

# Understanding Changes to the *Fisheries Act*, *Impact Assessment Act* and *Canadian Navigable Waters Act*

March 2021

## Introduction

In June 2016, the Government of Canada launched a comprehensive review of federal environmental and regulatory processes, in support of ministerial mandates, to increase the robustness and transparency of environmental assessment processes, to restore lost protections and incorporate modern safeguards under the Fisheries Act and the Navigation Protection Act, and to modernize the National Energy Board.

On August 28, 2019, two Bills of Parliament came into force:

- Bill C-68 amended the *Fisheries Act*.
- Bill C-69 repealed the *Canadian Environmental Assessment Act, 2012* and the *National Energy Board Act* and replaced them with, respectively, the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, while also amending the *Navigation Protection Act* and renaming it the *Canadian Navigable Waters Act*.

These Acts describe federal environmental regulatory processes for a wide range of developments and activities, including transportation projects. This briefing provides an overview of key changes associated with the *Fisheries Act*, *Impact Assessment Act* and *Canadian Navigable Waters Act*, focusing on aspects relevant to the transportation sector.

## Fisheries Act

Amendments to sections of the modernized *Fisheries Act* came into force on August 28, 2019 that reinstate protections, increase transparency, and provide opportunity for public and Indigenous input. Key changes include:

- Reinstating the protection of all fish and fish habitats (not limited to commercial, recreational or Aboriginal fisheries)
- Revising the definition of “fish habitat” to be “water frequented by fish and any other areas on which fish depend directly or indirectly in order to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas”
- Restoring the previous prohibition against “harmful alteration, disruption or destruction of fish habitat” (HADD)
- Restoring the prohibition against causing “the death of fish by means other than fishing”
- Prohibiting a temporary alteration (disruption) without authorization
- Providing the Department of Fisheries and Oceans Canada (DFO) with the ability to designate ecologically significant areas and apply special protections
- Providing DFO with the ability to designate projects for the purpose of establishing a permitting regime
- Providing for a new public registry to give full, transparent access to records on fish and fish habitat protections (under development, with initial data released publicly in March 2020)
- Strengthening the compliance and enforcement powers
- Establishing new provisions of the *Act* for a proponent-led fish habitat banking scheme, including:
  - a system for the creation, allocation and management of a proponent’s habitat credits
  - certificates validating a proponent’s habitat credits
  - clarity that habitat credits would only to be used within a specific service area
- Establishing a new authority for DFO to make “biodiversity protection” regulations (yet to be established). These would allow for restrictions on fishing activities to effectively protect elements of marine biodiversity that fall within the Minister’s mandate. The new biodiversity protection regulations would be applied on a year-round basis and over the long-term for biodiversity protection purposes. In instances of conflicts between regulations, the new biodiversity protection regulations take precedence over provisions of other fisheries regulations.

- When making a decision under the new Act, allowing the Minister to consider a wider range of factors or the ability to call upon a wider range of sources, including:
  - the application of a precautionary approach and an ecosystem approach
  - the sustainability of fisheries
  - social, economic, and cultural factors
  - scientific information
  - traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister
  - community knowledge
  - cooperation with any government of a province, any Indigenous governing body and any body (including a co-management body) established under a land claims agreement
  - the preservation or promotion of the independence of licence holders in commercial inshore fisheries
  - the intersection of sex and gender with other identity factors

The self-assessment process to determine if a DFO review is required for a project is no longer in effect. The need for DFO review is evaluated on the basis of the following considerations (outlined on the [Projects Near Water website](#)):

- If aquatic species at risk or critical habitat exist in project area, DFO approval is required to undertake an activity that affects an aquatic species at risk in a way that is prohibited by the *Species at Risk Act* (SARA).
  - For activities that intersect with both the Fish and Fish Habitat Protection Provisions of the *Fisheries Act* and SARA, DFO implements a one-window approach, to coordinate these approvals.
- If the project's primary purpose is to prevent, control or eradicate an aquatic invasive species, a DFO project review is required.
- If the measures to protect fish and fish habitat on the Project Near Water website are followed to prevent adverse effects on fish and fish habitat, a DFO project review is not required.
- If the measures to protect fish and fish habitat cannot be fully implemented to prevent adverse impacts, check to see if a DFO Standard or Code of Practice applies to the project. If so, submit a notification form to the regional DFO office. Currently, DFO has developed six interim Codes of Practice:
  - Interim Code of Practice: Beaver dam removal
  - Interim Code of Practice: Culvert maintenance
  - Interim Code of Practice: End-of-pipe fish protection screens for small water intakes
  - Interim Code of Practice: Routine maintenance dredging
  - Interim Code of Practice: Temporary cofferdams and diversion channels
  - Interim Code of Practice: Temporary stream crossings

- If the scope of the project does not fall within the standards and codes of practice, submit a request for review following guidance on DFO’s website.

In December 2019, DFO issued the ‘Policy for Applying Measures to Offset Adverse Effects on Fish and Fish Habitat Under the *Fisheries Act*’. This policy replaces their ‘Fisheries Productivity Investment Policy: A Proponent’s Guide to Offsetting’, which was applied between 2013 and 2019 under the 2013 amendments to the *Fisheries Act*. The new policy is organized as follows:

<b>PART 1</b>	provides background information on the fish and fish habitat protection provisions of the <i>Fisheries Act</i> .
<b>PART 2</b>	provides an overview of how to apply measures to offset adverse effects on fish and fish habitat to support the conservation and protection of fish and fish habitat, including objectives, guiding principles and types of measures.
<b>PART 3</b>	describes step-by-step procedures for developing an offsetting plan under the <i>Authorizations Concerning Fish and Fish Habitat Protection Regulations</i> , including selecting the appropriate measures, determining the geographic extent of measures needed, and ensuring monitoring and reporting.
<b>PART 4</b>	provides contact information and links for more information on key topics.

## ***Impact Assessment Act***

The *Impact Assessment Act* establishes the Impact Assessment Agency of Canada (the Agency or IAAC; formerly the Canadian Environmental Assessment Agency) as being responsible for leading all impact assessments that fall under the legislation. The Agency may delegate any part of an impact assessment to another person, body or jurisdiction and the Minister may substitute the process to another jurisdiction, including provincial or Indigenous, if conditions in the *Impact Assessment Act* are met. The Agency also sets time limits (within legislated timelines) at specific periods during the assessment process (i.e. determining the time limit for a specific panel review between 300 and 600 days), and considers extensions or pauses in the timelines requested by the proponent.

The *Impact Assessment Act* advances several of Canada’s key public policy initiatives. Its purpose statement states that the Act will establish “a fair, predictable and efficient process for conducting impact assessments that enhances Canada’s competitiveness, encourages innovation in the carrying out of designated projects, and creates opportunities for sustainable economic development.” The *Impact Assessment Act* also identifies the key public policy objectives to be achieved during the implementation of the Act, including: fostering sustainability; applying precautionary principles to avoid adverse effects within federal authority; promoting cooperation and coordination with

other jurisdictions; facilitating timely assessments; meaningful public participation; and ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*. The new name of the Act is intended to reflect a broader scope of factors to be considered under the *Impact Assessment Act* compared to the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), including positive and negative environmental, health, social, economic impacts and impacts on Indigenous peoples.

In terms of overall structure, the *Impact Assessment Act* is substantially similar to CEAA 2012. Its process for designated projects now comprises five stages, as opposed to CEAA 2012's four, with a new Planning Phase to involve all interested public, stakeholders, government authorities, and Indigenous groups earlier in the process to identify the issues of concern and inform project design. The *Impact Assessment Act* process also considers both the positive and adverse environmental, health, social and economic effects of "designated projects." Detailed guidance regarding the *Impact Assessment Act* process is available on the [IAAC website](#), including a link to an online practitioner's guide.

### Starting the process and Ministerial discretion

During the planning phase, the Agency must determine if an impact assessment is required for a designated project, considering factors laid out in subsection 16(2) the *Impact Assessment Act*. A designated project is a project defined in the *Physical Activities Regulations* (see 'Physical Activities Regulations' below) or by the project being designated for review through Ministerial discretion. As with CEAA 2012, the *Impact Assessment Act* still gives the Minister discretion to designate projects not included in the *Physical Activities Regulations*, where the Minister is of the opinion that the physical activity "may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation." The *Impact Assessment Act* also expressly notes the Minister may consider adverse effects on the rights of Indigenous peoples, including Indigenous women.

In addition, as in CEAA 2012, a project that is carried out on federal lands, and is not a designated project, cannot be carried out unless the applicable authority has determined that doing so is not likely to cause significant adverse environmental effects; or, if it is likely to, then the Governor in Council must decide that those effects are justified under the circumstances.

### Physical activities regulations

The *Impact Assessment Act* continues the approach taken under CEAA 2012 to designate projects by category and quantitative thresholds as prescribed by the *Physical Activities Regulations* (SOR-2019-285) (also referred to as the Project List). The Project List adds some new project types and removes others, the scopes of some have been expanded, and some public policy-based exemptions have been removed. However, for

the most part, project types that were reviewable under CEAA 2012 remain reviewable under the *Impact Assessment Act*, and most of the quantitative thresholds established under CEAA 2012 either remain the same or have increased slightly.

The following are examples of transport-related activities designated for an impact assessment under the current Project List (please reference the Project List for a complete listing):

- The construction, operation, decommissioning and abandonment in a wildlife area, as defined in section 2 of the *Wildlife Area Regulations*, a migratory bird sanctuary, as defined in subsection 2(1) of the *Migratory Bird Sanctuary Regulations*, or a protected marine area established under subsection 4.1(1) of the *Canada Wildlife Act*, of one of the following:
  - a new canal or lock
  - a new marine terminal
  - a new railway line
  - a new public road or parkway that is intended for the passage of motor vehicles
  - a new aerodrome or runway
- In a National Park, construction, operation, decommissioning, abandonment of a railway line or a public highway intended for passage of motor vehicles
- The construction, operation, decommissioning and abandonment of either of the following:
  - a new international or interprovincial bridge or tunnel
  - a new bridge over the St. Lawrence Seaway
- The construction, operation, decommissioning and abandonment of either of the following:
  - a new canal
  - a new lock or associated structure that controls water levels in navigable water
- The construction, operation, decommissioning and abandonment of a new permanent causeway with a continuous length of 400 m or more through navigable water
- The construction, operation, decommissioning and abandonment of a new all-season public highway that requires a total of 75 km or more of new right-of-way
- The construction, operation, decommissioning and abandonment of either of the following:
  - a new railway line that is capable of carrying freight or of carrying passengers between cities and requires a total of 50 km or more of new right-of-way
  - a new railway yard with a total area of 50 ha or more

- The expansion of an existing railway yard if the expansion would result in an increase of its total area by 50% or more and a total area of 50 ha or more
- The construction, operation, decommissioning and abandonment of one of the following:
  - a new aerodrome with a runway length of 1,000 m or more
  - a new aerodrome that is capable of serving aircraft of Aircraft Group Number IIIA or higher
  - a new runway at an existing aerodrome with a length of 1,000 m or more
- The operation of an existing runway that was not capable of serving aircraft of Aircraft Group Number IIIA and becomes capable of serving aircraft of Aircraft Group Number IIIA or higher
- The operation of an existing runway that was capable of serving aircraft of an Aircraft Group Number IIIA or higher and becomes capable of serving aircraft of any higher Aircraft Group Number

### Planning phase (180 days)

The *Impact Assessment Act* introduces a new Planning Phase intended to incorporate public, Indigenous and stakeholder input early into the review process and assist the Agency in deciding: (1) whether to carry out an assessment; (2) whether to coordinate with other jurisdictions (e.g. provincial, Indigenous governing bodies); and (3) what the scope of the assessment should include.

The Planning Phase begins with the proponent providing an Initial Project Description (IPD) to IAAC. The *Information and Management of Time Limits Regulations* (SOR/2019-283) set out specific information requirements for the Project Description(s). It is highly recommended that the proponent meet with the Agency to discuss the drafting of the IPD and discuss when the initial Project Description should be released online for public comment (i.e. the official start of the Planning Stage).

Once the IPD is formally accepted by the Agency as meeting the requirements of the Regulations, it is posted online and the Agency provides the public with the opportunity to comment. Under the *Impact Assessment Act*, the Agency is given discretion to consider the way members of the public may participate (and the Agency may provide funding for public to participate), there is no definition or limitation on who can participate, and anyone can provide input to the process.

During the Planning Phase, the Agency must offer to consult with any jurisdiction that has powers or duties in relation to an assessment of the environmental effects of the project and with any Indigenous group that may be affected by the project. A “summary of issues” that the Agency considers relevant for the assessment will be provided to the proponent. The proponent must then submit a Detailed Project Description that addresses specific identified issues, along with a formal response outlining how the

proponent intends to address each of the identified issues as part of the impact assessment.

During the Planning Phase, which is allocated 180 days from the posting of the initial Project Description online, the Agency must decide whether an impact assessment is required. This decision must consider the possibility of adverse effects within federal jurisdiction and adverse direct and incidental effects, potential for adverse impacts on the rights of Indigenous peoples, along with comments from the public, Indigenous groups, and federal authorities. The Agency can also consider “any other factor that the Agency considers relevant”. The Minister may approve substitution of another jurisdiction’s assessment process, which now includes Indigenous governing bodies as defined in section 2 of the *Impact Assessment Act*, for the impact assessment review process under the *Impact Assessment Act*. The Agency can, under certain circumstances, suspend or extend the Planning Phase.

If the Agency determines that an impact assessment is required, it must provide the proponent with planning documents including “tailored impact statement guidelines” (i.e. terms of reference for the proponent’s Impact Statement document), a “permitting plan” that outlines other regulatory approvals or permits that are expected to apply to the project, an “Indigenous engagement and partnership plan” and “public participation plan” (involving both government and proponent activities).

### **Notice of commencement**

Once the Agency accepts the Detailed Project Description and the proponent’s responses to the issues summary, a Notice of Commencement is issued.

Within 45 days of the Notice of Commencement being posted online, the Minister may decide to refer the impact assessment to a review panel (or Joint Review Panel) if, in the Minister’s opinion, doing so is in the public interest.

### **Proponent impact statement (up to three years)**

The proponent must prepare, consult upon, and file its impact statement containing the required information and studies within three years of the Notice of Commencement. This timeline may be extended at the request of the proponent. However, if the required documentation is not filed with the Agency by the applicable deadline, the impact assessment process is terminated. The *Impact Assessment Act* outlines a number of factors that must be addressed or considered by the proponent’s impact statement, and the scope of the factors are outlined in the IAAC’s online practitioner’s guide. Much of the required information is similar to that required under CEAA 2012, with some notable new requirements including:

- Any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project

- Knowledge of Indigenous peoples provided with respect to the designated project
- Community knowledge provided with respect to the project
- Considerations related to Indigenous cultures raised with respect to the designated project
- Comments from a jurisdiction that are received in the course of consultations
- Any relevant regional or strategic assessment
- Any assessment of the effects of the designated project that is conducted by, or on behalf of, an Indigenous governing body and that is provided with respect to the designated project
- Any study or plan that is conducted or prepared by a jurisdiction or an Indigenous governing body in respect of a region related to the designated project and that has been provided with respect to the project
- Consideration of positive, as well as adverse environmental, economic, social and health impacts
- Assessment of impacts on Indigenous peoples and their rights
- The project's contribution to sustainability
- The intersection of sex and gender with other identity factors (Gender-Based Analysis+)
- The extent to which the effects of the project hinder or contribute to Canada's ability to meet its environmental obligations and climate change commitments

### **Impact assessment process (300 days IAAC, or 600 days review panel)**

Once the impact statement has been filed by the proponent, it is reviewed by the Agency (with input from the public, Indigenous peoples, federal authorities and other persons) to ensure that it contains all necessary information specified by the tailored impact statement guidelines (TISG). If the Agency determines that information is missing, the proponent will be requested to supply it. Conversely, if the Agency determines that the proponent's impact statement addresses the TISG, then a notice is posted on the *Impact Assessment Act* Registry (see Registry, below) and the designated project moves to the impact assessment stage.

During the impact assessment stage, the Agency must post a copy of its draft assessment report for public comment prior to finalizing the impact assessment report. Under normal circumstances, the Agency would have up to 300 days to complete its impact assessment and submit it to the Minister for review and a decision. However, prior to commencing the impact assessment stage, the Agency can establish a longer timeline to allow for coordination with another jurisdiction. Additionally, the Minister may extend the established timeline by up to 90 days to allow for coordination with

another jurisdiction, while the Governor in Council may additionally apply this extension any number of times on the recommendation of the Minister.

If the Minister assigned the impact assessment to a review panel, the Agency will set the timelines for the review panel to submit its assessment report and recommendations. This time period can be up to a maximum of 600 days (shortened from a maximum of two years under CEAA 2012) unless the Agency believes more time is required (e.g. to allow for cooperation with another jurisdiction).

The review panel report is submitted to the Minister for review and a decision.

### Decision-making process (30 days or 90 days)

The decision-making process under the *Impact Assessment Act* involves a determination of whether the adverse effects within federal jurisdiction and the adverse direct or indirect effects described in the assessment report, and the extent to which they are significant, are in the public interest. The Minister must either make this determination within 30 days or refer it to the Governor in Council for a decision within 90 days. For assessments by a Review Panel, this public interest determination must be made by the Governor in Council within 90 days. The factors to be considered in the determination are:

- The extent to which the designated project contributes to sustainability
- The extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant
- The implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate
- The impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*
- The extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments with respect to climate change

The decision statement issued to the proponent must include conditions related to the adverse effects within federal jurisdiction and the adverse direct or indirect effects, including requirements for mitigation measures and follow-up programs. The decision statement must also set out the period within which the proponent must “substantially begin” to carry out the designated project, but this is undefined.

## Regional and strategic assessment

Regional and strategic assessments completed under the *Impact Assessment Act* can serve to inform future project impact assessments and decision making, for example, in addressing effects (including cumulative effects) within federal jurisdiction from development in a region (regional) or in relation to a policy, plan or issue within federal jurisdiction (strategic). The first strategic assessment completed was in relation to climate change. The first regional assessment completed was in relation to offshore exploratory drilling in specific areas off the coast of Newfoundland and Labrador.

## Enhanced registry

The *Impact Assessment Act* requires the development of an enhanced public registry to provide more transparent access to information, including the posting of plain-language summaries and regulatory decisions.

# Canadian Navigable Waters Act

## Background

In fulfilling a Ministerial mandate to re-instate navigation protections, the current government began a consultation and re-drafting process that resulted in the *Canadian Navigable Waters Act* (CNWA), which replaced the *Navigation Protection Act* and came into force on August 28, 2019. Greater transparency and public participation are enabled through public notification processes and a public registry.

## Navigability

A new navigability definition includes any waters that are, or could reasonably be, used by vessels either for commercial or recreational purposes or by Indigenous peoples exercising their rights, or in locations that have public access, two or more riparian owners, or where the Crown is the sole riparian owner.

## Schedule of navigable waters

The CNWA retains a schedule of navigable waters to oversee works that might interfere with navigation (via approval process), and adds criteria for scheduled waterbodies and a process for updating and adding new waterways to the schedule. Waters requiring extra oversight and those of greatest importance to all Canadians and to Indigenous peoples, including heritage and wild and long free-flowing rivers, will be eligible. In September 2019, 25 new waterbodies were added to the schedule under Order SOR 2019/321.

## Major and minor works

The CNWA established a new category, Major works, which require approval under the Major Works Order (SOR 2019/32). Major works include aquaculture sites, bridges with piers below the ordinary high-water mark, causeways, ferry cables, dams of a certain size, and certain water diversion structures.

The existing Minor Works Order remains in effect and now extends to all navigable waters. It allows works with slight interferences to navigation, and that meet specified criteria, to proceed without a formal approval process. Transport Canada is consulting with the public on revisions to the Minor Works Order, with a revised Order targeted by early 2021.

All works on scheduled waters and all Major works require application to the Minister who must consider the results of concurrent public notification before issuing an approval. On non-scheduled waters, works that are neither Major nor Minor can be permitted in one of two ways: through an opt-in formal approval, or through a self-regulated public notification process. To enable improved transparency, the notification process is generally as follows:

- The public has 30 days to submit concerns and disputes.
- If written concerns are submitted, the proponent has 45 days to consult and resolve the concern.
- If resolution results in change to proposed works, the proponent must publish new public notice.
- If not resolved in 45 days, the concerned party may request the Minister to decide if approval is required.

Enforcement is enhanced, and this can include regulation to order the removal of obstructions.

## Summary

The enactment of the *Impact Assessment Act*, *Canadian Navigable Waters Act* and amendments to modernize the *Fisheries Act* under Bills C-68 and C-69 will advance federal policy objectives including: fostering sustainability; applying precautionary principles to avoid adverse effects within federal authority; promoting cooperation and coordination with other jurisdictions; facilitating timely assessments; facilitating meaningful public participation; and ensuring respect for treaty and Aboriginal rights entrenched by section 35 of the *Constitution Act, 1982*.

Guidance to support proponents' understanding and implementation of the new legislation continues to be developed (see links in the next section). Members of TAC's Environment & Climate Change Council continue to engage federal agencies to receive updates, gain clarification and discuss challenges related to the regulatory changes. As

appropriate, updates are shared during the Council's spring and fall meetings and in the Council's report to TAC's Chief Engineers Panel. TAC members are encouraged to access federal government websites for the latest updates and guidance relevant to their projects and activities.

## Reference links

*Impact Assessment Agency of Canada* [online]. Updated 2020-12-10 [Viewed December 14, 2020]  
<https://www.canada.ca/en/impact-assessment-agency.html>

*Impact Assessment Act (S.C. 2019, c. 28, s. 1)* [online]. Updated 2019-08-28.  
[Viewed December 14, 2020]  
<https://laws.justice.gc.ca/eng/acts/I-2.75/index.html>

Fisheries and Oceans Canada. *Projects Near Water* [online]. Updated 2020-10-23.  
[Viewed December 14, 2020]  
<https://www.dfo-mpo.gc.ca/pnw-ppe/index-eng.html>

Fisheries and Oceans Canada. *Request a Review of Your Project Near Water* [online].  
Updated 2020-10-23. [Viewed December 14, 2020]  
<https://www.dfo-mpo.gc.ca/pnw-ppe/reviews-revues/request-review-demande-d-examen-001-eng.html>

*Fisheries Act (R.S.C., 1985, c. F-14)* [online]. Updated 2019-08-28. [Viewed December 14, 2020]  
<https://laws.justice.gc.ca/eng/acts/F-14/index.html>

Transport Canada. *About the Canadian Navigable Waters Act* [online]. Updated 2020-10-01.  
[Viewed December 14, 2020]  
<https://www.tc.gc.ca/eng/programs-632.html>

*Canadian Navigable Waters Act (R.S.C., 1985, c. N-22)* [online]. Updated 2019-10-04.  
[Viewed December 14, 2020]  
<https://laws.justice.gc.ca/eng/acts/N-22/index.html>

## Acknowledgements

This briefing was approved by TAC's Environment & Climate Change Council in January 2021. It was prepared by the following volunteers, whose efforts are gratefully acknowledged:

- Melissa Cummings, New Brunswick Department of Transportation and Infrastructure
- Michelle Davy, Transport Canada
- Oliver Laser, Wood Canada Limited
- Stephen Legaree, Alberta Transportation
- Shauna Lehmann, Saskatchewan Ministry of Highways
- Alison Marshall, Saskatchewan Ministry of Highways
- Kimber Osioy, AECOM
- Connie Roney, Nova Scotia Transportation & Active Transit
- Robin Taylor, Hemmera

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