

Backgrounder
Physical Activities Regulation (Project List) 5 Year Review
September 2024

This document has been prepared for information purposes to set the stage for the Assembly of First Nations' impact assessment webinar series. First Nations' participation in the webinars does not constitute consultation nor the fulfilment of the Crown's duty to consult and accommodate with First Nations in regards to any project or assessment and should not be construed as such.

BACKGROUND

The *Physical Activities Regulations*, also known as the Project List, is a regulation that sets out classes of “designated projects” that are subject to the *Impact Assessment Act* (IAA) and may require a federal impact assessment.¹ The Impact Assessment Agency of Canada (IAAC) is required to review the Project List² five years after it is adopted³ and submit a report setting out conclusions and recommendations to the Minister of Environment and Climate Change Canada (ECCC).⁴

The current Project List (adopted in 2019) includes 61 entries that cover 10 different sectors: national parks and protected areas; defence; mines and mills; nuclear facilities; oil and gas; transmission lines and pipelines; renewable energy; transportation; hazardous waste; and water projects. Thresholds (many are related to their “production capacity”) for each project category are employed; projects are only captured by the entry if they are at or above the threshold.

IMPACT ASSESSMENT AGENCY 5 YEAR REVIEW

The Discussion Paper on the Project List Review (Discussion Paper) introduces a new lens for the review, responding to the Government of Canada's initiatives to “improve the efficiency” of the impact assessment and permitting processes for major projects set out by the Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects. Their vision is outlined further in the report entitled “Building Canada's Clean Future: A Plan to Modernize Federal Assessment and Permitting Processes to Get Clean Growth Projects Built Faster.”⁵ IAAC's Discussion Paper does not include the Inherent and Treaty rights and Title of First Nations or the United Nations Declaration on the Rights of Indigenous Peoples (*Declaration*) as a lens, guide, or consideration for the review. In fact, neither the *Declaration* nor the *United Nations Declaration on the Rights of Indigenous Peoples Act* are mentioned in the Discussion Paper.

Note that during development of the Project List, First Nations recommended that any review of the regulation should involve First Nations and be open, participatory, and accountable, including

¹ *Physical Activities Regulations*, SOR/2019-285 (Project List).

² *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 at s. 111(1).

³ Project List at s. 3.

⁴ IAA at s. 111(2).

⁵ Impact Assessment Agency of Canada, “Discussion Paper on the Project List Review” and page 5; Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects, “Building Canada's Clean Future: A Plan to Modernize Federal Assessment and Permitting Processes to Get Clean Projects Built Faster” (June 2024), [online](#).

timely public notices and appropriate comment opportunities, including webinars, workshops, and public meetings across the country.⁶ Many First Nations recommended shorter (2-3 year) timelines for ongoing reviews of the Project List.

KEY ISSUES

First Nations took issue with the original approach to developing the Project List.⁷ The Project List was developed using a criteria-based approach that only captured projects with the “greatest potential for adverse effects in areas of federal jurisdiction related to the environment” and employed thresholds which only capture projects of certain size. The Project List reduced the scope of projects that are subject to federal assessment as compared to the *Canadian Environmental Assessment Act, 2012*.

The use of thresholds in the Project List encourages “project splitting” and contributes to a failure to identify, assess, prevent or mitigate cumulative impacts from multiple projects that may individually fall below the threshold. Project size can be deliberately restricted to fall slightly below the prescribed thresholds, enabling proponents to evade federal impact assessment requirements. First Nations have made many recommendations for crafting the Project List in a manner that would better capture projects with potential impact to First Nations and combat project splitting:

- require assessment for several smaller projects proposed by the same proponent if they reach a threshold when taken together;⁸
- require assessment of more than one project proposed within a geographic or space in a certain time period, even if they do not individually meet the Project List threshold;⁹
- adopt multiple types of thresholds to capture impacts through more than one set of criteria;¹⁰
- require projects nearing thresholds to notify IAAC, that the notification trigger preliminary review by IAAC and First Nations, formal consultation, and formal decision on whether the IA is needed;¹¹ or

⁶ Biigtigong Nishnaabeg Submission on the Project List (2019) [online](#) at page 37; Bingwi Neyaashi Anishnaabek Submission to Discussion Paper on Project List (2019) [online](#) at page 39.

⁷ Submission to Canada Environmental Assessment Agency Re: The Proposed Project List on behalf of Heiltsuk Tribal Council (May 31, 2019) [online](#) at page 2; Kebaowak First Nation Submission on regulations being developed for the Canadian Impact Assessment Act (“IAA”) in Bill C-69, namely, the Regulations Designating Physical Activities (the “Project List Regulation”) and Information Requirements and Time Management (May 31, 2019) [online](#) at page 6; Naskapi Nation of Kawawachikamach Letter re Federal Review of Environmental and Regulatory Processes: Discussion Papers pertaining to the Proposed Impact Assessment System (File: PE-DPGIA(I)-078) (May 31, 2019) [online](#) at page 2.

⁸ Dene Nation Submission on the Project List Discussion Paper (May 31, 2019) [online](#) at page 9.

⁹ Biigtigong Nishnaabeg Submission at page 16.

¹⁰ Heiltsuk Tribal Council Submission at page 4.

¹¹ Metlakatla Stewardship Society Letter re Feedback on the Proposed Project List Discussion Paper (May 31, 2019) [online](#) at page 2.

- adopt an Indigenous agreed-upon joint review mechanism to ensure that “near-threshold” projects are captured for IA requirements.¹²

Projects that are not captured by the Project List can only be considered for an impact assessment at the discretion of the Minister under section 9 of the IAA. This places a substantial burden on First Nations to lobby the Minister to exercise their discretion to designate a project for assessment. In fact, many designation requests come from First Nations and most are rejected.

SUMMARY OF PROPOSED CHANGES AND (IN)CONSISTENCY WITH FIRST NATION SUBMISSIONS

IAAC’s Discussion Paper sets out “options for consultation” that suggest changes to the Project List by category. Below, we have indicated whether proposed changes for each category of Project is consistent or inconsistent with First Nation submissions on the Project List from 2019 (during the original regulation making process) and other First Nation mandates.

Proposed Change	Type of Project	Consistent or Inconsistent with First Nation Submissions or Otherwise Articulated Positions *Non-exhaustive
Remove	In situ oil sands	Inconsistent with AFN Resolution no. 06/2019, 2019 Submissions. ¹³
	Fossil fuel power generation	Inconsistent with 2019 Submissions. ¹⁴
Add	Projects with high potential for effects on “sensitive federal lands”	May be consistent with 2019 Submissions. ¹⁵

¹² First Nations Major Projects Coalition Submission on the Project List Discussion Paper (May 31, 2019) [online](#) at page 4.

¹³ Kebaowak First Nation Submission at page 10.

¹⁴ Kebaowak First Nation Submission at page 10-11; Tsartlip First Nation Submission [online](#) at page 1-2.

¹⁵ Heiltsuk Tribal Council recommended including marine protected areas under the Oceans Act on the list of federal protected areas. Heiltsuk Tribal Council Submission at page 3.

Kebaowak First Nation recommended that all projects that interfere with the critical habitat of species listed under the Species at Risk Act should be included in the Project List. Kebaowak First Nation Submission at page 10.

Tsartlip First Nation recommended that “[t]he proposed construction, alteration, expansion, decommissioning or abandonment of any project to be located in critical habitat that is described in a published recovery strategy or is subject to a protection order under the Species at Risk Act.” Tsartlip First Nation Submission at page 2.

	Wave energy	Consistent with 2019 Submissions. ¹⁶
Adjust to capture more	Coal mines	May be consistent with 2019 Submissions. ¹⁷
Adjust to capture less	Railway yards	Inconsistent with 2019 Submissions. ¹⁸
	SMRs and large-scale nuclear reactors using known technologies on licensed sites	Inconsistent with AFN Resolutions no. 06/2019, 52/2023; Inconsistent with 2019 Submissions. ¹⁹
	Uranium mines on licensed sites	Inconsistent with 2019 Submissions. ²⁰

There are many categories of projects First Nations have recommended for inclusion on the Project List that have been ignored. For example, in 2019, First Nations recommended that pulp and paper mills, aquaculture facilities, oil and gas fracking, marine oil tanker shipping, and any project that would result in an increase of rail and/or marine traffic should be included in the Project List.²¹ First Nations also recommended that for the impact assessment regime to address climate change, the Project List should include triggers based on the quantity of greenhouse gas (GHG) emissions released by a proposed project and decrease the threshold over time to accord with Canada’s international and domestic climate change commitments.²²

DISCUSSION QUESTIONS

1. Do you support the Agency’s method and scope for the 5 Year Review of the Project List? Why or why not?

¹⁶ Kitigan Zibi Anishinabeg, “Consultation on the Discussion Paper on the Proposed Project List” (May 23, 2019 [online](#) at page 1.

¹⁷ Bingwi Neyaashi Anishinaabek recommended that the Project List capture all coal mines and expansions and all coal-fired generating facilities. Bingwi Neyaashi Anishinaabek Submission at page 28. Also see Kitigan Zibi Submission at page 2; Wolf Lake First Nation comments on the Discussion Paper on the Proposed Project List (May 31, 2019) [online](#) at page 5.

¹⁸ Biigtigong Nishnaabeg Submission at page 23; Bingwi Neyaashi Anishinaabek Submission at page 24; Kitizan Zibi Submission at page 2.

¹⁹ Anishinabek Nation Letter to Senator Rosa Galvez (March 2019), [online](#).; Kebaowak First Nation Submission at page 14; Kitigan Zibi Submission at page 2-3; Wolf Lake First Nation Submission at page 5.

²⁰ Biigtigong Nishnaabeg Submission at page 32; Bingwi Neyaashi Anishinaabek Submission at page 33; Kitigan Zibi Submission at page 2-3; Wolf Lake First Nation Submission at page 5.

²¹ The First Nations of Maa-nulth Treaty Society Letter re Comments on Regulations Related to Canada’s Bill C-69, Impact Assessment Act (May 31, 2019) online at page 2; Heiktsuk Tribal Council Submission at page 2-3; Kebaowak First Nation at page 10; Metlakatla Stewardship Society Submission at page 1; Tsartlip First Nation Submission at page 2.

²² Tsartlip First Nation Submission at page 1; Wolf Lake First Nation Submission at page 4.

2. Are current thresholds appropriate for capturing projects that pose a threat to First Nations' Inherent, Treaty and constitutionally-protected Rights?
3. Are IAAC's proposed changes to project types outlined above consistent or inconsistent with your communities' submissions, resolutions, mandates, etc.?
4. What additional kinds of projects should be included on the Project List due to potential impacts to First Nations' Inherent, Treaty and constitutionally-protected Rights?
5. Are there new technologies or types of projects that you are concerned about due to their potential to impact First Nations' Inherent, Treaty and constitutionally-protected Rights?