvals, available to agencies and decision-makers in terms of the information that they do receive and consider.
- A significant expansion of the discretion on part of ministers and the cabinet in terms of information they gather and consider in their decision-making.
- The transfer of decision-making from independent bodies and expert agencies including line ministries with long-standing mandates to administer legislation to the cabinet and to agencies without expertise in relation to the subject matter of the legislation under which they are now to make decisions.
- The imposition of time limits for agencies, review panels and decision-makers to gather and consider evidence in relation to decisions with potentially major environmental, social and economic consequences, regardless of the scale or complexity of projects.
- Limitations on the range of non-governmental sources of input whose views are to be considered in decision-making.

- The outright elimination of agencies and mechanisms that are countervailing sources of information, advice and analysis relative to the government's preferred policy paths.

Constraining Civil Society Actors

Third dimension of the government's approach, prominently evident in relation to the environment, is related to non-governmental sources of information, analysis and dissent. Civil society organizations play a number of important roles in informing the public policy decision-making process. They can act as "knowledge creators" conducting original policy-relevant research and analysis, and as "knowledge brokers," translating the implications scientific and technical information generated by others into terms understandable to decision-makers, the media and the public, and into specific recommendations for new or amended laws, regulations, polices and initiatives. They can be "policy entrepreneurs," representing and advancing particular issues and initiatives through the policy process – an especially important function in relation to issues, like the environment, around which the benefits of public policy responses are likely to be widely distributed throughout society and the costs concentrated on a relatively small, but potentially powerful range of interests. Finally, their combination of independence from government, expertise is what can be highly specialized areas of public policy, and capacity to communicate with the media and public, as well as decision-makers, positions them to be highly effective "watchdogs" on government activities, decisions, and performance in their areas of interest.

Through all of these functions civil society organizations can contribute to evidence-based policy-making by being sources information, analysis, and countervailing policy advice relative that provided from within governments themselves and from dominant economic interests. Unfortunately, the current government does not seem to recognize the importance of these functions and has taken publically labelling environmental non-government organizations (ENGOs) opposed to its oil sands and energy policies in the following manner (Oliver 2012):

> "Unfortunately, there are environmental and other radical groups that would seek to block this opportunity to diversify our trade. Their goal is to stop any major project no matter what the cost to Canadian families in lost jobs and economic growth. No forestry. No mining. No oil. No gas. No more hydro-electric dams.
>
> These groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to undermine Canada's national economic interest. They attract jet-setting celebrities with some of the largest personal carbon footprints in the world to lecture Canadians not to develop our natural resources. Finally, if all other avenues have failed, they will take a quintessential American approach: sue everyone and anyone to delay the project even further. They do this because they know it can work. It works because it helps them to achieve their ultimate objective: delay a project to the point it becomes economically unviable."

These statements have been followed by more concrete measures to limit the capacity of ENGOs inform public debate about the government's environmental policies. In October 2011 the Environment Canada terminated a long-standing funding arrangement with the Canadian Environmental Network (CEN). The CEN had facilitated and coordinated the participation of environmental organizations, especially smaller, grassroots groups, across Canada in consultations with the federal government for nearly 40 years. The 2012 budget included an $8 million allocation to the Canadian Revenue Agency (CRA) for the specific purpose of reviewing the "political" activities of charitable organizations in Canada. The finance minister and Ministers of Natural Resources and of the Environment have been clear that environmental organizations are to be major targets of this effort (Globe and Mail 2012, MacCharles 2012).

The apparent purpose of the government's actions is constrain the ability of ENGOs to contribute to the debates around the government's energy and environmental policies. This may be achieved through a combination of the underlying threat of the loss of

charitable status, which may constrain organizations' ability to access funding from philanthropic foundations interested in environmental issues, an important source of funding for public policy related research by Canadian ENGOs, and by draining institutional resources in having to deal with CRA auditors.

Finally, as noted earlier, the amendments to both CEAA and the NEB Act limiting rights of input or standing in environmental assessment and NEB hearings to those with a "direct interest" in undertakings also have the potential to limit the ability of civil society organizations to participate in and contribute to the evaluation of projects before CEAA panels and the board.

Conclusions

Environmental policy is deeply, if imperfectly grounded in EBPM. Environmental assessment processes, in particular represented early attempts to what would now be regarding as EBPM principles to environmental decision-making. In the current context, the federal government has made a number of moves which are likely to have the effect of undermining a significant portion of the infrastructure for evidence based policy-making with respect to the environment in Canada. The closure of the Experimental Lakes Area in Northern Ontario and of the National Round Table on the Environment and Economy, have come to symbolize the government's orientation, although in practice the impacts of the government's approach extends much further.

The government's actions can be organized around three core themes: The undermining of the knowledge and information base and capacity for policy-making through budgetary reductions to federal agencies and elimination of specific sources of research and analysis, particularly if they are not in accordance with the government's agenda; the weakening of mechanisms for EBPM via legislative changes, especially with respect to the federal environmental assessment process; and the constraining non-governmental sources of information, analysis and criticism through the withdrawal of funding, targeted enforcement of CRA rules as they relate to the "political" activities of charitable organizations and limitations on rights of participation in federal environmental assessment and NEB hearing processes.

The outcome of the story of EBPM and the environment in Canada still uncertain, but the case study of the current federal government's approach suggests some important conclusions for the broader discourse on EBPM. Recent events highlight in particular the vulnerability of efforts at EBPM to the loss of the evidence and information base for decision-making and the capacity of agencies to use what information does exist due to budgetary pressures, whether driven by external factors, or as a result of conscious choices by a government. The fate of the federal environmental assessment process points to a second vulnerability - that if process for gathering and considering evidence comes to be perceived as too cumbersome or time-consuming it can be at risk of attack and "reform" for these reasons. The result can undermine the usefulness, effectiveness and legitimacy of the process.

At the same time, the results of the government's restructuring efforts so far in the environmental case suggest caution in the other direction as well. Obvious failures or unwillingness to allow the proper consideration of evidence in decision-making process can ultimately undermine the political legitimacy and even legal validity of the resulting decisions. The growing political and legal challenges facing the proposed Alberta to BC Northern Gateway oil pipeline (Whittington 2012), notwithstanding the legislative changes undertaken under the "Responsible Resource Development" banner by the federal government in the name of facilitating its approval, underline the potential for such approaches to be self-defeating.

The environmental policy experience also highlights other risks and challenges. The loss of the information base and analytical capacity increases the risk for governments of being blindsided by emerging issues, and of being unable to formulate effective or credible responses. More importantly the loss of information and the capacity to assess and use that information weakens governments' ability to identify and address emerging problems before they manifest themselves as crises or disasters. Such an outcome implies significantly increased risks for the health, safety and environment of Canadians.

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