

SEPTEMBER 20, 2019

## Environmental Update: Recent Regulatory Developments

This past summer witnessed a number of significant legislative changes to Canada's environmental regimes at both the federal and provincial levels. The highly anticipated *Impact Assessment Act* came into force along with amendments to the *Fisheries Act*, while changes to provincial regimes in Ontario and Québec are under way. In this article, we provide a high-level review of the most notable changes and the developments expected over the coming months. We note that transitional rules may apply.

### Key Federal Changes

#### ***Impact Assessment Act***

On August 28, 2019, the *Impact Assessment Act* (IAA) came into force, replacing the previous federal environmental assessment regime under the *Canadian Environmental Assessment Act, 2012*. Noteworthy changes include the following:

- **Central authority:** Projects will be assessed by a central authority, the Impact Assessment Agency of Canada (Agency), in conjunction with the newly restructured Canadian Energy Regulator (former National Energy Board), the Canadian Nuclear Safety Commission and offshore petroleum boards.
- **Planning phase:** A new "planning phase" will replace the current screening process, with public notice inviting comments and a detailed project description to be prepared by the proponent, taking comments into account. The nature of designated projects has not changed significantly; for more information, see the [\*Physical Activities Regulations\*](#).
- **Ministry veto:** The Minister of Environment and Climate Change has the power to determine that a designated project will cause unacceptable environmental effects and to effectively prevent an assessment from being undertaken.
- **Public and Indigenous interests:** Public participation is at the discretion of the Agency (it is no longer necessary for persons to be directly affected or to have relevant expertise for "standing"). Indigenous interests are to be taken into account through express consultation and assessment obligations.
- **Public interest test:** The final determination of the assessment of a designated project will no longer be based upon whether any significant adverse effects of the project are justified, but rather on whether the project is in the "public interest." This test takes into account broad issues such as sustainability, the impact on Indigenous groups and their rights, and whether the effects of the project hinder or contribute to Canada's environmental obligations, including climate change commitments.

A [Practitioner's Guide](#) to the IAA has been issued.

#### ***Fisheries Act***

Also on August 28, 2019, final changes to improve and "modernize" the *Fisheries Act* came into force. The most significant changes are the reversal of amendments that were made in 2012 to limit the protections afforded by the *Fisheries Act*. The following protections have been reinstated:

- Protective provisions apply to all fish and fish habitats (rather than only to those fish and fish habitats that were part of or supported commercial, recreational or Indigenous fisheries).
- The prohibition against the harmful alteration, disruption or destruction of fish habitat now applies (rather than the more limited prohibition against serious harm to fish).

- The prohibition against causing the death of fish (by work, undertaking or activity other than fishing) now applies.
- Notification and corrective action obligations, as well as offence liabilities, apply with respect to the foregoing.

The conservation powers of the Department of Fisheries and Oceans have been enhanced in the amended *Fisheries Act*, including authority to designate and restrict projects that are likely to result in the death of fish or harm to fish habitat; authority to establish a system to encourage conservation activities for the establishment of habitat banks (to offset fish and fish habitat losses); and authority to establish rules to manage Ecologically Significant Areas with respect to fish habitat.

The federal government has begun publishing guidance documents and policy statements aimed at assisting proponents to navigate the revised legislation, including the *Fish and Fish Habitat Protection Policy Statement*.

## Key Provincial Changes

### Ontario's *Endangered Species Act, 2007*

On July 1, 2019, significant amendments to Ontario's *Endangered Species Act, 2007* came into force, as follows:

- **Adverse effect threshold:** Shifting from minimization of adverse effects on individual members of a species, to minimization of adverse effects on the species as a whole.
- **Species at Risk Conservation Fund:** The creation of an agency to collect developer charges (under permits/agreements, in lieu of project-specific mitigation requirements) and carry out coordinated conservation measures.
- **Suspended protections:** Discretion to suspend protections on newly listed species for up to three years (if protections are likely to have significant social or economic implications and survival of the species in Ontario is not jeopardized).
- **Preauthorizations and transition periods:** Preauthorization of specified activities. For existing permits/agreements, delayed obligations to comply with new species protections.
- **Streamlined permitting:** Preapproval of particular conservation methods. New "landscape agreement" for multiple activities in a geographic area.

### Ontario's *Environmental Assessment Act*

In a discussion paper issued in the spring, the Ministry of the Environment, Conservation and Parks proposed changes to modernize Ontario's *Environmental Assessment Act* (EAA), including the following:

- **"One-window" approach and specified timelines:** Coordination of environmental assessment (EA) and permitting processes to streamline applications and improve review timelines.
- **Project list:** Establishment of a list of projects requiring EA, exempting low-risk and certain medium-risk projects and further differentiating levels of assessment requirements.
- **Provincial/federal harmonization:** Minimization of duplication between provincial and federal EA requirements.
- **Restricting "bump-ups" of class EAs:** Restricting circumstances for "bump-up" requests (i.e., limiting individual EAs) and imposing timelines for the review of such requests.

On June 6, 2019, changes to the EAA were made to provide class EA exemptions for low-risk projects (based on criteria to be established) and to limit "bump up" requests to circumstances where the Minister is of the view that granting such requests may prevent, mitigate or remedy adverse impacts on the rights of Indigenous peoples, or on prescribed matters of provincial importance. Draft regulations aimed at enacting the remainder of the proposed amendments are expected to be released for public consultations this fall.

**Québec's *Environment Quality Act***

After amendments modernizing the *Environment Quality Act* came into force in March 2018, Québec has been developing and amending the numerous regulations required to implement these changes. An overview of initial proposals was provided in our [February 20, 2018 bulletin](#). Following receipt of numerous comments, the Québec government has revisited the proposals and is now establishing an authorization scheme tailored to environmental risk, with regulations expected to require one of the following:

- a ministerial authorization (moderate-risk activities)
- a declaration of compliance (low-risk activities)
- an exemption from the obligation for an authorization or a declaration of compliance (activities representing a negligible or low risk)
- an environmental impact assessment and review pursuant to the assessment framework in effect since spring 2018 (high-risk activities)

Some sectoral regulations have also been adopted or updated in 2019, including the *Regulation respecting Sand Pits and Quarries and the Land Protection and Rehabilitation Regulation*. Furthermore, various draft regulations have been published by the Québec government in 2019 and are currently being finalized, including the *Regulation respecting Halocarbons* and the *Regulation respecting Traceability of Excavated Contaminated Soil*.

We will continue to monitor and provide commentary on future developments. For further information, please reach out to any of the key contacts listed on this communication.

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