SENATE SÉNAT

CANADA

Summary of evidence for the subject-matter of those elements contained in Divisions 4, 18 and 21 of Part 4 of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures

Report of the

Standing Senate Committee on Energy, the Environment and Natural Resources

The Honourable Richard Neufeld, Chair
The Honourable Grant Mitchell, Deputy Chair

NOVEMBER 2012

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brought to the attention of the committee by email at

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MEMBERSHIP

The Honourable Senator Richard Neufeld, Chair

The Honourable Senator Grant Mitchell, Deputy Chair

and

The Honourable Senators:

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Other Senators who have participated in this study:
The Honourable Senators Boisvenu, Frum, Ogilvie and White

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Clerk of the Committee:
Lynn Gordon

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Tuesday, October 30, 2012:

The Honourable Senator Carignan moved, seconded by the Honourable Senator Poirier:

That, in accordance with rule 10-11(1), the Standing Senate Committee on National Finance be authorized to examine the subject-matter of all of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, introduced in the House of Commons on October 18, 2012, in advance of the said bill coming before the Senate;

That the Standing Senate Committee on National Finance be authorized to sit for the purposes of its study of the subject-matter of Bill C-45 even though the Senate may then be sitting, with the application of rule 12-18(1) being suspended in relation thereto; and

That, in addition, and notwithstanding any normal practice:

1. The following committees be separately authorized to examine the subject-matter of the following elements contained in Bill C-45 in advance of it coming before the Senate:

(a) the Standing Senate Committee on Banking, Trade and Commerce: those elements contained in Divisions 1, 3, 6 and 14 of Part 4;

(b) the Standing Senate Committee on Energy, the Environment and Natural Resources: those elements contained in Divisions 4, 18 and 21 of Part 4;

(c) the Standing Senate Committee on Transport and Communications: those elements contained in Divisions 5, 12 and 20 of Part 4;

(d) the Standing Senate Committee on Aboriginal Peoples: those elements contained in Division 8 of Part 4; and

(e) the Standing Senate Committee on Agriculture and Forestry: those elements contained in Division 19 of Part 4;

2. The various committees listed in point one that are authorized to examine the subject-matter of particular elements of Bill C-45 submit their final reports to the Senate no later than November 30, 2012; and

3. As the reports from the various committees authorized to examine the subject-matter of particular elements of Bill C-45 are tabled in the Senate, they be deemed referred to the Standing Senate Committee on National Finance so that it may take those reports into consideration during its study of the subject-matter of all of Bill C- 45.

The question being put on the motion, it was adopted, on division.

Gary W. O'Brien

Clerk of the Senate

The Standing Senate Committee on Energy, the Environment and Natural Resources has concluded its pre-study of the subject-matter of certain elements of Part 4 of Bill C-45, a second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, on November 22, 2012. The committee held 5 meetings and heard from 19 witnesses across a range of stakeholder interests and received submissions of written evidence.

Some of the amendments build on earlier changes to legislation as set out in Bill C-38, now the *Jobs, Growth and Long-term Prosperity Act*, which received royal assent on June 29, 2012. For example, Bill C-45 contains transitional provisions to clarify that an authorization provided under the previous *Fisheries Act* applies in the current Act and that the conditions of the authorization may be applied consistent with the new provisions of the Act. Similarly, the *Canadian Environmental Assessment Act, 2012* is amended to clarify obligations for federal authorities for environmental assessments on federal lands. As well, the definition of "aboriginal fishery" in the amended *Fisheries Act* is clarified to include fish harvested by an Aboriginal organization for "any purposes set out in a land claims agreement entered into with an Aboriginal organization," in addition to fish harvested for food, social or ceremonial purposes. This change is intended to provide flexibility to ensure the protection provisions apply to food, social and ceremonial fisheries defined within a current or future land claim agreement.

This bill further seeks to amend the *Navigable Waters Protection Act* to streamline and modernize the regulatory regime for navigation. The Act was recently amended in 2009 by Bill C-10, the *Budget Implementation Act, 2009,* which established classes of waters and works. Works that meet criteria set out in the *Minor Works and Waters (Navigable Waters Protection Act) Order* are pre-approved under the Act. Further amendments were made to the Act by Bill C-38 in June 2012. These amendments exempted international and interprovincial power lines from the requirements of the *Navigable Waters Protection Act* and gave the National Energy Board jurisdiction over navigable waters where pipelines and power lines are concerned.

The *Navigable Waters Protection Act* is further amended by Bill C-45 by restricting its application to specific navigable waters that are set out in Schedule 2 of the Act. This seeks to allow Transport Canada to focus its resources on Canada's busiest waterways and exclude those waterways not heavily navigated from Transport Canada's oversight. The aim of this change is to reduce unnecessary project reviews and the backlog and delays these reviews have created. The

Act is enhanced with the introduction of an administrative monetary penalty regime. Under this scheme, the maximum penalty for violation is $5,000 in the case of an individual, and $40,000 in any other case.

Amendments in Bill C-45 build on earlier consultations that resulted in Bill C-38 or from conversations with project proponents, the provinces and stakeholders in the implementation of that bill. Given this, public consultations were not held prior to the introduction of Bill C-45.

The *Fisheries Act*

Division 4 of Part 4 makes targeted and focused amendments to the *Fisheries Act* to provide greater legal clarity and certainty regarding some of the *Fisheries Act* amendments made by Bill C-38 in June 2012.

This part of the bill amends the *Fisheries Act* and some clauses of Bill C-38 relevant to that Act but not yet in force, in four areas: obstruction to fish passage; allotment of fines; the definition of Aboriginal fisheries; and transitional provisions for existing permits for killing or harmful alteration of habitat. The prohibitions on the obstruction of passage of fish are amended to bring the wording in line with the definition of a "fishery" and move them under "General Prohibitions" to clarify that section 35 of the *Fisheries Act* clearly applies to any obstacle to fish passage. The prohibition on the use or placement of "any kind of net or other fishing apparatus, logs or any material of any kind in the unobstructed part of a river, stream or tidal stream" would be deleted from Bill C-38 and therefore from the *Fisheries Act*. Fines received in respect of offences under the current part of the *Fisheries Act* entitled Fish Habitat Protection and Pollution Prevention (to become Fisheries Protection and Pollution Prevention when the relevant clauses of Bill C-38 come into force) would be credited to the Environmental Damages Fund, and powers would be given to courts to direct these funds to specific entities. This is similar to the regime currently in place in the *Canadian Environmental Protection Act, 1999.*

"Aboriginal fisheries" is clarified to include fish harvested by an Aboriginal organization for "any purposes set out in a land claims agreement entered into with an Aboriginal organization," in addition to fish harvested for food, social or ceremonial purposes. Transitional provisions in Bill C-45 suspend offences for non-compliance with conditions in existing permits for killing fish or habitat damage that are still in force at the time of coming into force of these changes.

Offences would not apply for up to 210 days while, on application by the owner, the Minister decides how existing permits will be applied under the new prohibitions.

The *Navigable Waters Protection Act*

Amendments to the *Navigable Waters Protection Act* build on earlier changes to that Act made in 2009. At that time, the Act was amended to allow the Minister to issue the *Minor Works and Waters (Navigable Waters Protection Act) Order*. This created a class of "minor works" that were considered low-risk to navigation, such as docks and boathouse, and "minor waters" that are not reasonably navigable by the public. Minor works and works on minor waters may be built as pre-approved as long as they conform to specified criteria.

Bill C-45 re-names the *Navigable Waters Protection Act* the Navigation Protection Act, and limits its application to those navigable waters listed in Schedule 2 of the Act. These bodies would include 100 listed oceans and lakes, as well as 62 listed rivers and riverines. The Act could also potentially apply in respect of a work on a navigable body of water that is not listed in the schedule, but only on the request of a proposed work's owner. The amendments would modify the approval process under the Act, such that the owner of a proposed work (human-made structure, filling or excavating) in, on, over, under, through or across a listed navigable water would submit notice of the proposed work to the Minister of Transport. The Minister would then determine whether the work is likely to substantially interfere with navigation. If it is not likely to do so, the work would be permitted to be carried out in accordance with requirements imposed under the Act, or a regulation or order made under the Act. If the Minister determines that the work is likely to substantially interfere with navigation, he or she would either approve the work subject to terms and conditions, or reject it if in the public interest to do so.

The revised Act would give the Minister the power to designate any works as "minor works," as well as to designate any of the navigable waters listed in the schedule as "minor waters." The effect of such designations would be that the owner of a "minor work", or a work related to a "minor water", would not be required to apply to the Minister for approval of the work. Rather, owners would be responsible for following the requirements under the Act, and any regulations or orders made under the Act, in carrying out the work.

Division 18 would provide for administrative monetary penalties to be issued under the Act and would include amendments related to administration and enforcement, and offences and punishment, as well as transitional and coordinating provisions, and consequential amendments.

The *Canadian Environmental Assessment Act, 2012*

The amendments that Division 21 of Part 4 would make to the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) are mostly technical in nature, clarifying the existing provisions of the CEAA 2012 and better aligning the French and English versions. One substantive change would clarify that, following an environmental assessment that results in a designated project being allowed to proceed subject to conditions, those conditions may include more than the implementation of mitigation measures and a follow-up program. The amendment proposes broader language with respect to the conditions to ensure that a decision statement can include administrative requirements such as reporting on the implementation of mitigation or providing information on monitoring and follow-up.

A second substantive but transitional change would, until 1 January 2014, make CEAA 2012 applicable to a designated project that would have been required to undergo an environmental assessment under the former *Canadian Environmental Assessment Act* (despite it having been determined under the former Act that an environmental assessment was likely not required), if the federal involvement (such as permitting) that actually would have triggered the former Act is still required for the project to go ahead.

What the committee heard

Officials from the Canadian Environmental Assessment Agency, Fisheries and Oceans Canada and Transport Canada appeared before the committee to discuss the bill, as did representatives of industry, environmental and recreational groups and Aboriginal stakeholders.

The committee heard broadly supportive views that the amendments will improve the efficiency of environmental outcomes from regulatory reviews and environmental assessments for major infrastructure projects, while maintaining Canada's strong record of responsible development. The committee was assured that the *Canadian Environmental Assessment Act, 2012*, the *Fisheries Act* and the proposed Navigation Protection Act, together with existing protections set out in the *Canadian Environmental Protection Act, 1999*, the *Fisheries Act* and the *Species at*

Risk Act and provincial legislation will continue to safeguard Canada's waters and the environment.

Representatives from the Canadian Association of Petroleum Producers, the Canadian Construction Association, and the Canadian Energy Pipeline Association stressed the importance of improving Canada's regulatory framework as fundamental to attracting the investment required to create Canadian jobs, economic growth and energy security in an increasingly competitive global market. They stressed that regulatory efficacy and efficiency are both crucial in Canada's effort to be internationally competitive. It was their view that Bill C-45 will help achieve this.

The Canadian Energy Pipeline Association further stated that consolidating responsibility with the National Energy Board for watercourse crossings on pipelines under their jurisdiction as primary regulator is a positive step. This will create a more efficient permitting process and reinforce accountability with a single regulator.

The Canadian Construction Association, in supporting the amendments, stated that the changes to the *Navigable Waters Protection Act* will reduce the regulatory burden and focus resources on projects on waters where regulation is warranted and appropriate to protect navigation. This will provide certainty to proponents about which works and waters are designated as requiring approval.

Industry representatives gave an example of the uncertainty, unnecessary project reviews, delays these reviews have created and additional expenses caused by assessments of projects that were unlikely to result in significant impediments to navigation. The Saskatchewan Association of Rural Municipalities described an infrastructure project that was delayed by over a year and required additional time and money to accommodate non-existent public water travel. According to this organization, this example was one of many and the amendments in Bill C-45, in removing unnecessary requirements for waterways with no navigational impact, will help ensure that much needed repair and replacements of rural road networks will be done in a timely manner with no unnecessary additional costs. This was corroborated by Transport Canada officials, who told the committee that the current volume of applications for approval is so large that there are inevitable backlogs. They stated that these backlogs are delaying essential infrastructure projects

by months and even years. Accordingly, the Saskatchewan Association of Rural Municipalities welcomed the changes brought forward in Bill C-45.

Transport Canada officials advised the committee that in the three years since the introduction of the 2009 amendment resulting in the *Minor Works and Waters (Navigable Waters Protection Act) Order*, Transport Canada is not aware of a single complaint that has arisen from minor works or works on minor waters. Industry and environmental representatives similarly confirmed the lack of litigation or complaints stemming from those Orders.

Amendments to the *Navigable Waters Protection Act* would allow an owner of a planned work to opt into the regulatory process if the Minister deems it justified in the circumstances. That is, where a proponent wishes to build a work in a non-listed navigable water, the proponent may ask the Minister to review and, if appropriate, approve the work and be regulated under the Navigation Protection Act in the same way that projects in listed waterways would be. Witnesses were broadly supportive of the ability to benefit from the additional certainty provided by the regulatory regime applied to listed waters and thus avoid uncertainty about building in unlisted waterways.

Some concerns

The committee also heard concerns about the amendments to the *Navigable Waters Protection Act* and the *Canadian Environmental Assessment Act, 2012*.

The Canadian Association of Petroleum Producers expressed some concern about amendments to the *Navigable Waters Protection Act* that they felt may give rise to potential unintended consequences without further clarification or context being provided in the legislation.

Clause 321 of Bill C-45 amends sections 22 and 23 of the proposed Navigation Protection Act concerning depositing of material into waters less than 36 meters deep and prohibits the dewatering of any navigable water. There is a concern that these provisions could be interpreted to have very broad and unintended application.

Section 22 prohibits the throwing or depositing of rocks or other materials into navigable waters less than 36 metres in depth. This clause is not limited to activities that may substantially interfere with navigation and thus also applies to activities that may not have any impact on navigation. This, in turn, could result in unintended consequences such as capturing minor rock

deposits on the edge of a waterway or deposits into tailings ponds. It was suggested that this section be restricted to those activities that would substantially interfere with navigation.

A new section 23 prohibits the dewatering of any navigable water. It was observed that the Act does not define “dewatering”. Without clarity on what is meant by dewatering there is potential for the removal of any water from any water body to become subject to the legislation. Absent a definition, dewatering might be interpreted to include water withdrawals that do not have any effect on navigation and are otherwise subject to provincial regulation, and may have material impacts on industrial, municipal, and private users of surface waters. Witnesses recommended that the term dewatering be defined so as to permit the removal of water unless it creates a significant impediment to navigation, and the dewatering prohibition restricted to the navigable waters listed in Schedule 2 of the proposed Navigation Protection Act.

Similarly, the Canadian Construction Association noted clauses 430 and 431 of Bill C-45 amend sections 66 and 67 of CEAA 2012, which address duties of certain authorities and projects carried out on federal lands. These sections of CEAA 2012 require that a federal authority or specified body must not carry out a "project" on federal lands unless, among other things, it determines that the carrying out of the project is not likely to cause significant adverse environmental effects.

For these clauses of the bill, a "project" is defined as a physical activity that is carried out in relation to a physical work. Bill C-38 established that only "designated projects” require environmental assessments. "Designated projects" are projects such as large power plants, mines or offshore oil developments which have the potential to result in significant adverse environmental effects, thereby warranting environmental assessment under CEAA 2012. The definition of "project" in clause 430 of Bill C-45 includes all physical works and associated activities that are not designated projects. There is a concern that without clarification, federal authorities could interpret clause 431 of Bill C-45 as requiring an informal environmental assessment for projects on federal lands; an assessment that would have none of the formal processes or time frames set out for environmental assessments for designated projects as set out under CEAA 2012. The ambiguity arises because the authority is given some decision-making power to determine whether the project is likely or not to cause significant environmental effects. However, the Act is silent as to how this will be achieved; there is no guidance as to how the

authority will make this determination and fulfil its responsibility. This could then be interpreted to mean requiring an environmental assessment. It was suggested that Parliament consider eliminating the requirement for federal authorities to make the determination whether the project is likely or not to cause significant environmental effects. Failing that, it was believed that Parliament should amend these sections to establish a strict process and rules of conduct for these determinations made by authorities, including timelines like those that apply to the assessment of designated projects under CEAA 2012.

The Canadian Hydropower Association and the Canadian Electricity Association submitted written comments confined to CEAA 2012. It should be noted that their comments do not address any of the amendments proposed in Bill C-45 but rather relate to CEAA 2012 more generally as it was established under Bill C-38. The Canadian Hydropower Association and the Canadian Electricity Association observed that CEAA 2012 does not provide for amendment of the conditions of the decision statement if subsequent construction and operation of a project results in the need for changes. After a decision statement has been made and as the project progresses through design and construction, it may be necessary to change the project design or mitigation measures in light of new information. For example, additional field data gathered during the early phases of the implementation of a project may show that a specific mitigation measure that was envisaged during the environmental assessment will not work while another measure can ensure the desired environmental outcome. In light of this, they recommend amending CEAA 2012 to provide the power for decision maker to amend the conditions in a decision statement, provided specific conditions are met. A proposed amendment to this effect is set out in the Appendix C to this report for consideration when CEAA 2012 is further studied.

They also provided suggestions to ensure consistency and alignment between the environmental assessment decision statement and any necessary authorizations that are conditions of that decision. They noted that in some circumstances it may not be possible to detail all the necessary mitigation or compensation measures in a decision statement if detailed information is pending but not yet received at the time the decision statement is issued. This creates difficulties for project proponents who require certainty that subsequent authorizations will not be inconsistent with the mitigation and compensation measures committed to and accepted during the environmental assessment. Accordingly, the Canadian Hydropower Association and the Canadian Electricity Association recommend amending CEAA 2012 to require that any permits,

approvals or authorizations to be issued or delegated by federal authorities after an environmental assessment has been concluded must be consistent with the conditions established in the decision statement. This must also apply to permits, approvals and authorizations issued by provincial authorities where a provincial environmental assessment process has been substituted for the federal process. A proposed amendment to this effect is set out in the Appendix C to this report for study at the appropriate time.

The Canadian Hydropower Association and the Canadian Electricity Association further pointed out an inconsistency between CEAA 2012 and the *Species at Risk Act* concerning requirements for environmental assessments. They note that under CEAA 2012, responsible authorities must examine the impacts on listed aquatic species and migratory birds when undertaking an environmental assessment. However, the *Species at Risk Act* requires responsible authorities to consider all species listed in that Act. If not clarified, this inconsistency could result in an application for judicial review from a third party on the basis that that impacts on terrestrial species or other plants listed under the *Species at Risk Act* should have been considered.

Additionally, while CEAA 2012 establishes timelines for screenings and for environmental assessments, there is no time limit for the period between the end of the screening with the posting of a decision by the Canadian Environmental Assessment Agency under s.12, and the beginning of the environmental assessment with the posting of the Notice of Commencement under s.17. The Canadian Hydropower Association and the Canadian Electricity Association suggest there should be a maximum of 15 days for this interval. A proposed amendment to this effect is set out in the Appendix C to this report for study at such time as the Act is further examined.

A number of witnesses commented on the lack of consultation prior to the introduction of the amendments in Bill C-45. The Assembly of First Nations noted that the federal government has a constitutional duty to consult with First Nations when Crown conduct may adversely impact established or potential Aboriginal and treaty rights. According to the Assembly of First Nations, meaningful consultation would have consisted of the department sharing information and giving the Assembly of First Nations a comment period in which they could examine the proposed amendments, make recommendations and propose changes prior to the introduction of the bill. Aside from some high level technical briefings that were lacking in the specificity that resulted in

these amendments, this did not occur in advance of the amendments to legislation set out in the bill. Moreover, the Assembly of First Nations stated that CEAA, 2012, the *Fisheries Act* and the proposed Navigation Protection Act are silent in terms of specifying whether or how the Crown is to discharge its duty to consult with and accommodate First Nations.

The World Wildlife Fund-Canada, Ecojustice and the West Coast Environmental Law Association also commented on the lack of meaningful stakeholder and public consultation and limited transparency in decision-making prior to the introduction of Bill C-45. The World Wildlife Fund-Canada advised the committee they participated in a conference call briefing on the proposed amendments to the *Navigable Waters Protection Act* with staff from Transport Canada on October 19, 2012, one day after the bill was tabled in Parliament. A request for specific, detailed information on the process and criteria used to select waters for listing in Schedule 2 has yet to receive a response. The West Coast Environmental Law Association also noted a lack of transparency in how the Minister is to decide whether to allow an owner of a work on an unlisted water to opt in to the legislative framework. They suggest the bill be amended to include some criteria to be used by the Minister in reaching this decision.

With respect to amendments to the *Fisheries Act* and the definition of an "aboriginal fishery", the Assembly of First Nations is concerned about an attempt to legislate a definition as to which fisheries qualify as Aboriginal. They state that is up to each First Nation to determine the extent and nature of their fisheries, and leaving avenues open for departmental policy to define food, social and ceremonial fisheries or which fisheries qualify as those within a land claim agreement may result in infringement of First Nation rights guaranteed under the *Constitution Act, 1982*. They fear that an interpretation that is not flexible will create an opportunity for abrogating and derogating First Nation rights by allowing for species that First Nations fish to continue to decline in population, potentially past the point of recovery, to the detriment of the ability to continue to exercise a right to fish. Accordingly, they suggest Bill C-45 be amended to make it clear that all traditional fisheries must be protected, whether currently practised or whether in a period of recovery to allow for future practice. Moreover, fisheries within treaties as well as land claim agreements, and fisheries practised for the purpose consistent with an Aboriginal right must be included as Aboriginal fisheries.

The Assembly of First Nations also voiced concern about the breadth and discretion in administering the Environmental Damages Fund for purposes related to conservation and protection of fish, fish habitat, the restoration of fish habitat, or for administering the fund. They state that First Nations are distinct resource users recognized by the *Fisheries Act* and have unique fisheries uses that differ from others that may be overlooked in favour of compensating larger commercial or recreational fisheries. As well, First Nations have specific insight and interests that should be taken into account when making funding decisions. The Assembly of First Nations recommends that First Nations technicians are included in the technical body that reviews proposals for the Environmental Damages Fund and that the fund adopt a preference system similar to that in the 1986 Habitat Policy to assess funding proposals.

Several witnesses raised a number of points about the amendments to the *Navigable Waters Protection Act*. The World Wildlife Fund-Canada, Mountain Equipment Co-op and Ecojustice expressed disappointment with the decision to focus on the commercial navigation aspect of waters and not on waterways and watercourses as part of an ecosystem. These witnesses advised the committee that protecting all waterways also protects the economic and health benefits provided by the water itself. In their opinion, protecting waterways benefits Canadians by ensuring that development does not negatively affect water supplies, fish and fisheries, ecosystems and natural water purification and filtration services. In their view, it is not possible to separate navigation from the health of the aquatic environment.

Mountain Equipment Co-op, the West Coast Environmental Law Association, the World Wildlife Fund-Canada and Ecojustice raised several points about the amendments to the *Navigable Waters Protection Act* set out in Bill C-45. They were concerned about the narrowing of the scope of the Act to the waters listed in Schedule 2 of Bill C-45. They stated that, without federal oversight, navigation on most of Canada's waterways will be left to the protection of the common law right to navigation. They note that Canada's waterways are public resources and that there is a public, common law right to navigate waters; this can only be limited if the works impeding navigation are clearly authorized by statute. In reducing the number of waterways requiring approval for works, Bill C-45 raises the potential that works will be built which may impede navigation but which are not approved by statute.

The West Coast Environmental Law Association, Mountain Equipment Co-op, Ecojustice and the Lake Ontario Waterkeeper noted that the common law right to navigation right is enforceable by citizens by bringing an action in public nuisance before the courts. Not only is such an action reactive – that is, it is usually brought after navigation has been affected – but litigation is generally a costly undertaking. Moreover, Ecojustice was concerned that an action in public nuisance brought by a private citizen inappropriately shifts the protection of a public right on to private citizens. It was further suggested that reducing the number of waterways subject to regulation will result in increased uncertainty and litigation for projects on unregulated waters that interfere with navigation.

The Assembly of First Nations echoed this concern about the increased potential for litigation under the proposed Navigation Protection Act. They advised the committee that the scheme for approving works in listed waters as set out in section 5 of the Act provides no consideration of, or ways for, considering First Nation rights issues. This means that if the Minister makes a decision on a work or a project that affects First Nation rights, there is no statutory authority for him or her to consider those rights when granting an approval. In the opinion of the Assembly of First Nations, this all but guarantees costly and complex litigation related to project approvals. Because the statutory scheme lacks a means to consider First Nations rights and thus the Minister is simply unable to do so, the Minister is bound to encounter litigation when deciding to approve a project. If the Minister does not consider First Nation rights in deciding whether to grant an approval, the government may face judicial review on the grounds that it failed in its constitutional duty to consult with affected First Nations. If the Minister does consider First Nation rights, then a project proponent may seek judicial review of the Minister's decision on the basis that the decision was made inconsistent with the established statutory scheme. Moreover, as there is no statutory obligation or duty on project proponents to consult with First Nations prior to building on unlisted waters, this raises the potential for further litigation if the work prevents access to fisheries or water resources for First Nations.

Ecojustice, Mountain Equipment Co-op and the Lake Ontario Waterkeeper were also concerned that the proposed Navigation Protection Act removes automatic public notice and comment provisions for projects. Under the current *Navigable Waters Protection Act*, public notice and comment periods are mandatory for projects that will substantially interfere with navigation. The proposed Navigation Protection Act would make all public notice and comment requirements

discretionary and public notice and comment opportunities would not be required for projects that would not substantially interfere with navigation. Given the discretionary nature for notice for projects that would substantially interfere with navigation, these witnesses were concerned that this could result in projects being approved and built without public notice or opportunity to comment. It was their view that without knowing what works are being planned, it will be difficult to ensure that they do not interfere with the right of navigation or that they will not pose a risk to the safety of water users.

The World Wildlife Fund-Canada, the West Coast Environmental Law Association, Ecojustice and the Lake Ontario Waterkeeper observed that focusing resources on listed waterways will mean no federal oversight of navigational matters such as dewatering and depositing material into waterways on unlisted rivers, lakes and streams. Moreover, because only the federal government has constitutional jurisdiction over navigation, this potential gap cannot be filled by the provinces or territories. Similarly, the West Coast Environmental Law Association questioned the capacity to enforce the *Fisheries Act* in light of reduced resources. Witnesses further noted that in restricting federal oversight to commercial navigation in waters listed in Schedule 2, it will be difficult to assess and understand the impacts of these amendments on the water and the aquatic environment because the majority of Canadian waterways will no longer be subject to federal monitoring, target or goal setting at the ecosystem level.

Mountain Equipment Co-op and the World Wildlife Fund-Canada observed that outdoor recreation and tourism contributes significantly to the Canadian economy and that recreationalists, outdoor business and marina owners, angling outfitters and others in the outdoor economy rely on access to and the navigability of waterways for their livelihood. They suggest that excluding navigation rights from unlisted waterways is tantamount to excluding the economic, cultural, and social benefits that derive from water-based outdoor recreation. It is their fear that the focus on commercial navigation minimizes the importance of paddling, recreational boating, fishing, hunting, and other water-based recreational activities. In their view, such an approach marginalizes the outdoor recreation and tourism industry.

Concern was expressed regarding changes in the *Fisheries Act* relating to the obstruction of fish passage. The amendments to that Act in Bill C-38 in June 2012, which are not yet in force, prohibited the obstruction of more than two thirds of the width of any river or stream or more

than one-third of the main channel at low tide of any tidal stream. This prohibition did not include an authorization scheme to allow the government to permit such obstructions under specified circumstances. This could pose difficulties for project proponents seeking to build a dam or other obstruction across a river or stream. Accordingly, Bill C-45 amends the pending *Fisheries Act* changes to remove the prohibition of obstruction of more than two-thirds of the width of the river or a stream. Therefore, the need for an authorization is no longer an issue.

Rather, the prohibition against obstructing fish passage is found in section 35 of the *Fisheries Act*, which prohibits serious harm to any commercial, recreational or Aboriginal fishery or any fish that supports such a fishery, unless authorized. The concern is that this leaves fish that are not part of, or do not support a commercial, recreational or Aboriginal fishery with no protection, particularly with respect to their habitat.

Moreover, with respect to the prohibition against seines, nets, weirs, or other fish appliances that obstruct "more than two thirds of the width of any river or stream or more than one third of the width of the main channel at low tide of any tidal stream", the Assembly of First Nations asserts this may result in the infringement of First Nation rights. Certain First Nation fisheries use seines and weirs that extend across entire rivers for fishing purposes as well as for purposes to count and monitor fish stocks. As the right to practice these fisheries is protected by the Constitution, it is unclear how this right will be accommodated under the *Fisheries Act* as amended.

The West Coast Environmental Law Association, Mountain Equipment Co-op, the World Wildlife Fund-Canada, Ecojustice and the Assembly of First Nations noted that C-45 contains significant legislative changes, and to bring such amendments in an omnibus budget bill is regrettable. They were of the opinion that it would be preferable to separate the navigation legislation from the bill and to address each element in a timely but thorough manner through a multi-stakeholder process that would ensure public participation and scrutiny.

APPENDIX A: Witness List

Meeting of November 22, 2012	

Mark Mattson, President *(Lake Ontario Waterkeeper)*
Audrey Mayes, Senior Policy Analyst *(Assembly of First Nations)*
Dan Pujdak, Policy Analyst *(Assembly of First Nations)*

Meeting of November 20, 2012	

Rachel Forbes, Staff Counsel *(West Coast Environmental Law Association)*
David Labistour, Chief Executive Officer *(Mountain Equipment Co-op)*
Tony Maas, Director, Freshwater Program *(World Wildlife Fund - Canada)*

Meeting of November 8, 2012	

William Amos, Director, Ecojustice Clinic, University of Ottawa *(Ecojustice Canada)*
Ian Miron, Student *(Ecojustice Canada)*
Ray Orb, Vice President *(Saskatchewan Association of Rural Municipalities)*

Meeting of November 6, 2012	

Jeff Barnes, Member *(Canadian Construction Association)*
Bob Bleaney, Vice President, External Relations *(Canadian Association of Petroleum Producers)*
Phil Langille, Manager, Federal Regulatory and Northern Affairs *(Canadian Association of Petroleum Producers)*
Kim McCaig, Vice President and Chief Operating Officer *(Canadian Energy Pipeline Association)*

Meeting of November 1, 2012	

Nathan Gorall, Director General, Navigable Waters Protection Task Force *(Transport Canada)*
Jeff MacDonald, Director General, Legislative and Intergovernmental Affairs *(Fisheries and Oceans Canada)*
John McCauley, Director, Legislative and Regulatory Affairs Division *(Canadian Environmental Assessment Agency)*
Steve Mongrain, Senior Policy Advisor, Policy Development Sector *(Canadian Environmental Assessment Agency)*
Ekaterina Ohandjanian, Legal Counsel *(Transport Canada)*
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APPENDIX B: Brief submitted but did not appear before the committee

Joint Submission – Canadian Electricity Association and the Canadian Hydropower Association.

APPENDIX C: CHA-CEA- Proposed Amendments – CEAA 2012

CHA-CEA Proposed Amendments - CEAA 2012

November 16, 2012

In our sector, CEAA 2012 will reduce duplication, improve timelines, avoid triggering the federal EA process for minor projects and clarify responsibilities. Since the majority of our projects are also subject to provincial EA, all impacts will continue to be addressed without any compromise to environmental protection.

We have reviewed CEAA 2012 and the amendments to CEAA 2012 included in Bill C-45 carefully and suggest some minor amendments to facilitate the application of the Act to electricity sector projects:

1) Give an explicit power to amend the conditions of decision statements to the Minister.

Currently, there are no provisions in CEAA 2012 for amendment of the conditions of the decision statement if subsequent construction and operation of a project results in the need for changes. Often, as detailed engineering progresses or new information becomes available during construction after the decision under the CEAA, changes to project design or mitigation measures become necessary. For example, additional field data gathered during the early phases of the implementation of a project may show that a specific mitigation measure that was envisaged during the environmental assessment will not work while another measure can ensure the desired environmental outcome.

Recommendation*: The following language is designed to provide the power to the decision maker to amend the conditions in a decision statement, provided specific conditions are met.*

Consequential amendment to s. 54

(7) For greater certainty, a decision statement issued under this section includes an amendment to the decision statement made under section 54.1.

Amending power

54.1 (1) For the purpose of this section, the following definitions apply:

"new information" means information regarding

(a) additional detail or changes to the design, construction or operation of the designated project;
or

(b) additional detail or changes to the environmental effects referred to in subsection 5(1) that was not available at the time the decision was made under section 52.

"existing conditions" means conditions included in a decision statement under section 54.

(2) Subject to subsections (3) to (5) the decision maker referred to in sections 27, 36, 47 and 51 may amend a decision statement issued under section 54.

Scope of amendments

(3) An amendment to the decision statement issued under subsection 54.1(2) may:

(a) amend the existing conditions;
(b) add new conditions; or
(c) delete the existing conditions.

Pre-conditions for amendments – amending existing conditions or adding new conditions

(4) An amendment to amend the existing conditions or add new conditions to a decision statement under subsection 54.1(3)(a) and (b) may be made, only if the decision maker

(a) has received new information; and

(b) is of the opinion that the amendments to the existing conditions or the proposed additional conditions are necessary to ensure the conclusions in section 52(1)(a) or (b) regarding the adverse environmental effects of the designated project are not significantly altered.

Pre-conditions for amendments – deleting conditions

(5) An amendment to delete conditions in a decision statement under subsection 54.1(3)(c) may be made, only if the decision maker

(a) has received new information; and

(b) is of the opinion that the conditions are not necessary to ensure that any significant adverse environmental effects of a designated project are mitigated.

2) Ensure consistency and alignment between the EA and authorization conditions.

This was one of our key recommendations in our submission to the House Standing Committee on Environment and Sustainable Development of November 2011. In Bill C-38, there has been an attempt to address the problem; however the current provisions will not achieve the intended result. We believe that this would be best addressed by improving the relevant provisions of CEAA 2012. This can be done by including the key parameters (or boundaries) of the authorizations, to be obtained under other federal statutes in the CEAA decision statement, which would be made binding upon federal authorities. These provisions of the CEAA should ensure consistency between the EA decision and the authorizations, including in cases where the process is delegated or when a provincial process is substituted for the federal process.

In some circumstances it may not be possible to detail all the mitigation or compensation measures in the CEAA 2012 decision statement if detailed information on the project is pending. However, if detailed information on the project is forthcoming, proponents require certainty that subsequent authorizations will not be inconsistent with the mitigation and compensation measures committed to and accepted during the EA (except to the extent warranted by the additional information).

Recommendation*: The following language is designed to require that any permits, approvals or authorizations to be issued by federal authorities after a CEA assessment has been concluded, must be consistent with the conditions established in CEAA Decision Statements.*

53.1 Notwithstanding the provisions of any act of parliament, when a federal authority exercises a power or performance of a duty or function that would permit a designated project to be carried out, in whole or in part, any further conditions that form part of any agreement, permit, licence, order, approval, or similar document authorising a person or organisation carry out the designated project, in whole or in part, must not include more stringent mitigation measures than are required under the conditions with which the proponent of the designated project must comply under section 53, unless there is an amendment to a decision statement in accordance with section 54.1.

3) In CEAA 2012, the consequential amendment to SARA needs to be clarified.

There is an inconsistency between CEAA 2012 and SARA requirements for EA:

1. according to section 5. (1) of CEAA 2012, the RAs only needs to look at impacts on listed aquatic species and migratory birds; or

2. according to section 79. (1) of SARA they need to consider all listed SARA species.

If not clarified this inconsistency could result in a situation where an EA is done that only looks at impacts on aquatic species and migratory birds, a Decision Statement is rendered, and there is a judicial review brought forward by 3rd parties on the basis that impacts on listed terrestrial species or plants should have been considered.

4) Timelines

CEAA 2012 establishes timelines for screenings and for environmental assessments, but there is no time limit for the period between the end of the screening (posting of the Agency decision under s.12 and the beginning of the EA (posting of the Notice of Commencement under s.17). We suggest a maximum of 15 days for this interval. Section 17 would be amended as follows:

“17. For projects that are subject to a screening, within 15 days after the posting of a decision to conduct an environmental assessment under s.12, the responsible authority with respect to a designated project must ensure that a notice of the commencement of the environmental assessment of a designated project is posted on the Internet site”.

5) Other suggestions on CEAA 2012 and regulations and policies under the new Act.

The ultimate success of the changes to the CEAA will depend not only on the Act but also on the regulations and policies that are adopted under the Act. The CEA and CHA are looking forward to participating in the development of regulations and guidance documents.

Care should be taken in CEAA 2012 and in the Regulations Designating Physical Activities to make sure that projects that were not subject to federal environmental assessment in the past do not become subject to a federal assessment under CEAA 2012, unless there are strong reasons to do so. For example, in the past, most power lines did not trigger the CEAA because there was no trigger. In cases where there were environmental effects in areas of federal jurisdiction (migratory birds, for example), these were usually addressed through participation of federal authorities in provincial processes). This worked well, as the environmental effects were mostly in domains that fall primarily under areas of provincial jurisdiction. We suggest that the Act and the Designated Physical Activities Regulations be reviewed to ensure that this continues to be the case.