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Analysis: Federal Government's Discussion Paper on Environmental Reviews

This June, the federal government released its [Environmental and Regulatory Reviews Discussion Paper](#), outlining some of the key changes it is considering to environmental laws and processes. The Discussion Paper follows expert panel reviews of [federal environmental assessment processes](#) and the [National Energy Board](#), and Parliamentary Committee reviews of the [Fisheries Act](#) and [Navigation Protection Act](#), which were launched to deliver on government promises to strengthen, modernize and restore public trust in those environmental laws.

The Discussion Paper focuses primarily on environmental assessment reform and is very light on detail. Only 21 pages (excluding covers), it falls far short of the mark when it comes to the government's commitments, as well as a multitude of comments and submissions by the public, groups and Indigenous peoples on how to launch Canada's environmental laws into this millennium.

On its release, West Coast issued [Making the Grade: A Report Card on Canada's Proposal for Strengthening Environmental Laws and Processes](#), which graded the main discussion points against key recommendations on next-generation environmental laws. The Discussion Paper got a C- overall. The environmental assessment section received a D.

Overview of the Discussion Paper

The Discussion Paper outlines five principles that will guide changes it makes to the four environmental laws. They are:

- Fair, predictable and transparent environmental assessment and regulatory processes that build on what works;
- Participation of Indigenous peoples in all phases that advances the Government's commitment to the United Nations Declaration on the Rights of Indigenous Peoples and reconciliation;
- Inclusive and meaningful public engagement;
- Timely, evidence-based decisions reflecting the best available science and Indigenous knowledge; and
- One project – one assessment, with the scale of assessment aligned with the scale and potential impacts of the project.

Section 1: Environmental Assessment

The first substantive section, "Rebuilding Trust in the Project Assessment System," addresses seven main issue areas:

- Addressing Cumulative Effects

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

Addressing Cumulative Effects

The Discussion Paper proposes four strategies for addressing policy issues and the cumulative effects of multiple types of development:

- Developing and strengthening national environmental frameworks like the Pan-Canadian Framework for Clean Growth and Climate Change;
- Conducting strategic assessments to determine how to apply those frameworks at the project level;
- Conducting regional assessments; and
- Developing an integrated open science and data platform.

At the strategic level, it says that a strategic assessment of the Pan-Canadian Framework should occur first to determine how to assess projects' life-cycle greenhouse gas emissions.

While a focus on strategic and regional assessment is welcome, there is no mention of legislated triggers, or how and where regional assessments will occur. It's also not clear whether the law will require that the outcomes of these regional and strategic assessments be applied at the project level. Also absent is a commitment to require strategic assessments of proposed federal plans, policies and programs with implications on sustainability in the legislation.

A welcome proposal is to collaborate with Indigenous peoples on regional-scale studies, although the reference to "regional studies" as opposed to "assessments" is concerning. While regional studies merely assess cumulative impacts within a region, regional assessments analyze alternative scenarios for development, to select the preferred option for sustaining ecological and human well-being.

Another major gap is the lack of mention of the funding that will be necessary for carrying out effective, collaborative and outcomes-oriented regional and strategic assessments. In order for the government to actually begin to conduct regional and strategic assessments in a systematic way and as needed, it will need to devote considerable up-front resources – resources that could be recovered by proponents, as well as by the cost savings of having healthier ecosystems, communities and climate.

Early Engagement and Planning

In alignment with the [Expert Panel report](#) on environmental assessment processes, the Discussion Paper suggests a requirement for an early planning and engagement phase that would be "led by proponents with clear direction from government."

The early planning phase would help design project proposals and assessment processes, by identifying an initial list of issues to be considered in the assessment, what would be assessed and how, and the information required in the assessment and regulatory processes. This phase would also determine how to incorporate stakeholder interests and consider Indigenous rights, and establish timelines for reaching a decision.

Early planning is critical to achieving meaningful public participation and Indigenous collaboration, and through those, better EA outcomes. However, an early planning phase led by industry rather than government seriously risks undermining those goals.

Also, the Discussion Paper lacks detail on the process for the early planning stage, such as when it is triggered, what information the proponent would provide, and the role of other jurisdictions. To maximize its effectiveness, an early planning phase should require proponents to register basic (not detailed) project descriptions with the assessment authority, and the assessment authority to provide notice to other jurisdictions, Indigenous peoples and the public. In addition to the scope of the project and assessment, consultation and participation plans, this phase should also identify alternative means of carrying out the project, and reasonable alternatives to the project.

Transparency and Public Participation

A welcome proposal is to eliminate the standing test applied by the National Energy Board to determine whether or not members of the public should be able to participate in assessments. The Discussion Paper also proposes improving participant funding programs, creating more user-friendly online public access to project information, and establishing more inclusive monitoring and compliance activities. Canadians would be engaged in a two-way dialogue, and there would be greater transparency on reasons for decisions and information on how decision-makers considered public input.

Curiously, the Paper suggests “[c]learer transparency requirements for more projects (e.g., assessments of projects on federal lands, notice of proposed works on navigable waters),” but does not define what “more projects” refers to. This proposal may be that such projects are not subject to federal assessments but would have heightened transparency requirements, or it may be that those projects do require assessments and that those assessments would have greater transparency requirements than assessments of other projects.

Overall, these proposed changes are welcome, but there are some critical gaps. In order to achieve two-way dialogue, communities will need to have options beyond just information sessions, written comments and hearings, and will need to be consulted in *how* they would like to engage. It’s also critical to preserve the ability to hold formal hearings with cross-examination where appropriate, to allow for rigorous testing of the evidence.

Further, the mandatory timelines referred to in the Impact Assessment section (see below) risks eroding both the ability of people to meaningfully participate, as well as their confidence in the outcomes, due to difficulties faced in trying to meaningfully engage within a limited (and often inadequate) timeframe. Also, decisions made by Cabinet based on a vague public interest test could mean no or inadequate reasons for decision or demonstrated application of the information and knowledge provided in the assessment. Without these, transparency will not be achieved.

Science, Evidence and Indigenous Knowledge

For this section, the Discussion Paper reiterates its proposal for an open science and data platform (which presumably is the same user-friendly online project information platform referred to above). It mentions incorporating Indigenous knowledge through tools co-developed with Indigenous peoples, as well as protection of confidentiality, peer reviews of science and evidence, and providing plain language summaries to the public.

This section, too, falls a little flat. While emphasizing Indigenous knowledge is a good start, Indigenous people have raised concerns that “integrating” Indigenous and western science and knowledge perpetuates colonization by subsuming Indigenous knowledge and legal systems within dominant colonial state systems. Rather, some scholars have suggested “[braiding](#)” as a more appropriate method.

As for western science, there is again no mention of the increased capacity that would be required of the assessment authority and other federal departments and agencies (such as Environment Canada and Fisheries and Oceans Canada) in order to ensure the best available information and rigorous reviews. Nor is there mention of placing the burden of proof on proponents, so that participants’ evidence is given adequate weight.

Impact Assessment

As recommended by the EA Review Expert Panel, the Discussion Paper proposes moving from “environmental” assessment to a broader “impact” assessment that would consider health, social and economic impacts and benefits along with environmental ones (the EA Expert Panel had also recommended considering cultural values). It also suggests applying “[Gender-Based Analysis Plus](#)” in assessments and explicitly requiring consideration of impacts on Indigenous peoples, which are both welcome additions.

However, decision-making power would be retained by the Minister or Cabinet (no details are provided on which, or when), based on whether projects are in the public interest. These recommendations, in combination with the inclusion of considering economic factors, is one of the most concerning aspects of the report.

Groups like West Coast advocated for a [sustainability approach](#) that uses decision-making criteria and trade-off rules to ensure that projects make a net contribution to sustainability without trading significant environmental harms for economic benefits. The EA Expert Panel [recommended a similar approach](#).

Instead, the Discussion Paper makes no mention of a net contribution to sustainability, or safeguards against environmental trade-offs. Rather, it appears to preserve the current decision-making structure that allowed Cabinet to approve the [Site C dam](#) against the recommendations of its jointly-appointed review panel, and approve the Northern Gateway oil pipelines and tankers project despite [obvious significant risk](#) to marine environments, Indigenous peoples and non-Indigenous communities.

Also, while the Discussion Paper proposes establishing a single government agency responsible for EAs (or IAs), it does not stop regulators like the National Energy Board from acting as assessment authorities. Instead, it proposes returning to the pre-2012 practice of appointing joint review bodies comprised of the regulators and assessment authority – only adding offshore energy boards as joint authorities. Essentially, the proposal is for a return to the kinds of joint

review panel appointed for the troubled Northern Gateway assessment, which so lacked credibility that the controversy surrounding that assessment contributed to the government's promise to reform EA.

There are more troubling proposals in this section, such as retaining legislated timelines and only requiring assessments of projects designated on a list – which is the current process that, when introduced in 2012, saw the elimination of thousands of assessments. In order to understand the cumulative impacts of smaller projects on the environment and Indigenous peoples' rights, we need some mechanism for understanding, tracking and mitigating the even comparatively smaller impacts of projects and activities.

Partnering With Indigenous Peoples

The main proposals in this section deal with improving consultation and “being responsive to” Indigenous rights, jurisdiction and decision-making, without providing many details. The single government agency responsible for EAs would have increased capacity to coordinate consultation and accommodation, and roles for consultation and accommodation would be clarified (what those roles are is not stated). Government would work with Indigenous peoples to build their capacity and enable their participation, and working tables with Indigenous peoples would be convened. Indigenous peoples would be engaged early and regularly, with the goal of achieving their free, prior and informed consent (FPIC).

For co-governance, there would be formalized co-development of collaboration frameworks, as well as greater participation of Indigenous peoples on assessment boards and panels, and in regulatory processes. The Discussion Paper also proposes “[c]reating opportunities for Indigenous partnerships and co-development in monitoring.”

The combined proposals for early engagement, the early planning phase and the goal of achieving FPIC are encouraging. However, the proposal falls short of *requiring* FPIC, or of co-governance of regional or project EAs.

Cooperation with Jurisdictions

The Discussion Paper proposes more comprehensive collaboration with other jurisdictions (including provincial, territorial and Indigenous governments), and suggests allowing the Minister to approve exemptions to legislated timelines in order to align with other jurisdictions' processes. However, it would retain substitution of provincial and territorial assessments, which is widely opposed by the public and environmental groups (including West Coast).

The proposal to ensure better recognition of Indigenous jurisdiction, laws, practices and governance systems is encouraging, although the Paper falls short of proposing to actually *respect* them. The Discussion Paper also recommends working with provinces, territories and Indigenous peoples on the planning and management of cumulative effects, but does not mention providing funding to enable that cooperation.

Section 2: Modern Energy Regulation

The second section of the Discussion Paper deals with modernizing the National Energy Board (NEB). It proposes changes to the mandate, governance, decision-making and operations of the NEB, and improving Indigenous participation.

For the NEB's mandate, the Discussion Paper recommends improved use of existing venues for policy discussions, such as [Generation Energy](#), developing a separate model for delivering energy information, and providing the NEB with the authority to regulate renewable energy projects in offshore areas. Also, the Discussion Paper suggests that the *NEB Act* explicitly include environmental, safety, social and health considerations in determinations of "public interest."

Regarding governance, the Discussion Paper follows the NEB Expert Panel's recommendation to separate the roles of the Chief Executive Officer and Chairperson, and creating a corporate-style executive board. It suggests creating separate Hearing Commissioners to review projects and provide regulatory authorizations. While the NEB would remain in Calgary, there would no longer be a residency requirement for the Board and Hearing Commissioners. The diversity of those members should be enhanced, including through increased Indigenous representation and expertise in Indigenous knowledge.

The Discussion Paper suggests increasing public participation opportunities, enhancing participant support and introducing a landowners' advocate. The NEB would have authority to make final decisions on things like import/export licenses, and there would be alternative dispute resolution and other adjudicative processes. Information would be made publicly available online, and safety and security measures would be enhanced.

Finally, there are some points regarding improving Indigenous engagement, including creating opportunities for dialogue with Indigenous peoples on energy policy, building Indigenous capacity for participation, and expanding the role of Indigenous peoples in monitoring.

While many of these recommendations are welcome, more details are required, such as the proposed "separate model to deliver timely and credible energy information to Canadians." Absent from the Discussion Paper is any mention of a statutory right of appeal, and as mentioned above, the retention of NEB authority over environmental assessments is contrary to calls from across the country to limit the NEB's role in assessments to that of expert advisor. Also, the Discussion Paper is silent on whether and how the NEB will consider climate in its regulatory and energy reporting functions.

Section 3: Restoring Lost Protections to the *Navigation Protection Act*

Despite the title, this section fails to suggest restoration of the legal protections lost for the vast majority of Canada's rivers and lakes in 2012. Instead, the paper follows the disappointing recommendations of the Parliamentary Standing Committee on Transport (which we've [written about previously](#)) and proposes improving the process for adding navigable waters to the Schedule of the Act that currently protects less than 1% of Canada's waterways. It also proposes regulating obstructions and certain classes of works, and developing a complaint mechanism to address public concerns about the right of navigation.

In addition to these lesser protections, the Discussion Paper proposes incorporating Indigenous knowledge in decision-making, facilitating early and regular engagement and participation of Indigenous peoples in NPA processes, and involving Indigenous peoples in monitoring, enforcement and decision-making of activities within their territories. Proponents would be required to provide notice and opportunities for consultation on works on any navigable water, and there would be public access to on-line information about projects.

The paper is unclear about whether “any navigable water” means any water body on the Schedule of protected waters, or if it includes non-Scheduled waters. The former interpretation would be preferable, as it would at least allow for some tracking of and consultation on projects on all Canada’s navigable waters.

Section 4: Enhanced Protection for Canada’s Fish and Fish Habitat

This section of the Discussion Paper received the highest grade in our report card, with a B overall. Happily, it proposes restoring the former protection of harmful alteration, disruption or destruction (HADD) of fish habitat without approval, although does not clarify whether that prohibition would apply to activities as well as projects. It also suggests developing standards and codes of practice, enhancing enforcement powers, clarifying when *Fisheries Act* authorizations are required and building the capacity and expertise to protect fish and fish habitat. While it mentions clarifying the factors considered in decision-making, it does not mention what those factors would be.

In addition to increasing protections, it proposes a number of measures related to planning and integrated management. For example, there would be the incorporation of resource management and planning principles such as ecosystem-based management, support for early and broad engagement in planning and management activities, and the identification of important habitats.

There is much mention of collaboration, including for identifying restoration and rebuilding priorities, conserving and enhancing fish habitat, and developing scientific expertise. Welcome proposals include strengthening federal leadership, cooperation and communication with other orders of government, and the establishment of a collaborative advisory committee on fish and fish habitat protection. Finally, as with the other sections, the Paper suggests providing transparent access to information about projects and activities that impact fish and fish habitat, through improved reporting, strengthening monitoring, and making relevant information available in a timely manner.

Absent from the Discussion Paper is any mention of making sustainability the foundation of the *Fisheries Act*, or mention of including legal requirements to rebuild fish stocks.

Conclusion

While the sections of the Discussion Paper on the *Fisheries Act* and National Energy Board are encouraging (although light on detail), the main section on environmental assessment reform is disheartening. Also, the lack of full restoration of protections under the *Navigation Protection Act* – and no mention of environmental assessments of projects that require NPA or *Fisheries Act* authorizations – means that the Paper falls short of the government’s commitment to restore lost protections.

Overall, while there is a lot to work with in the Discussion Paper, much needs to be done to bring the environmental assessment proposals and other recommendations in line with the government’s commitments to restoring lost protections and public trust in processes.

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