

An Overview of Bill C- 38: The Budget Bill that Transformed Canada's Federal Environmental Laws

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In late April 2012, the federal government introduced [Bill C-38: An Act to Implement Certain Provisions of the Budget tabled in Parliament on March 29, 2012 and Other Measures](#) which received Royal Assent on June 29, 2012ⁱ and is now known as the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19. As its title suggests, *Bill C-38* purports to implement the most recent budget of the federal government (the [Jobs, Growth and Long-Term Prosperity Economic Action Plan 2012](#)).

Weighing in at over a hefty 400 pages, *Bill C-38* does much more than implement budgetary objectives; it substantively changes federal environmental law in Canada. Over ten pieces of federal environmental legislation are amended or repealed by *Bill C-38*. Significant changes are made to federal environmental assessment law, fisheries law, and the operation of the National Energy Board. As well, *Bill C-38* amends the charity provisions of the *Income Tax Act* which may have profound implications for many of Canada's environmental organizations.

Changes to Federal Environmental Assessment Law

Prior to the passage of *Bill C-38*, federal environmental assessment in Canada was governed by the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*). With the passage of *Bill C-38*, *CEAA* has been repealed and replaced with the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*).

Under *CEAA 2012*, the number and scope of federal environmental assessments will be reduced. Previously, a federal environmental assessment was required for all projects which triggered *CEAA* (by virtue of involving the federal government as proponent, federal lands, a prescribed federal permit or federal financial assistance). Under *CEAA 2012*, only those projects designated by regulation or by the Minister of Environment may be subject to federal environmental assessment.

Even if a project is designated by regulation, a federal environmental assessment might not occur for two reasons.ⁱⁱ First, the Canadian Environmental Assessment (CEA) Agency may determine that a federal environmental assessment is not required. Second, the federal government may decide not to conduct its own environmental assessment of a designated project on the basis that the project is being assessed provincially (essentially, a delegation of federal power and jurisdiction to the provinces).

In the event that a designated project will be subject to a federal environmental assessment, the scope and content of that assessment are narrower under *CEAA 2012* than under the previous *CEAA*. The definition of “environmental effects” in *CEAA 2012* is limited to effects on fish, aquatic species at risk, migratory birds and federal lands. This contrasts with the much broader definition of environmental effects under the previous *CEAA*.

Significant procedural changes to the federal environmental assessment process have been introduced with *CEAA 2012*. These include strict timelines for completion of environmental assessments and restricting public participation to only “**interested parties**” (i.e., those parties who are directly affected or have relevant information or experience).

Under the previous *CEAA*, there were various types of environmental assessments which could proceed under the Act. There were screenings, comprehensive studies and panel reviews. An environmental assessment could also proceed by way of mediation. Under the *CEAA 2012*, there are two levels of assessment: environmental assessment by the responsible authority (i.e., the CEA Agency, National Energy Board or the Canadian Nuclear Safety Commission) or panel review.

Changes to Fisheries Law

Since the 1970s, section 35 of the *Fisheries Act*, R.S.C. 1985, c. F-14 has operated to protect fish and fish habitat throughout Canada by prohibiting the harmful alteration, disruption or destruction of fish habitat (referred to as the *HADD provision*). The *HADD provision* has served as the primary focus of federal regulation under the *Fisheries Act*.

Under *Bill C-38*, the *HADD provision* will be changed to reduce the level of protection offered by the *Fisheries Act*. It should be noted that these changes are being made in a two-step process. As a first step, some transitional changes have been made to the *Fisheries Act*, effective on Royal Assent of *Bill C-38*, to permit the creation of regulations designating certain activities that cause harmful alteration, disruption or destruction of fish habitat as acceptable.

As a second step, the *HADD provision* will be removed from the *Fisheries Act* (this change comes into effect by Order-in-Council at a later, undetermined date). In its place will be a provision that prohibits works, undertakings or activities that result in **serious harm to fish that are part of a commercial, recreational or Aboriginal fishery**, or to fish that support such a fishery. The definition of “serious harm to fish” is “the death of fish or any permanent alteration to, or destruction of, fish habitat”.

By removing the *HADD provision* from the *Fisheries Act*, the level of protection for Canadian fisheries is significantly reduced. Protection is limited to only commercial, recreational or Aboriginal fisheries. As well, under the new provision, the degree of harm permitted is much

higher (fish deaths or permanent alteration or destruction of habitat, as opposed to, harmful alteration, disruption or destruction of fish habitat). This means that all harm to fish, short of death, is allowable (such as mutation, reduced reproduction, illness and so forth). Further, it will be difficult to demonstrate that habitat is **permanently** altered or destroyed. A proponent may be able to argue that the habitat alteration or destruction is not permanent if there is a possibility – however remote - of future restoration.

The protection of Canadian fisheries will be further weakened by the new regulatory powers granted to the Minister of Fisheries and Oceans (these provisions are not yet in force). The Minister will have the power to make regulations allow the killing of fish or serious harm to fish in prescribed waters (in accordance with conditions, if any, set by regulation). As well, killing of fish and serious harm to fish will be allowed for works, undertakings and activities prescribed by regulation (conditions, if any, set by regulation must be met).

As with *CEAA 2012*, the *Fisheries Act* has also been amended to purportedly allow the delegation of federal powers and jurisdiction to the provinces. The amendments to the *Fisheries Act* include the creation of a new power to enter into agreements with provinces for cooperative administration of the *Fisheries Act*. Such agreements can include a declaration that certain provisions of the Act or its regulations do not apply within the province.

Changes to the National Energy Board

Several changes have been made to the *National Energy Board Act*, R.S.C. 1985, c. N-7 and to other legislation (the *Oil and Gas Operations Act* and the *Species at Risk Act*) that impact upon the operation of the National Energy Board.

One effect of amendments made to the *National Energy Board Act* is the politicizing of decisions regarding the issuance of certificates of public convenience and necessity for pipelines. Prior to the passage of *Bill C-38*, the National Energy Board could either refuse to grant such a certificate or, if the National Energy Board determined that such a certificate ought to be granted, make a recommendation to the federal Cabinet for issuance of the certificate. After amendment by *Bill C-38*, the National Energy Board no longer has the power to refuse a certificate of public convenience and necessity. All final decisions, whether to refuse or grant a certificate, will be made by the federal Cabinet. This provision is in force as of the date of Royal Assent and applies to applications currently before the National Energy Board.

Another change has been made to the National Energy Board's consideration of applications for certificates of public convenience and necessity for a pipeline. Amendments to the *Species at Risk Act*, S.C. 2002, c. 29 (*SARA*) make s.77(1) inapplicable to the National Energy Board's decision to issue such a certificate. Section 77(1) of *SARA* provides:

77. (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and

(b) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

In other words, the National Energy Board no longer needs to consider the potential impacts of a proposed pipeline on the critical habitat of Canada's species at risk.

Another effect of amendments made by *Bill C-38* is to change the treatment of pipeline crossings over navigable waters. This is accomplished by amendments to both the *National Energy Board Act* and the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7. Prior to the amendments by *Bill C-38*, pipeline crossings over navigable waters required authorization under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22. Pursuant to the amendments made by *Bill C-38*, a pipeline crossing will no longer be considered a "work" to which the *Navigable Waters Protection Act* applies. In other words, while a pipeline crossing navigable waters will require the authorization of the National Energy Board, there will no longer be a requirement for authorization under the *Navigable Waters Protection Act*.

Additional amendments to the *National Energy Board Act* include the imposition of legislative timelines for completion of environmental assessments prepared by the National Energy Board and the creation of new enforcement measures (including administrative penalties). As well, the National Energy Board is no longer required to consider the impact on the environment of an application to export electricity.

Changes to other Federal Environmental Laws

In addition to changing the federal environmental assessment laws, fisheries laws and the operation of the National Energy Board, other aspects of federal environmental law have been amended by *Bill C-38*. A brief overview of these changes is provided below.

Canadian Environmental Protection Act, 1999

Some changes regarding permits issued under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (*CEPA, 1999*) have been made by *Bill C-38*. The amendments allow

renewal of permits that are issued under s. 127 of the *CEPA, 1999* (which are permits for loading for disposal and disposal of wastes at sea).

As well, the *Bill C-38* amendments change notice requirements for issuance, amendment or renewal of a permit. Previously, such notice had to be published in the *Canada Gazette*. After the changes made by *Bill C-38*, such notice needs to be published in the Environmental Registry.

Parks Canada Agency Act, Canada National Parks Act and Canada National Marine Conservation Areas Act

Several pieces of legislation pertaining to Canada's national parks are amended by *Bill C-38*: the *Parks Canada Agency Act*, S.C. 1998, c. 31, the *Canada National Parks Act*, S.C. 2000, c. 32 and the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18. Generally, these amendments operate to reduce accountability and transparency of parks management.

The requirement to review management plans under the *Canada National Parks Act*, the *Canada National Marine Conservation Areas Act* and for national historic sites or other protected heritage areas are significantly reduced (from every 5 years to every 10 years). As well, the requirement for the Parks Canada Agency to submit a report on the state of Canada's National Parks to the Minister is reduced from every 2 years to every 5 years.

Other reporting and accountability requirements - the submission of a corporate plan and annual report to the Minister under the *Parks Canada Agency Act* and an annual audit of the Parks Canada Agency by the Auditor General of Canada - are completely eliminated.

Coasting Trade Act

The *Coasting Trade Act*, S.C. 1992, c. 31, which deals with the use of foreign ships and non-duty paid ships in the coasting trade, is amended by section 531 of *Bill C-38*. Generally, the *Coasting Trade Act* requires that foreign ships or non-duty paid ships be licensed to engage in the coasting trade. After amendment by *Bill C-38*, this requirement no longer applies to ships that are engaged in seismic activities relating to the exploration for mineral resources in Canadian waters.

Kyoto Protocol Implementation Act

Section 699 of *Bill C-38* repeals the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 in its entirety. Given the decision of the federal government to withdraw from the *Kyoto Protocol* at the end of 2011, it is perhaps not surprising that this particular piece of legislation has been repealed. It is, however, disappointing.

The *Kyoto Protocol Implementation Act* established the federal government's approach to the issue of climate change by requiring the development and implementation of a federal Climate Change Plan. Regardless of Canada's (non) involvement in the *Kyoto Protocol*, a federal plan for dealing with the issue of climate change is still required.

National Round Table on the Environment and the Economy Act

The National Round Table on the Environment and the Economy (the NRTEE) is terminated and wound up by *Bill C-38*. For the last 25 years, the NRTEE has provided objective, non-partisan research and advice to help Canada achieve sustainable development. The forced demise of the NRTEE is truly a loss for all Canadians.

Nuclear Safety and Control Act

Amendments to the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 will allow for the transfer of licences that have been issued by the Canadian Nuclear Safety Commission. There are also changes to enforcement measures under the Act, including, the establishment of administrative penalties.

Seeds Act

The *Seeds Act*, R.S.C. 1985 c. S-8 has been amended to allow issuance of licences authorizing a person to perform activities related to controlling or ensuring the quality of seed or seed crops. These activities can include sampling, testing, grading or labeling of seeds.

Species at Risk Act

Some changes to *SARA*, as they relate to the operation of the National Energy Board, have been previously discussed. Other amendments include changes to time limitations on agreements and permits issued under the act. Previously, under *SARA* the term of an agreement could not exceed 5 years and the term of a permit could not exceed 3 years. This time restriction is eliminated by *Bill C-38* meaning that an agreement or permit can be issued for any period of time. As well, *Bill C-38* also makes some changes to the penalties that can be issued under *SARA*.

Charity Provisions of the *Income Tax Act*

As mentioned, *Bill C-38* amends the charity provisions of the *Income Tax Act* which may have profound implications for many of Canada's environmental charities. All Canadian charities will be required to provide more information about their political activities, including related foreign funding, as part of their annual charitable filings. The specifics of these new requirements have not yet been made public by the federal government. Both political activity

(in accordance with federal guidelines) and foreign funding are legally permitted for Canadian charities.

ⁱ Many, but not all, provisions of *Bill C-38* come into force on the date of Royal Assent (i.e. June 29, 2012). Two notable exceptions are the provisions regarding *CEAA 2012* which came into force on July 6, 2012 by Order-in-Council, and the provisions amending section 35 of the *Fisheries Act* are being implemented in a two-step process as discussed above.

ⁱⁱ There are a limited number of designated projects that must undergo a federal environmental assessment. These are the projects linked to either the Canadian Nuclear Safety Commission, the National Energy Board or a federal authority designated by regulation. As well, the Minister has the discretion to designate a particular project for which a federal environmental assessment must occur.