



AFN Impact Assessment Webinar Series

What We Heard

September 24, 2024 1-3pm EST

Assembly of First Nations Environment, Lands & Water Branch



AFN Mandate on Impact Assessment

- Call on Canada to ensure that regulatory and policy development fully respects the constitutional and other legal obligations of the Crown to First Nations and standards set by the *United Nations Declaration on the Rights of Indigenous Peoples* ([Resolution 69/2018](#)).
- Call on Canada to engage in focused dialogue with First Nations to substantively identify, recognize, and engage the protocols, elements, and processes to conduct joint regulatory and policy drafting ([Resolutions 69/2018, 06/2019](#)).
- Call upon Canada to meet or exceed precedent set in development and eventual passage of the Species at Risk Act – full, direct, and unfettered participation of First Nations ([Resolution 73/2017](#)).



AFN Mandate on Impact Assessment

- Continue to support and coordinate interventions and participation of First Nations, regional organizations, and provincial territorial organizations in the co-development process, including creating regionally specific processes to address specific concerns and support provisions as part of nation-to-nation relationships ([Resolutions 73/2017, 07/2018, 69/2018](#)).
- Advocate for adequate funding directly to First Nations for their full and effective participation ([Resolutions 73/2017, 07/2018, 69/2018, 06/2019](#)).
- Conduct regional information sessions to support First Nations, regional organizations, and provincial/territorial organizations in the process ([Resolutions 73/2017, 07/2018, 69/2018](#)).



Impact Assessment Act (IAA)

- First Nations participated actively in the policy development process for the *Impact Assessment Act* (IAA).
- IAA entered into force in August 2019. It repealed and replaced the Canadian *Environmental Assessment Act, 2012*.
- IAA outlines a process for assessing the impacts of major projects and projects carried out on federal lands or outside of Canada.
- The Impact Assessment Agency of Canada is responsible for conducting impact assessments under IAA.



Key First Nation Provisions

- Mandatory consideration of the impacts of a project on Indigenous rights both as part of the assessment and at the decision-making stage;
- Mandatory consideration and protection of Indigenous knowledge;
- Recognition of Indigenous governing bodies as “jurisdictions”;
- New opportunities for Indigenous led assessments;
- Prohibition on designated projects proceeding without approval under the IAA if they will have effects on Indigenous rights or interests; and
- Mandatory establishment of an Indigenous Advisory Committee.



What We Heard: Recent Amendments

- “Non-negligible” effects
 - Recommendation: FN must be involved in and agree with the categorization of potential impact to rights.
- No change to regional assessment sections. IAAC can re-engage in RAs



Alignment with UN Declaration

- IAA references the Government of Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in the preamble.
- *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA)* has come into force since the IAA.
- UNDA Action Plan
 - Government of Canada committed to develop mandatory assessment tools to determine if new or changes to laws and regulations are consistent with the UN Declaration. These have not been adopted.
 - APM 51 committed IAAC to implement the IAA in a way that aligns with the UN Declaration and lists certain means of doing do.



IAA Inconsistencies with UN Declaration

- Article 26
 - IAA failure to give legal recognition and protection to First Nations lands, territories and resources in accordance with the laws, customs, traditions and land tenure systems of First Nations.
- Article 32
 - IAA does not require free, prior or informed consent of impacted First Nations in order for the Government of Canada to approve a project.
- Article 37
 - IAA provides mechanisms for cooperation and shared decision-making, but the fails to effectively implement those powers and share decision-making with First Nations, including in treaty territories.



Draft Recommendations

- Call for IAA amendment to recognize FN jurisdiction and decision-making authority.
- Demand mandatory public assessment tool for alignment with UNDA.
- Call on GoC to fund FN-led analysis of alignment with UNDA.



First Nation Led Assessments

- Growing number of First Nation led assessments.
- First Nation led assessments can inform whether a community provides or withholds FPIC.
- IAA requires the federal impact assessment to consider First Nation led assessment along with other factors.
- Outstanding issue is adequate funding for First Nation led assessments.
 - IAAC has indicated there is some funding available for “pilot projects” in First Nation led assessment on an ad hoc basis.



What We Heard

- Desire to exercise Inherent authority over Lands, Waters, and Air in a manner consistent with Indigenous Legal Orders, customs, traditions, etc.
- FNs need a clear process to decide whether to provide or withhold FPIC.
- Lots of interest in learning more about FN own IA processes.
- Support for specific funding portfolio to support FN led IA.
- Government of Canada needs to respect and implement FNs decisions that come from these FN-led assessment process.



Draft Recommendations

- Webinar on FN led assessments November 28, 2024.
- Call on GoC to allocate and provide funding to support development of FN own assessment laws/procedures and FN led assessments themselves.
- Working group of FNs that have done own IA/EA to share experiences/lessons and inform a toolkit for FN led assessments.
- Seek funding to host a meeting or workshop on FN led assessments for next year.



Project List 5 Year Review

- 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 IAA and may require a federal impact assessment.
- IAAC is required to review the Project List 5 years after it was adopted, and submit a report setting out conclusions and recommendations to the Minister of ECCC.
- IAAC Discussion Paper has been release for feedback.
- IAAC’s lens for review is “regulatory efficiency” but does not include an analysis of impact to First Nations Inherent or constitutionally protected rights or title.
- First Nations took issue with the original approach to the Project List and made many suggestions for project categories that should be included on the Project List.



Nuclear Projects

- IAAC has proposed to exempt single SMR proposals and increase thresholds for multiple SMRs or, alternatively, remove all SMRs as well as large-scale nuclear reactors using known technologies. IAAC is also considering exempting or scoping down assessments of nuclear projects using known technologies on brownfield fossil-fuel electricity generating sites (Discussion Paper p. 38).
- Current entry: nuclear reactors with combined 900 MWth on Class 1 site and 200 MWth outside Class 1 site.
- No nuclear projects triggered IA since 2019. Minister has rejected one s. 9 designation request.

What do you think about IAAC exempting SMRs and large scale nuclear reactors (using known tech) from federal IA requirements?



In Situ Oil Sands

- Current entries: new or expansion of in situ oil sands extraction facilities with a bitumen production capacity of 2 000 m³/day or more, in a province without provincial legislation to limit greenhouse gas emissions from oil sands or limit has been reached.
- Because of the provincial emissions cap where projects are proposed, no in situ oil sands facilities have been captured for federal IA since 2019.
- IAAC has proposed to remove new in situ oil sands facilities and remove expansions of in situ oil sands facilities (Discussion Paper p. 40).
- AFN Resolution 06/2019 specifically calls for the inclusion of in situ oil sands facilities on the Project List.

What do you think of IAAC's proposal to remove these projects so they no longer require federal IA?



Fossil Fuel Power Generating Facility

- Current entries: new or expanded fossil fuel-fired power generating facility 200MW or more.
- Since 2019, 5 have entered the IA process and 3 have been screened out. All 6 that entered the process under CEAA, 2012 were also screened out.
- IAAC has proposed removing fossil fuel-fired power generating facilities from the Project List.

Should fossil fuel power generating facilities be captured due to their contribution to GHG emissions and impact to First Nations?



Coal Mines

- IAAC has proposed lower thresholds for new coal mines (Discussion Paper p. 35): 3000 t/day for new and expansions.
 - Return to CEAA, 2012 threshold.
- Current listing: coal mines with a production capacity of 5000 t/day or more.
- No coal mine has met the current threshold since 2019.
- Designation requests received from Indigenous peoples. Concern with impact to Rights and selenium harm to fish.

Would the proposed threshold appropriately capture coal mines?



What We Heard

- Does IAA interact with federal/FN child welfare legislation?
- Concern about lens used for review is “Regulatory Efficiency” and not Indigenous rights. Lack of information about how these viewpoints were engaged or weighed if they conflict.
- Removing classes of projects from the Project List or increasing thresholds leads to fewer opportunities for First Nations to influence decision making about projects in their territories.
- Concern with IAAC proposals regarding in situ oil sands production, nuclear and SMRs.
- Suggestion that there be stronger opportunities and requirements for regional assessments.



Discussion Questions

- 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?
- 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?



Draft Recommendations

- The Government of Canada expeditiously adopt a cabinet directive or mandatory assessment tool on consistency of laws with the UN Declaration; and the mandatory assessment tool be applied to the Impact Assessment Act, the proposed amendments, and any regulations made under the Act.
- Demand IAAC articulate how Indigenous rights have been used a lens to guide proposed changes and/or how impact to Indigenous rights from additions/deletions/changes to the project list have been considered or addressed.
- In situ oil sands facilities, fossil fuel fired power generating facilities, nuclear projects and SMRs potentially impact First Nations title and rights, so they should receive federal impact assessment.
 - IAAC must consult with First Nations in the oil sands region before a determination can be made whether to remove in situ oil sands operations from the Project List.
 - Prior to removing nuclear projects from the Project List or reducing the associated thresholds, the CNSC must meet or exceed the capacity and expertise of IAAC in relation to Indigenous partnership, consultation and engagement and any protections and Indigenous-specific considerations contained in the IAA should be incorporated into the regulatory framework administered by the CNSC.
- The reference to consideration of adverse effects on the Indigenous Peoples of Canada should be made mandatory; and the evaluation of the potential for adverse project effects should involve the active and informed participation of First Nations and in considering adverse impacts to First Nations' rights, consultation with potentially affected First Nations should be made mandatory.



Assessment of Projects on Federal Lands and Exemptions

- Requirements for assessment of non-designated projects (not in the Project List) on “federal lands,” including reserves and protected areas, are set out in the IAA.
- Federal authorities must determine that “the project is not likely to cause significant adverse environmental effects” or that those significant adverse environmental effects are justified in the circumstances.
- Projects can be exempted from the “environmental effects determination” requirements if they are listed in the *Designated Classes of Projects Order* (Ministerial Order).
- Indigenous Services Canada administers the environmental effects assessments on reserve lands through the Environmental Review Process.
- Parks Canada administers the environmental effects assessment for lands it manages, including National Parks, National Wildlife Areas, National Marine Conservation Areas, National Historic Sites, and Historic Canals through their impact assessment process.



What We Heard

- Concern about how the potential for cumulative effects was assessed and informed the proposals for projects exempt from environmental effects determinations.



Discussion Questions

- Do you have issues to raise or recommendations to make wrt ISC's Environmental Review Process?
- Are you concerned with any of the projects at IAAC proposes to exempt from environmental effects determination processes.



Draft Recommendations

- Request recommendations from First Nations with experience in the ERP.
 - Questionnaire?
- Engage with ISC to provide recommendations wrt their Environmental Review Process.
- Invest in FN-led follow up and monitoring to ensure that projects that are exempt from environmental effects determination requirements do not end up having a larger impact than initially defined.



Co-Administration of Federal IA

- Section 114 gives the Minister of Environment and Climate Change the power to enter into agreements to recognize Indigenous governing bodies as jurisdictions and authorize Indigenous governing bodies to exercise powers or perform duties or functions in relation to impact assessments in relation to specified lands.
- There is a self-imposed limitation that a regulation must be passed in order to recognize Indigenous Governing Bodies as jurisdictions for the purposes of the IAA. The regulation is being called the Indigenous Co-Administration regulation.
- IAAC is currently engaging on Indigenous Co-Administration and First Nations can provide feedback and recommendations to how the regulation and associated policies address co-administration.



Co-Administration Continued

- Circle of Experts (CoE) co-developed Discussion Paper in their personal capacity.
- Discussion Paper is a diagnostic, rather than a position.
- Discussion Paper sets out differing views of IAAC and the CoE.
- There must be request for community processes, including time for FNs to fulfil protocols and conduct ceremonies necessary.
- Should regulation be expedited to enable negotiation of agreements before a change in government?



Outstanding Inquiries

- Indigenous co-administration agreements will only apply to specified lands. If an Indigenous Governing Body were to be recognized as a “jurisdiction” under the Impact Assessment Act pursuant to an Indigenous co-administration agreement, would a proposed project have to be entirely within the specified lands in order for that Indigenous jurisdiction to be a candidate for substitution?
- What happens if there is an ICA and the Province wants its process substituted for the federal IA?



What We Heard

- Concern with any negotiations or agreements with the Government of Canada and implication for historic Treaties.
 - IAAC confirmed nothing in regulation, policy, or agreements would infringe Treaty.
 - Treaties are constitutionally entrenched and that prevail.
- Concern that FNs are being turned into municipalities.
 - CoE member indicated this may be true generally but its not necessarily because of or worsened by co-administration of federal IA.
- What would be the mechanism to dissolve an agreement if the First Nation is unhappy with it?
 - IAAC and CoE identified this is a helpful suggestion for things that need to be considered.
- Suggestion that agreement could provide an alternative dispute resolution to judicial review.
- IAAC should not narrow the powers, duties, or functions that could be exercised by an IGB.
- FNs should be the ones making final determinations about project approval.



Discussion Questions

- What do you think about the suggestion of a committee to oversee eligibility determinations?
- How should territorial “overlaps” or areas of shared use be addressed?



Draft Recommendations

- Adopt enabling regulations that protect First Nations in negotiation of Indigenous Co-Administration Agreements.
 - Include provision speaking to precedence of Constitutionally protected Inherent and Treaty rights.
- Don't forgo support for FN led assessments in favour of Indigenous Co-Administration Agreements. All avenues of self-determination must be open to First Nations.



Thank you