

Backgrounder
Impact Assessment on Federal Lands
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 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 Impact Assessment Act (IAA) sets out requirements for assessment of non-designated projects (those not in the *Physical Activities Regulation*, i.e. Project List) on "federal lands," including reserves and protected areas.¹ These requirements are triggered when a federal authority contemplates taking action or making a decision that would enable a project to proceed. IAA requires "federal authorities" to determine prior to project approval that "the project is not likely to cause significant adverse environmental effects" or that those significant adverse environmental effects are justified in the circumstances. There are certain factors that must be considered when determining the significance of adverse environmental effects.² Projects can be exempted from the "environmental effects determination" requirements if they are listed in the *Designated Classes of Projects Order* (Ministerial Order).³

IAA contains an overarching mandate requirement but does not establish specific criteria for how authorities are to conduct "environmental effects determinations" on federal lands. Over 75 government entities are considered authorities, and they are able to adopt their own procedures for the environmental effects determination. On average about 1,000 projects are assessed under such procedures per year.

ISC ENVIRONMENTAL REVIEW PROCESS

Indigenous Services Canada administers the environmental effects determination process on reserves through its Environmental Review Process (ERP).⁴ The ERP was established in 2013 and has been updated to reflect the requirements of the IAA.

ISC is responsible for making a determination on environmental effects before it can issue funding, land tenure or other authorizations in support of projects on reserve lands.⁵ Reasons why an ERP would be triggered:

1. ISC is the project proponent;
2. ISC is providing financial assistance to the project:

¹ *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 at ss. s 2, 81-91.

² *Impact Assessment Act* at s. 84.

³ *Designated Classes of Projects Order*, SOR/2019-323.

⁴ Indigenous Services Canada, Environmental Review Process for Projects on Reserve Land, online: <https://www.sac-isc.gc.ca/eng/1345141628060/1612813855724>.

⁵ List of ISC reasons for a determination under IAA s. 82:

- a. Funding from ISC programs (community infrastructure, housing, economic development), with the exception of block funding
- 3. ISC is issuing a statutory authorization in support of the project.

Note a band council resolution is still required to initiate the issuance of ISC statutory authorizations following the ERP.

Statutory Authorizations that would Trigger ERP

Category of Project	Explanation	Reference to Statute
Financial	Ministerial expenditure decisions to release band moneys	Indian Act, ss. 64, 66 and 69
	Issuance of a Ministerial Loan Guarantee which protects First Nations property from seizure by a non-Indian (for example, lender).	Indian Act, s. 89(1)
Lands for Public Infrastructure	Authorization for use of First Nations lands for the purpose of Indian schools, administration of Indian affairs, Indian burial grounds or Indian health projects	Indian Act, s. 18(2)
Lands for Private Infrastructure	Issuance of a Certificate of Possession for the purpose of enabling a First Nation member to construct a dwelling or other building	Indian Act, s. 20
Lands Generally	Issuance of a permit for occupation or use of First Nations land	Indian Act, s. 28(2)
	Sale or lease of surrendered or designated lands	Indian Act, s. 53(1)
	Lease to a third party of land allotted to a band member	Indian Act, s. 58(3)
	Taking of lands by local authorities	Indian Act, s. 35(1)
	Acceptance of an absolute surrender or designation	Indian Act, s. 39(1)(c)
Quarries	Disposal of sand, gravel, clay or other non-metallic substances or the taking	Indian Act, s. 58(4)(b)

	of these materials, on or under First Nations lands	
Mineral Mining	Issuance of a permit or lease for the exploration or development of minerals	Indian Mining Regulations, ss. 5(2), 6(1)
Waste Disposal	Issuance of a permit to operate a garbage dump, dispose of or store waste, or burn waste on First Nations lands	Indian Reserve Waste Disposal Regulations, s. 5
Logging	Issuance of a permit to First Nations members to cut timber for sale	Indian Timber Regulations, s. 5(1)
	Issuance of a licence for cutting and removing timber from First Nations lands or varying the terms of a timber licence	Indian Timber Regulations, s. 9 or s. 22(1)
Oil and Gas	Issuance of surface leases and rights-of-way or exploratory work on First Nations lands that requires an exploratory licence	Indian Oil and Gas Regulations, s. 29(1) or s. 73(3)
	Oil and gas exploration on First Nations lands that requires a right of entry	Indian Oil and Gas Regulations, s. 30
	Issuance of a lease to commence production of crude bitumen	Indian Oil and Gas Regulations, 1995, s. 39(1)
	Amendment of a lease or permit to provide for production of crude bitumen	Indian Oil and Gas Regulations, 1995, s. 39(3)
Hydroelectric	Authorization from the Minister to enter on, use, occupy, take and acquire any lands that may be required for a hydroelectric project.	Dominion Water Power Act, s. 7(1)
	Authorization from the Governor in Council necessary to bring about the joint development and operation of a	Dominion Water Power Act, s. 9

	hydroelectric project, where such is economically desirable	
	Licences, authorizations and approvals under other sections of the Dominion Water Power Regulations	Dominion Water Power Regulations ss. 8(1), 12(2), 21, 25(2), 40(1), 46, 49(3), 50 or 69(3)

Where a First Nation has its own Land Code under the *Framework Agreement on First Nations Land Management Act* (FNLMA)⁶ and an ISC ERP is required, ISC and the First Nation may agree to a harmonized approach to the project's assessment. If an agreement cannot be reached on a way to harmonize the First Nation's and ISC processes, they can be done in parallel.

Steps in ISC ERP:

The proponent must propose the project to the First Nation and inform ISC about their plans; the proponent has to fill out an ERP Project Description Form⁷ and submit it to the regional ISC office.

Step 1: Determine if the Environmental Review Process applies

Proponent completes and submits Sections 1 and 2 of the Project Description Form

1. Is this a "designated project"?
 - a. Yes: Refer to the Impact Assessment Agency of Canada.
 - b. No: Proceed to question 2.
2. Does the project involve a physical activity associated with a physical work on reserve?
 - a. Yes: Proceed to question 3.
 - b. No: The Environmental Review Process does not apply.
3. Is the project in response to an emergency?
 - a. Yes: The Environmental Review Process does not apply.⁸
 - b. No: Proceed to question 4.
4. Will ISC issue funding or an authorization in relation to this project?
 - a. Yes: Proceed to step 2.

⁶ Framework Agreement on First Nation Land Management Act, S.C. 2022, c. 19, s. 121, online: <https://laws-lois.justice.gc.ca/eng/acts/f-31.46/FullText.html>.

⁷ ISC, Environmental Review Process – Project Environmental Impact Assessment, online: https://www.sac-isc.gc.ca/ForcePDFDownload?url=https%3a%2f%2fwww.sac-isc.gc.ca%2fDAM%2fDAM-ISC-SAC%2fDAM-FNDNG%2fSTAGING%2ftexte-text%2fforms_By_Category_1722435013046_eng.pdf.

⁸ Projects being carried out because of an emergency do not require a section 82 determination. This exemption applies in instances where the project is being carried out in response to matters of national security or to a national emergency as defined under section 3 of the Emergencies Act. This also applies when executing the project without delay will prevent damage to property or the environment or maintain public health or safety. ISC regional environment officers have the discretion to exempt a project from review because of emergency circumstances.

- b. No: The Environmental Review Process does not apply.

Step 2: Identify level of environmental review

There is a minimum 30-day waiting period required between posting the Notice of Intent and posting the Notice of Determination on the Registry.

- 5. Is the project excluded under the Ministerial Order?
 - a. Yes: ISC completes a justification for project exclusion and may at a later date issue funding or authorizations in support of the project. Proceed to step 5, question 7.
 - b. No: ISC will post a Notice of Intent with an invitation for public comments on the Registry. Proceed to question 6.
- 6. Does ISC require additional information to perform a risk assessment?
 - a. Yes: the proponent completes and submits Sections 3 to 5 of the Project Description Form. Proceed to step 3.
 - b. No: A minor review will be conducted by ISC. No further review required. Proceed to step 3.

Step 3: Analysis of environmental effects

A risk assessment will be performed by ISC:

- a. Negligible risk: A minor review will be conducted by ISC. Proceed to step 4.
- b. Low risk: Simple environmental review must be completed by the proponent. Proceed to step 4.
- c. Medium risk: Detailed environmental review must be completed by the proponent. Proceed to step 4.

Step 4: Consideration of factors

ISC will consider factors outlined in section 84(1) of the IAA:

- a. Impacts on section 35 rights
- b. Indigenous knowledge
- c. Community knowledge
- d. Public comments
- e. Mitigation measures

Proceed to step 5.

Step 5: Decision and implementation

ISC posts a Notice of Determination on the Registry.

- 7. Are significant adverse environmental effects likely?
 - a. Yes: ISC cannot issue funding or authorization in support of the project, or ISC may refer the project to the Governor in Council to determine if effects are justified.

b. No: ISC may issue funding or authorization in support of the project. The project may proceed.

Level of Review

Once the Project Description Form is complete, ISC regional environment officers will review the information provided and perform a risk analysis to identify whether there is a need for further environmental review. Using the results of this analysis, ISC regional environment officers will assign a level of review appropriate to the project, based on its potential risk to the environment.

Risk Level	Negligible	Low	Medium	High
Level of Review	Minor	Simple	Detailed	Referral for designation under s. 9 of IAA
Example	Construction of a single house Installation of telecommunications or Internet infrastructure Maintenance activities	Construction of a water treatment plant Construction of a residential subdivision Construction of a gas station	Construction of a stone quarry with a production capacity of less than 3.5 million tons per year Construction of a waste incinerator Construction of an all-season highway	Projects that have a high environmental risk or a high level of public concern and are not already designated

Environmental Effects, Mitigation Measures, and Significance

For each adverse effect identified, mitigation measures must be proposed with the aim of eliminating, reducing or otherwise controlling the adverse effect. If the proponent does not propose mitigation measures in the Project Description Form or the Detailed Environmental Review Report, the ISC regional environment officer may propose mitigation measures as a condition of approving the project. ISC may require a Mitigation Measures Compliance report as part of project completion reporting.

Effects predicted to remain after mitigation measures have been applied are evaluated for their significance. When determining the likelihood of significant adverse effects, the probability that the effects will occur and the level of scientific uncertainty associated with the information and methods used in the environmental review must be considered.

Justification of Significant Adverse Environmental Effects

If the environmental review determines that carrying out a project is likely to cause significant adverse environmental effects, ISC cannot provide support (such as, funding or regulatory authorization) to the project. It may, in consultation with the proponent, seek a Governor in Council decision on whether the significant adverse environmental effects are justified in the circumstances.⁹

CURRENT EXEMPTIONS AND PROPOSED CHANGES

The Minister of ECCC has adopted the *Designated Classes of Projects Order* (Ministerial Exclusion Order) to exempt a list of classes of projects they view as causing only “insignificant adverse environmental effects” from the requirement for environmental effects determinations, including those ERPs administered by ISC for some projects on reserve lands. There are currently classes of projects on the Ministerial Exclusion Order and therefore exempt from environmental effects determinations.¹⁰

The Minister of ECCC and IAAC are proposing to repeal and replace the Ministerial Exclusion Order to add additional classes of projects; make small changes to existing classes; and make minor changes to the general conditions that apply to all classes of projects.

The following criteria were considered when determining whether a class of projects should be added to the new Ministerial Exclusion Order:¹¹

- The project type is not complex and has minimal interaction with the environment;
- Projects do not require an authorization from another federal authority or other jurisdiction for approval;
- Federal authorities’ experience with the project type has resulted in a strong understanding of any associated potential environmental effects;
- Any potential adverse environmental effects can be reduced to an insignificant level through standard design and by the application of effective and established mitigation measures; and
- Potential for cumulative effects.

The proposed changes make a couple notable changes to the general conditions:

- Presently, projects are not eligible to be excluded if they cause a change to any characteristic of a water body. This would be replaced with conditions to allow some activities near water bodies. The conditions would require an environmental effects determination for projects that would change water level, alignment of watercourse, characteristic of a wetland, or involves the release of a deleterious substance.

⁹ IAA at s. 82(b).

¹⁰ Designated Classes of Projects Order, SOR/2019-323, online: <https://laws.justice.gc.ca/PDF/SOR-2019-323.pdf>.

¹¹ Canada Gazette, Part I, Volume 158, Number 30: Order Designating Certain Excluded Classes of Projects, online: <https://canadagazette.gc.ca/rp-pr/p1/2024/2024-07-27/html/reg1-eng.html>.

- Right now, projects are not eligible to be excluded if they would disturb known or suspected subsurface contamination. This would be changed so that sites listed as “closed” on the Federal Contaminated Sites Registry can be exempt.

Category	Existing Exemption	Proposed Change
General	<p>Operation, maintenance or repair of an existing project; projects carried out inside a building; wells for scientific research or identifying/monitoring contamination.</p> <p>Unless these involve filling a water body.</p>	<p>Expand the geotechnical wells class to include wells used to assess building suitability.</p> <p>Add structures on land less than 25 m², and in-water structures less than 10 m².</p> <p>Add stand-alone structures less than 1 000 m² on developed land (or expansion by 1 000 m²), or less than 100 m² on undeveloped land.¹²</p>
Buildings	<p>Buildings less than 1000m² on developed land; expansion of less than 1000m² on developed land; buildings of less than 100m² on undeveloped land. Unless these involve filling a water body, disturbing subsurface contamination, demolishing a building less than 30 m from school, hospital or residence.</p>	<p>Change expansions to allow exclusions of certain projects that increase a structure’s present-day footprint by no more than 1 000 m² on developed lands and 100 m² on undeveloped land.</p> <p>Modify the buildings class by increasing the thresholds from 1 000 m² to 1 500 m² for buildings used for educational, medical, or residential purposes.</p>
Works Related to Buildings	<p>Infrastructure related to existing buildings less than 1000m² on developed lands, unless it involves filling a water body or disturbing subsurface contamination;</p> <p>Infrastructure related to existing buildings less than 100m² on undeveloped lands, unless it involves</p>	<p>Allowing the physical activity “modification” without a threshold for the lowest-risk classes (e.g. sidewalks, guardrails, buildings, prefabricated structures, signage).</p> <p>Adjusting classes related to lighting systems, signage, parking lots, and other similar physical works such that for modification,</p>

¹² Includes larger (e.g. prefabricated structures, moveable accommodations, air transportation navigational aids, radio communication antennas or radar systems, scientific instruments) and smaller works (e.g. patios, flagpoles, mail receptacles).

	<p>filling a water body or disturbing subsurface contamination.</p>	<p>decommissioning, replacement, or removal, these physical works no longer have to be in relation to a building to qualify for exclusion.</p> <p>Add physical works in relation to buildings¹³ less than 1 000 m² (or the expansion of a work by 1 000 m²) on developed land or less than 100 m² on undeveloped land.</p>
<p>Utility Infrastructure</p>	<p>Hydrant or hook up for utility distribution for municipality or farm; water related utility infrastructure (other than pipelines) less than 100m³; water pipelines less than 100m³ under or on developed land next to a railway or road; changes to a water treatment facility; water, telecommunication etc. infrastructure more than 30m from water and on or underneath developed land next to a railway or road. Unless they involve filling a water body, crossing a water body if it is not overhead telecommunication lines, or disturbing subsurface contamination.</p>	<p>Increasing the threshold for modification, decommissioning, removal, and replacement from 100 m to 1 000 m for water pipelines or telecommunication lines on undeveloped land next to a railway, road, or paved area at an airport, and from 100 m² to 1 000 m² for water utility infrastructure.</p> <p>Including paved areas at airports in the list of allowed locations for new sewers, drains, steam lines, service tunnels, or telecommunication lines.</p> <p>Adjusting the class for hydrants or hook-ups that are part of a utility distribution system so that they would be excluded, no matter the type of utility distribution system.</p> <p>Add septic systems less than 1 000 m² and that are at least 30 m from a water body.</p> <p>Add overhead or underground electrical transmission lines of 130 kV or less, if located next to a railway, road, or paved area at an airport. If located elsewhere, work is limited to 100 m of new installations (or expansions), or</p>

¹³ E.g. bollards; security systems; heating, ventilation and air conditioning (HVAC) systems; or pedestrian accessibility structures.

		work on 1 000 m of existing electrical lines. Add an electrical substation less than 1 000 m ² if on developed lands, or 100 m ² if on undeveloped land.
Above Ground Storage Tank Systems	Above ground storage tanks for petroleum or allied petroleum products if less than 30,000L when located in an airport or less than 5,000L outside of an airport. Unless this would involve disturbing subsurface contamination.	

Proposed New Classes

Underground Storage Tank	Underground storage tank systems for petroleum products or allied petroleum products with an aggregate capacity of no more than 5 000 L.
Airports	Expansion of a runway to create a runway end safety area.
Railway, Road, Other Transportation	Lengthening of a railway or road by 100 m, or widening of a road by one lane or twinning of a railway up to 100 m, or work on any 100 m portion of a railway or road. Installation of up to 100 m (or lengthening by 100 m) of curbs, handrails, guardrails, fences, and gates, or their decommissioning, removal, or replacement, with no length threshold.
Projects in or near water	Projects in water (e.g. culverts, retaining walls and breakwaters, shoreline protection structures, fishways) for which only work on existing structures is allowed, and strict limiting conditions apply (no installation of new piles, no use of explosives, no use of heavy machinery on the substrate). Projects near water (hydrometric stations or marine navigation aids) with a footprint of no more than 100 m ² (or work on existing structures that have a footprint of no more than 1 000 m ²).

DISCUSSION QUESTIONS

1. Do you have examples of impact assessments or environmental effects determination processes for projects on your reserve land that demonstrates a need to change requirements and/or processes?
2. Do you have concerns with the existing exemptions?
3. Do you have concerns with the proposed exemptions?

- a. Are there any types of projects on reserve lands proposed for exemption you feel should continue to require an environmental effects determination?
- b. Are there any additional types of projects on reserve lands that should be excluded from environmental effects determination requirements, specifically ISC's ERP?

PARKS CANADA IMPACT ASSESSMENT PROCESS

The *Parks Canada Directive on Impact Assessment* (2019) provides direction for the process Parks Canada will apply to its environmental effects determinations to non-designated projects, which Park Canada refers to as impact assessments. Information on Parks Canada's impact assessment process can be found in the *Guide to the Parks Canada Process under the Impact Assessment Act*.¹⁴

EXISTING EXEMPTIONS AND PROPOSED CHANGES

Category	Existing Exemption	Proposed Change
General	Operation or maintenance of a work. Projects inside a building. Maintenance or changes to a road, highway, parking lot, or related infrastructure. Prefabricated structures. Changes to campsites without a new toilet or use of heavy equipment. Tent pads or moveable accommodations without a septic field or use of heavy equipment for vegetation removal. Well for scientific research or assessing contamination. Except for those of the above that involve filling a water body. Operation or changes to underground electrical transmission or related infrastructure. Maintenance or changes to trails without: new pedestrian bridge; paving; removal of vegetation with heavy equipment; trail	Add repair of telecommunication lines and repair of water treatment systems with a footprint of less than 1000m2 on developed lands. Add removal of prefabricated structures (not in Banff). Expand wells to include those to assess building suitability.

¹⁴ Parks Canada, "Guide to the Parks Canada Process under the Impact Assessment Act" (August 2020) [online](#).

	<p>widening more than 50cm; trail extension more than 500m; rerouting trail more than 50m or by extension more than 500m.</p> <p>Operation or changes to above ground petroleum storage tank.</p> <p>Maintenance or removal of shoreline stabilization, wharves, piers, docks, boathouses, launch ramps or navigational aids. Without filling water body, dredging, or diversion channel.</p> <p>Maintenance or changes to causeways, fishways, fish ladders, retaining walls, breakwaters. Without filling water body, dredging, or diversion channel.</p>	
<p>Historic Canals and National Marine Conservation Areas</p>	<p>Maintenance of locks, dams, bridges.</p> <p>New or maintenance of in-water anchoring systems, hook-ups, boat lists, marine railways, inland boat slips or mooring basins.</p> <p>New shoreline stabilization, wharves, piers, docks, boathouses, launch ramps, navigational aids.</p> <p>Unless these involve dredging, increasing a work's footprint below the high-water mark, or creating a diversion channel.</p>	<p>Remove condition that works not involve a footprint increase.</p>
<p>National Parks and National Historic Sites</p>	<p>On developed land accessible by road or in certain zones (not Banff): new or changes to buildings or other structures; changes to campsites; new or changes to hook-ups, sidewalks, boardwalks, fences, railings; closing roads, parking lots, pull-offs, sidewalks, boardwalks, trails; new or changes to recreational areas; new or changes to buildings or structures in a Park Community. Unless these involve filling a water body, new or changes to a septic field, or removal of vegetation with heavy equipment.</p>	<p>Remove abandonment of works.</p> <p>Expand to include these exemptions for National Urban Parks and National Parks without zoning.</p>

	<p>In Banff, on developed land: changes to buildings or structures, changes to campsites, hook-ups, sidewalks, boardwalks, fences, railings; closing roads, parking lots, pull-offs, sidewalks, boardwalks, trails; changes to recreational areas. Unless these involve filling a water body, new or changes to a septic field, removal of vegetation with heavy equipment.</p>	
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Impact Assessment Agency of Canada is also proposing to exempt certain classes of projects in National Wildlife Areas:

- Operation, maintenance, repair of works;
- Projects within a building;
- Buildings less than 1000m² on developed land or less than 100m² on undeveloped land;
- Geotechnical wells;
- Removal or replacement of parking lots or water quality infrastructure less than 1000m²;
- Fencing less than 100m;
- Removal or replacement of up to 100m of road;
- Changes or removal of marine navigation aids or structures for berthing and mooring less than 1000m².

DISCUSSION QUESTIONS

1. Do you have examples of impact assessments or environmental effects determination processes for projects in protected areas (particularly those managed by Parks Canada) that demonstrates a need to change requirements and/or processes?
2. Do you have concerns with the existing exemptions?
3. Do you have concerns with the proposed changes to the exemptions?