



August 25, 2017

The Hon. Catherine McKenna, M.P.
Minister of the Environment

The Hon. Dominic Lablanc, M.P.
Minister of Fisheries and Oceans

FACULTY OF
ENVIRONMENTAL
STUDIES

The Hon Marc Garneau, M.P.
Minister of Transport

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

The Hon Gary Carr, M.P.
Minister of Natural Resources

Re: Environmental and Regulatory Reviews Discussion Paper

Dear Ministers,

I am writing to you in response to the Government of Canada's June 2017 Discussion Paper on the federal environmental and regulatory review processes. The paper deals specifically with proposed reforms to the *Fisheries Act*, former *Navigable Waters Protection Act* (replaced through Bill C-38 with the *Navigation Protection Act*, and the *Canadian Environmental Assessment Act*.

I was the author of a discussion paper on the federal environmental and regulatory process published last year by the George Cedric Metcalf Foundation.¹ I have written and published extensively on the impact of Bill-38 on the environmental governance framework in Canada² and energy, environment, and climate change policy in Canada more generally.³

I participated in the Environmental Assessment Expert Review Panel process and have hosted through the Faculty of Environmental Studies Sustainable Energy Initiative, a series of videoconference/webinar discussions on the

¹ Winfield, M., *A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects* (Toronto: George Cedric Metcalf Foundation, 2016)

² See, for example, Winfield, M., "The Environment, 'Responsible Resource Development' and Evidence Based Policy-Making in Canada", for Shaun Young ed., *Evidence Based Policy-Making in Canada* (Toronto: Oxford University Press, 2013).

³ See, for example, Winfield, M., "Implementing Environmental Policy in Canada" for D. VanNijnatten, ed., *Canadian Environmental Policy and Politics* (4th Edition) (Toronto: Oxford University Press, 2016); Winfield, M., and D. Macdonald, "Federalism and Canadian Climate Change Policy" for G. Skogstad and H. Bakvis, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy* 3rd edition, (Toronto: Oxford University Press, 2012).



reviews.⁴ Given the time limitations, and the extensive comments provided by other individuals and organizations I have focussed my comments on a limited number of specific issues in relation to each of the three major elements of the discussion paper.

1. Habitat Protection Provisions of the *Fisheries Act*

FACULTY OF ENVIRONMENTAL STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

Bill-38 substantially weakened the habitat protection provisions of the *Fisheries Act*. These provisions were essential to protecting the sustainability of Canadian fisheries, and protection of aquatic ecosystems throughout Canada. Provincial governments and municipalities relied heavily on these provisions as foundations of their own management frameworks for wetlands, shorelines, stream, rivers, and other important landscape and ecosystem features.

I support the overall direction of the government's proposals with respect to the *Fisheries Act*, including the emphasis on partnerships with indigenous people, effective planning and integrated management frameworks, and reporting to Canadians. I am particularly encouraged by the proposal to restore the s.35 prohibition on the harmful alteration, disruption or destruction (HADD) of fish habitat without approval.

However, rather than clarifying which projects require authorizations and which do not, as proposed on the discussion paper, the focus should be what *form* authorizations should take. For "minor" projects, the scope of which would need to be defined in the Act (*i.e.* what qualifies as minor), Parliament could give the Minister the power to enact regulations that would automatically authorize such works, provided that the proponents comply with certain enforceable conditions, and be subject to some form of notice and registration system. Such an approach would follow that being employed by a number of provinces with respect to minor environmental approvals.

However, experience with these provincial systems suggests the need for a number of important safeguards.⁵ In addition to a clear definition of what constitutes a "minor" project, the following elements should be included in the system:

⁴ See <http://sei.info.yorku.ca/seminar-presentations/>, March 23, 2016 and March 13, 2017.

⁵ See R.Nadajarah, E.Macdonald and M.Carter-Whitney, *Modernizing Environmental Approvals* (Toronto: Canadian Environmental Law Association, Canadian Institute for Environmental Law and Policy and EcoJustice, 2010), <http://www.cela.ca/sites/cela.ca/files/720.ModernizingApprovalsProcess.pdf>.



FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

- Public notice, and an opportunity to comment and request that a proposed minor project be subject to a more detailed review, before registration of a project can be finalized. Given that Department of Fisheries and Oceans officials would not be reviewing “minor” projects on a routine basis, local and traditional knowledge of site conditions, the significance of the location in question, and local knowledge of past practices on the part of proponents will be the only safeguards to ensure that projects are not inappropriately registered, do not qualify as “minor” or whose implications are such that a more detailed, individual review should take place. Notice of proposed registrations, opportunities to file comments or request a detailed review, and notice of final registrations should be managed through a single on-line registry, similar to the *Environmental Bill of Rights* registry in Ontario.
- Mechanisms must be established to consider the cumulative effects of multiple “minor” in specific locations. This is a particularly important consideration with respect to fish habitat, where the incremental damage caused by minor projects can cumulatively become very significant. Consideration of cumulative effects has emerged as a major gap in provincial registration/permit-by-rule type approval systems.
- Safeguards must be established to prevent proponents from attempting to divide major projects into a series of minor projects to avoid detailed review.
- Adequate resources must be put in place for follow-up inspections of projects approved through the registration process. This has emerged as a major area of weakness in provincial registration/permit-by-rule type systems. A legislative mechanism for members of the public to report and request investigations of potential failures to comply with the relevant regulations and guidelines should be established.

2. The Navigation Protection Act

The discussion paper’s proposals regarding the former *Navigable Waters Protection Act* (NWPA)(now the *Navigation Protection Act*) are by far its most disappointing element.

The discussion paper essentially proposes to maintain the Bill-C-38 *Navigation Protection Act* structure of listing specific waterways for which the approval of the Minister of Transport will be required for any works or undertakings that interfere with navigation. The *Navigation Protection Act* structure was a major retreat from the NWPA provisions, which required the approval of the Minister of Transport for works and undertakings that could interfere with any navigable waters in Canada.

The discussion paper proposals fail to fulfil the 2015 Liberal Party Platform commitment to “restore” the protections lost through Bill C-38. The



FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

comprehensive protections provided by the former NWPA were essential to the protection of navigation in all Canadian waters. The provisions also provided an important foundation for the role of the federal government in the wider protection of the integrity and quality of these waters.

The original provisions of the NWPA, requiring the approval of the Minister of Transport for any activities interfering with navigation in all navigable waters should be restored. A mechanism, similar to that proposed above in relation to s.35 of the *Fisheries Act*, for minor works and undertakings affecting fish habitat, could be established for minor projects affecting navigable waters. "Minor" projects would need to be clearly defined, mechanisms for public notice and opportunities to comment and request more detailed individual project reviews would need to be established, a registry of such projects established, along with mechanisms to address cumulative effects, and adequate resources for inspection and enforcement provided.

3. The *Canadian Environmental Assessment Act*

The reform of the *Canadian Environmental Assessment Act* represents the most complex aspect of the discussion paper. The paper incorporates some of themes from the Expert Panel on Environmental Assessment's report. However significant gaps and concern remain. I will focus my comments on these issues.

What Undertakings are Subject to Federal Environmental Assessment?

The discussion paper proposes to maintain the approach to the triggering of federal environmental assessments through a designated project list, established through the Bill-38 version of CEAA.

This proposal is a major disappointment. The original triggering structure within CEAA, based on the status of projects as having a federal proponent, occurring on federal lands, receiving federal funding, or being subject to a requirement for a specified federal approval (a.k.a. the law list triggers), was carefully constructed to provide a solid constitutional basis for the conduct of federal assessments. It also provided a clear and consistent structure for understanding when a federal assessment would be required. The designated project list approach, in contrast, has no clear constitutional foundation, and embeds a high level of political discretion and uncertainty in when assessments are required.⁶ The designated project list model also leaves significant gaps relative to the previous approach under CEAA, particularly with respect to minor, but potentially cumulatively significant, and projects on federal lands or with federal proponents.

⁶ On problems with the designated project list approach see, Commissioner for Environment and Sustainable Development *2014 Fall Report "Implementing CEAA 2012"* http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_04_e_39851.html



FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

The original CEAA triggering mechanisms for federal environmental assessments should be restored. A designated project list may serve as a backstop, or as a guide to when more detailed assessments will be required, in a manner similar to the former Comprehensive Study List. Mechanisms should also be established for the designation of project for review by the Minister of the Environment in response to circumstances beyond those contemplated in the general triggering mechanism and in response to high levels public concern, impacts on indigenous rights or interests, or potential environmental significance.

Scope and Criteria for Assessment

The Discussion Paper proposes broadening the scope of environmental assessments to include the environmental, economic, social, and health impacts of projects to support integrated decision-making. The Discussion Paper also recommends the consistent use of Gender-Based Analysis, enhancing the assessment of impacts on Indigenous peoples, considering both the positive and negative impacts of projects, and strengthening assessments through peer-review of scientific evidence.

These elements of the discussion paper are welcome, but to fulfill the promise of the Discussion Paper's proposals, the government's new legislation must clearly state its overarching *purpose*, which should be to ensure that approved projects are consistent with – and contribute to – sustainability.

Consistent with the recommendation made by Olszynski et.al. in their submission,⁷ a revised CEAA should include:

- A legislated definition of sustainability that includes all five pillars acknowledged in the Expert Report;
- Legislated requirements that all impact assessments—project, strategic and regional—result in a determination of which option(s) makes the greatest contribution to overall net sustainability;
- A legislated requirement that project assessment consider: the project's purpose; positive and negative impacts over its entire lifecycle; cumulative effects; alternatives to the project and alternative means of carrying out the project; public comments; and scientific and Indigenous knowledge;
- An institutional and procedural mandate that allows for a rigorous and comprehensive sustainability assessment (including public participation at all stages and expert peer review);

⁷ M.Olszynski, J.Stacy, J.McLean, A.Kwasniak and R.B.Gibson, *Rebuilding Public Trust in Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation*, August 2017.



FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.

4700 KEELE ST.

TORONTO ON

CANADA M3J 1P3

T 416 736 5252

F 416 736 5679

www.yorku.ca/fes

- Robust reason-giving requirements to ensure transparency in how the sustainability assessment is conducted.

Location of Decision-Making Authority

Consistent with the comments of Olszynsk et.al. I support the government's proposal to have impact assessment carried out by a single agency. I strongly support the Expert Panel's recommendation for a new Independent Assessment Commission, modelled on Canada's experience with successful independent, quasi-judicial commissions. In particular, Quebec has decades of positive experience with the Bureau d'audience publique en environnement (BAPE), an independent environmental commission, that has enjoyed long-standing public support.

The establishment of an independent commission, with decision-making powers, would de-politicize the decision-making process around environmental assessments, and make a significant contribution to restoring the credibility and legitimacy of the federal review process, particularly among indigenous, scientific, industry and public constituencies.

Concerns have been raised about the appropriateness of locating decision-making authority with an independent commission, as opposed to the cabinet, as under Bill C-38, or individual ministers, as under CEAA 1992. There is widespread precedent for vesting of decision-making powers with independent agencies and commissions. Prominent examples at the federal level include the Canada Radio and Television Commission (CRTC) and the National Energy Board, prior to the Bill C-38 revisions to the *National Energy Board Act*.

Decisions by an independent commission could be subject to appeal to the Minister of the Environment or cabinet. However, new legislation should establish a clear, open and transparent process for such appeals, including the criteria to be considered in decision-making, and requiring a detailed justification for an amendment or changes to decisions made by the commission.

If decision-making authority is not vested in a new Environmental Assessment Commission, then authority should be placed with the Minister of the Environment. Given the crowded nature of the cabinet's agenda, the vesting of decision-making authority with the cabinet, as is the case with Bill C-38, is impractical unless only a very small number of assessments per year (i.e. <10) are contemplated. Such an outcome would leave major gaps in Canada's environmental assessment structure.

Transparency and Public Participation

I welcome the government's commitment to transparency and public participation in federal regulatory and approval processes. Mechanisms to



FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.
4700 KEELE ST.
TORONTO ON
CANADA M3J 1P3
T 416 736 5252
F 416 736 5679
www.yorku.ca/fes

ensure public participation and transparency need to be embedded in the legislation. In particular, the legislation should include mandatory language requiring the publication of all notices about assessments and regulatory actions on an online registry. The standing test of being "directly affected" by an undertaking, introduced into CEAA and the *National Energy Board Act* through Bill C-38, must be eliminated and not be replaced with another test for standing. Public confidence in the assessment process requires inclusivity, recognizing also that there are many ways in which public participation can be facilitated.

Intergovernmental Cooperation

I am supportive of a cooperative and integrated approach to assessment when more than one government is involved in the approval of a project. Joint assessments should be integrated in the direction of the highest standard for public participation, the scope of assessment and decision-making criteria. Substitutive or equivalent process approaches should be avoided. All of the levels of government involved in the assessment of projects should be actively involved in the review process.

While intergovernmental cooperation is highly desirable, circumstances may arise when an effective and transparent review process cannot be established through such cooperation. In these circumstances the federal government must retain the capacity to conduct its own assessment of a project or undertaking and reach its own decisions regarding its approval.

Other Matters in the Assessment Process

On the questions of Cumulative Effects; Science, Evidence and Indigenous Knowledge; and Adaptive Management, I concur with and support the comments made by Olszynski et.al.

4. Partnering with Indigenous Peoples

With respect to the *Fisheries Act*, the *Navigation Protection Act*, and CEAA, I defer to Canada's Indigenous peoples to comment on the discussion paper proposals that directly affect their rights and interests. I strongly support the government's proposals in principle for enhanced cooperation and collaboration with Canada's indigenous peoples in regulatory and environmental decision-making.

I would be pleased to respond to any questions you, or your officials may have regarding my comments on these matters,

Yours sincerely,



MS. Winfield

Mark S. Winfield, Ph.D.

Professor

e-mail: marksw@yorku.ca

Tel : 416-736-2100 Ext 21078

FACULTY OF
ENVIRONMENTAL
STUDIES

HEALTH, NURSING
& ENVIRONMENTAL
STUDIES BLDG.

4700 KEELE ST.

TORONTO ON

CANADA M3J 1P3

T 416 736 5252

F 416 736 5679

www.yorku.ca/fes

Cc : Elizabeth May, M.P., Leader, Green Party of Canada
Linda Duncan, M.P., NDP Environment Critic.