

Canada's Environmental Laws:

Time for Some Progressive Change

By Joanna Skrajny, *AWA Conservation Specialist*



Canada's environmental laws and regulations are no stranger to change. Too often, as Professor Arlene Kwasniak argued in the October 2011 issue of *WLA*, the seriousness with which the federal government takes its environmental assessment responsibilities has been in retreat. In 2012 the Harper government made further changes to Canada's environmental assessment regime that affirmed, if not accelerated, that retreat (see April 2012 *WLA*, 26). Change is again on the horizon for Canada's environmental laws and regulations. The question that remains is whether the federal Liberal government will be making good ones that improve the quality of the environmental assessment process.

In 2015, the federal government promised to restore Canada's environmental protections. To its credit it established panels of experts and committees to evaluate Canada's environmental assessment processes, the *Fisheries Act*, the *Navigation Protection Act*, and the National Energy Board. These expert panels held extensive public consultations and presented their recommendations to the government in reports which were open to public review.

Now the government has released how they intend to proceed. They have outlined the changes they are considering in a discussion paper released this past summer. Implementation of these changes is expected to happen later this fall.

It has been challenging to review this discussion paper in a meaningful manner, mainly due to the fact that it is so short: it's only 24 pages long. In contrast, the

Expert Panel report on recommended changes to Canada's environmental assessment processes was 100 pages longer – and that was only one of the four reviews! The discussion paper simply lacks depth. Its superficiality makes it very difficult to determine whether the proposed changes will move Canada in the right direction. Furthermore, and this is a genuine cause for serious concern, it made no mention of how (or whether) the Expert Panel reports and public consultations were considered.

In the June issue of *WLA*, AWA outlined our thoughts on the Expert Panel's recommended changes to Canada's environmental assessment processes. Essentially, while it wasn't perfect, we thought it was an important step in the right direction. The Expert Panel's report had some significant, forward-thinking recommendations which focused on what is actually needed to carry us through the 21st Century.

A pivotal Expert Panel recommendation was to move towards sustainability based assessments; the general concept is that projects and activities will be approved after the positive and negative consequences of doing the project are weighed and measured against a clear list of criteria such as:

- Is this good for the environment?
- Does this benefit future generations?
- Does this help us meet international agreements?
- Does this contribute to anthropogenic climate change?

These criteria would guide decision makers and if trade-offs were made then they would be clearly listed.

Disappointingly, the federal govern-

ment omitted consideration of this proposal in the discussion paper. It doesn't go beyond stating that a broader set of impacts will be considered. To better assess whether an activity is sustainable requires the identification of a clear set of sustainability-linked decision making criteria. Without those criteria and the establishment of a clear "test" of when those criteria are met economic considerations alone may creep back to supplant the sustainability objective.

Another disappointment in the discussion paper is the intention to continue to allow the substitution of provincial environmental assessment processes for federal ones "where there is alignment with federal standards." Unfortunately, outside of this statement there is no more information on what this means substantively and procedurally. In the past, substitution meant a province might undertake an assessment themselves and the federal government would use these results to make their decision. This abdication of responsibility is problematic in principle. The federal government's clear constitutional responsibilities over subjects such as fisheries, navigable waters, First Nations, and migratory birds, should not be delegated effectively to the provincial level of government. AWA is concerned that the paper's interest in intergovernmental cooperation may come at the expense of ensuring that environmental assessments are robust.

One positive recommendation from the federal discussion paper concerns cumulative effects. Such effects should

be addressed by conducting regional assessments. Assessing a region for cumulative effects is a critical way to determine whether many small projects are having a big, unacceptable, impact on our ecosystems. Ideally, this would help to plan activities on our landscapes in a comprehensive and holistic way and would guide decision making *before* we reached a tipping point of no return. Cumulative assessments would also provide benefits outside of approving projects – they could help guide recovery of species at risk and fisheries.

However, in order for these assessments to *mean anything* they need to move beyond big, complex reports that sit on a shelf and be applied and implemented in the real-world, on the ground. Proponents of activities must be governed by legislated and regulated compliance requirements; there need to be incentives for proponents to co-operate together to meet their objectives and strict penalties for those who don't. There also needs to be meaningful

development limits – if cumulative effects thresholds are exceeded on a landscape, then future disturbances there should be prohibited. The focus should then shift to recovery on those lands.

One of the most important questions in assessment processes revolves around *what will actually be assessed?* The two methods that Canada has used historically are quite different from one another. Initially, all projects touching on areas of federal responsibility were assessed and this led to thousands of assessments a year. After the sweeping rollback of environmental protections in 2012, Canada moved to a system where only those projects on a list would be assessed. The number of projects assessed every year plummeted; only dozens of projects were subject to assessment. However, as Professor Sharon Mascher (University of Calgary Faculty of Law) points out in her analysis of the two systems, a high number of assessments does not necessarily mean that the process itself is working and legitimate. The

federal government is suggesting that it would like to stay with the current system (where projects on a list are assessed) but it would also provide regular opportunities to revise this list and a clear set of criteria which would allow additional projects and activities to be assessed. But, without any explanation of what these criteria would be, it's hard to estimate what the actual numbers (and quality) of assessments will be. The recommended approach would likely mean that we would have more than dozens of assessments a year (too little) and less than thousands (arguably too many).

Professor Mascher suggests that the additional set of criteria should encapsulate projects which are likely to have consequential impacts for present and future generations. She defines in detail what should be considered consequential impacts. They are: impacts that affect multiple matters of federal interest, will last several generations, will have impacts beyond where the project is located (such as

releasing greenhouse gases), will substantially deprive future generations of Aboriginal title holders of the benefit of the land, will release toxic substances or live organisms (biotechnology), will contribute to cumulative effects, and will affect an ecologically or culturally sensitive area (National Parks, World Heritage Sites). These criteria seem reasonable according to a sustainability framework and AWA hopes Ottawa will incorporate them into its project assessment rubric.

As noted above the *Fisheries Act* was also reviewed. The proposed changes seem to strengthen fisheries protection and are largely positive. They reincarnate the importance of protecting fish habitat, lost in the sweeping 2012 changes. They also propose to incorporate cumulative effects into fisheries management, to identify key areas in restoration, and to identify areas of important habitat and what areas need to be protected. However, we need to see more details about how these proposals are going to be implemented. Ot-

tawa must commit to do more than just identify important areas of habitat and areas for restoration: it needs to ensure it adopts mechanisms and processes to fast track these areas for protection. If cumulative effects are exceeded, management of these fisheries needs to shift to restoring them.

Many of the holes in Canada's environmental protection network lie in the fact that while something can be good in principle, there is little to no follow up to see what works on the ground. For example, under the *Fisheries Act*, habitat destruction can be "authorized" if a proponent offsets the habitat that was destroyed. Unfortunately, there is little to no monitoring to see whether these offsets worked in any way. Reviews conducted by the Department of Fisheries and Oceans showed that often these habitat replacements did not work and companies often weren't charged for failing to adhere to the rules. The same basic concern applies to mitigation measures

used in the federal assessment process: while they may look good on paper, there was little follow up to see whether they were actually biologically relevant. On a positive note the federal government has broadly committed to strengthened enforcement and monitoring in all aspects of Canada's environmental protections; how this is implemented should be a good indicator of the successes of these changes moving forward.

Finally, it is clear that there are many proposals that appear to have been ignored. There also are many more which lack the detail needed for us to do more than just speculate about their impact.

AWA hopes the government truly takes this once-in-a-generation opportunity seriously and makes reforms which will carry us through the 21st Century, protecting and restoring damaged landscapes and comprehensively ensuring resilience for the next generation. 🐟