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Re: Process for Five-year Review of the *Physical Activities Regulations*

Dear Sarah and Patricia,

Thank you for meeting with us and other members of the Environmental Planning and Assessment Caucus (EPA Caucus) of the Canadian Environmental Network (RCEN) on November 6 to discuss the Five-year Review of the *Physical Activities Regulations* (Project List) under the *Impact Assessment Act* (IAA).

As you may know, the EPA Caucus has been engaged in reform of federal environmental assessment law and policy since the 1980s. Caucus members share a common vision of truly effective impact assessment in Canada, including the integration of impact assessment into development planning.

This letter expands on the EPA Caucus' positions on Project List policy and process issues raised at our November 6 meeting and provides recommendations for the Five-year Review. The EPA Caucus plans to make further submissions recommending that specific categories of projects be included on or excluded from the Project List and on changes to thresholds for some project categories.

This letter sets out the following recommendations for the Five-year Review:

1. Adopt a policy for the Five-year Review that aims to develop a Project List that is robust, comprehensive, and grounded in evidence;
2. Include all physical activities that have the potential for consequential effects on areas of federal jurisdiction;
3. Ensure that evidence held by or submitted to the Agency or federal departments in support of or in opposition to Project List entries or thresholds is made public;

4. Ensure effective and efficient use of federal resources in broadening the application of the IAA;
5. Identify physical activities likely to have non-trivial adverse environmental effects in federal protected areas and on other federal lands and waters for inclusion on the Project List;
6. Identify projects using new technologies or proposing to exploit new categories of resources for inclusion on the Project List; and
7. Consider designing template-tailored impact statement guidelines for certain project types in order to facilitate shorter assessment timelines.

1. Adopt a policy for the Five-year Review that aims to develop a Project List that is robust, comprehensive, and grounded in evidence

The Agency has the opportunity with the Five-year Review to develop a robust, comprehensive and evidence-based Project List that includes physical activities that may have consequential adverse effects in areas of federal jurisdiction. The evidence supporting current Project List entries has not been assessed by independent experts or Indigenous knowledge holders since the promulgation of the 1995 *Comprehensive Study List Regulations* in 1995. The 2012 and 2019 project lists largely mimic the *Comprehensive Study List Regulations* with minor changes; the evidence supporting the 2012 and 2019 project lists has not been made public nor released pursuant to Access to Information requests.

The Project List requires significant updating because the universe of physical activities that may have consequential adverse effects within federal jurisdiction has changed considerably since 1992. Examples of such projects include: peat and silica mines; small modular nuclear reactors; space ports; and wind-to-hydrogen energy and export developments.

Further, federal environmental objectives (e.g., achieve net-zero carbon emissions, halt and reverse biodiversity loss) are dramatically more ambitious than they were in 1992; clearly these objectives and supporting laws and policies should serve as touchstones for the reform of the Project List. The Agency has stated that the Five-year Review will "align with clean growth and net zero priorities" but does not refer to other federal environmental priorities such as Canada's international obligations to implement the Kunming-Montreal Global Biodiversity Framework. The federal government shares authority to halt and reverse biodiversity loss with the provinces but has clear responsibility to protect fish and fish habitat, conserve migratory birds under the *Migratory Birds Convention*, and protect Canada's oceans. We urge the Agency to identify ways to define climate and biodiversity considerations as federal effects under the IAA. This may require amendments to section 2 of the IAA, amendments to reference other federal heads of power, inclusions on Schedule 3, or policy or regulatory changes.

Recommendation 1: The Agency's policy for the Five-year Review should be to develop a Project List that is robust, comprehensive and grounded in evidence. To ensure that the Project List is robust and comprehensive, the Agency should identify ways to define climate and biodiversity considerations as federal effects under the Impact Assessment Act.

2. Include all physical activities that have the potential for consequential effects on areas of federal jurisdiction

The Supreme Court of Canada upheld the constitutionality of the designated projects scheme in its opinion in *Reference re Impact Assessment Act*. The Supreme Court majority opined that “a low threshold for the application of an impact assessment scheme is a practical necessity” and “[r]equiring definitive proof that a project will have effects on areas of federal jurisdiction prior to an impact assessment would put the cart before the horse . . .” (para 206).

Impact assessment remains our best – and often only – tool for predicting and avoiding adverse federal effects and enhancing the benefits of projects. The Supreme Court’s opinion highlights the opportunity to expand the Project List to include physical activities where there is a possibility – but no certainty – for adverse effects in areas of federal jurisdiction.

The Agency has stated that the “objective of the review is to continue to focus federal assessment on projects with the greatest potential for adverse environmental effects in areas of federal jurisdiction, and in areas where federal assessment adds value beyond federal regulatory oversight and provincial processes.” These two restrictions on changes to the Project List (“greatest potential for adverse environmental effects in areas of federal jurisdiction” and “adds value beyond federal regulatory oversight and provincial processes”) are not prescribed under the *Impact Assessment Act*.

We urge the Agency to revisit the policy that the IAA should only apply to projects with the “greatest potential for adverse environmental effects in areas of federal jurisdiction” as part of the Five-year Review. As the Expert Panel appointed to review federal environmental assessment processes (Expert Panel) recommended, the IAA should apply to all physical activities or undertakings that have the potential to have consequential (i.e., non-trivial) effects on one or more areas of federal jurisdiction.

For example, all mines with the potential for consequential impacts on areas of federal jurisdiction should be subject to IA, even if there may be mines that will result in even more serious adverse federal effects. Applying the IAA only to those projects with the “greatest potential” for adverse federal effects arbitrarily abandons federal environmental responsibilities and encourages proponents to pursue work-arounds such as project splitting, under-scoping and incremental expansions.

The term “*where federal impact assessment adds value beyond existing federal and provincial regulatory processes*” also warrants revisiting. Where federal authorities seek to exclude projects from designation due to claims that impact assessment will not add value, there must be clear and compelling evidence that the federal or provincial regulatory process will do what impact assessment is intended to do: i.e., be participatory, planning-oriented, focused on the sustainability of federal matters, and adequately resourced. Most provincial environmental assessment regimes are far from rigorous, and to our knowledge, all regulatory permitting processes fall far short of that mark. Most environmental regulatory regimes focus on ensuring that projects meet prescribed standards – which may be modest – and are neither participatory nor aimed at finding best options for avoiding or mitigating adverse

effects, enhancing benefits or ensuring the equitable distribution of both. Nor do most regulatory regimes consider cumulative effects of regulated projects in combination with other existing or planned projects.

These restrictions also ignore the fact that the IAA, and impact assessment more generally, serve as a planning tool, and that planning must take into account factors beyond often-narrow regulatory considerations. Indeed, a key impetus for enacting the *Canadian Environmental Assessment Act* in 1992 was the very inadequacy of federal and provincial regulations in addressing the adverse environmental effects of projects subject to federal jurisdiction.

Recommendation 4: The Agency should revisit the policies that the IAA should only apply to projects with the "greatest potential for adverse environmental effects in areas of federal jurisdiction" and "in areas where federal assessment adds value beyond federal regulatory oversight and provincial processes." The Agency should consider adopting the recommendation of the Expert Panel appointed to review federal environmental assessment processes that the IAA apply to all physical activities or undertakings that have the potential to have consequential (i.e., non-trivial) effects on one or more areas of federal jurisdiction.

3. Evidence held by or submitted to the Agency or federal departments in support of or in opposition to Project List entries or thresholds should be made public

Evidence compiled by federal governments and agencies, as well as evidence submitted by other governments, industry and civil society organizations supporting or opposing changes to the Project List should be made public before the Agency submits its report in August 2024. Given that the evidence for including some physical activities or setting thresholds for physical activities on the Project List may be limited, independent and Indigenous experts and knowledge-holders should be consulted for their advice, preferably in sector-specific multi-stakeholder forums.

Recommendation 3: Ensure that evidence held by or submitted to the Agency or federal departments in support of or in opposition to Project List entries or thresholds is made public.

4. Ensure effective and efficient use of federal resources

We acknowledge that the federal government and the Agency do not have unlimited resources to assess all projects falling within areas of federal authority. The Five-year Review should include a candid discussion as to how resources provided through federal funding and cost-recovery schemes for projects included on the Project List can be deployed effectively and efficiently to expand the application of the IAA in accordance with the Expert Panel's recommendations.

Recommendation 4: Ensure effective and efficient use of federal resources in broadening the application of the IAA.

5. Identify physical activities in federal protected areas and on other federal lands and waters that have non-trivial effects, and consider for inclusion on the Project List

Independent studies by the Canadian Parks and Wilderness Society (with respect to national parks), and Chantal Brodbeck in the Department of Geography at the University of Winnipeg (with respect to federal lands) concluded that the sections 81-91 process for determining the significance of adverse environmental effects is not effective. Data obtained by Ecojustice (with respect to Canadian port authorities) supports this conclusion. We are concerned that the sections 81-91 process is a rubber stamp that does little to achieve federal objectives such as net-zero carbon emissions and halting and reversing biodiversity loss.

We are not aware of any section 82 determinations among the several thousand decided since 2012 in which the federal authority concluded that a project would have a significant adverse environmental effect. However, we are aware of projects (e.g., draining of a wetland that provided habitat to species at risk in a National Park) that clearly did have significant adverse environmental effects.

Given the lack of utility or accountability of the section 81-91 assessment process we believe that projects in federal protected areas (e.g., national parks, marine conservation areas, national wildlife areas, marine protected areas, migratory bird sanctuaries) and on federal lands and waters, including oceans should be included on the Project List if they have the potential for non-trivial adverse effects. At present, very few projects located in federal protected areas are included on the Project List. Many additional physical activities in federal protected areas (e.g., roads, parking lots, visitor centres and attractions, shipping, whale watching) should be included given the higher level of nature protection that should – but does not always occur – in federal protected areas. For example, the *Canada National Parks Act* provides that the Minister's first priority in terms of management of national parks shall be the "maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes." As a result, projects in federal protected areas deserve more stringent assessment of effects and more public engagement than similar projects not located in federal protected areas. Given the lack of utility or opacity of the section 81-91 process, the Project List should be greatly expanded for federal protected areas.

Similarly, the federal *Directive on Real Property Management* provides as follows: "The expected results of this directive are as follows... Real property is managed in a manner that enables operational outcomes, demonstrates sound stewardship and provides best value, consistent with the Government of Canada's socio-economic and environmental objectives . . ."

The Directive thus sets a higher standard for sound stewardship and consistency with federal environmental objectives on federal lands than for other lands. Hence, the Agency should engage with federal land-management departments and agencies including National Defence, National Capital Commission and Transport Canada to ensure careful consideration for inclusion on the Project List of physical activities with potential for consequential effects on federal lands and waters.

Recommendation 5: The Agency should engage with other federal entities especially Parks Canada, Fisheries and Oceans, National Defence, National Capital Commission, Transport Canada and Canadian Wildlife Service to identify for inclusion on the Project List physical activities that may occur in federal protected areas and on other federal lands and waters that have had, or have the potential to have, consequential effects.

6. Identify projects using new technologies or proposing to exploit new categories of resources for inclusion on the Project List

New types of projects and projects proposing to use new technologies should be considered for inclusion on the Project List due to uncertainties respecting their potential for adverse federal effects and mitigation of those effects. For example, small modular reactors propose to make use of new, unassessed technologies and produce different forms of radioactive waste that may demand different handling, storage and disposal techniques. The environmental effects of large-scale peat and silica mines, and of in-situ projects, on water quality (and hence fish habitat) are not well-understood scientifically, hence the need for impact assessment for these new types of projects. Similarly, hydrogen projects are a new project type that merit careful attention and consideration, particularly respecting certainty of future demand compared to significance of effects.

Recommendation 6: Identify projects using new technologies or proposing to exploit new categories of resources for inclusion on the Project List.

7. Consider designing template-tailored impact statement guidelines for certain project types to facilitate more focused assessments

The EPA Caucus has observed that the so-called tailored impact assessment guidelines for projects being assessed under the IAA are not often well tailored. To reduce the complexity and potentially the length of assessment processes, the Agency may wish to consider more focused templated tailored impact assessment guidelines for some project sub-categories, such as projects with lower predicted federal effects and projects important to the energy transition. This would mean identifying and emphasizing the key environmental issues and issues most relevant to affected communities and Indigenous nations. These more focused tailored impact statement guidelines would be employed for designated projects whose adverse environmental effects are better understood, although still serious.

Recommendation 7: Consider designing template-tailored impact statement guidelines for certain project types in order to facilitate shorter assessment timelines, particularly for projects with better-known or less consequential federal effects.

We look forward to receiving the Agency's responses to these recommendations. Of course, we would be pleased to discuss them or to provide any further information that may be relevant to the Five-year Review.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Anna Johnston', with a long horizontal flourish extending to the right.

Anna Johnston
Staff Lawyer, West Coast Environmental Law
Co-chair, RCEN Environmental Planning and Assessment Caucus

A handwritten signature in blue ink, appearing to read 'Stephen Hazell', with a long horizontal flourish extending to the right.

Stephen Hazell
Counsel, Nature Canada
Member, RCEN Environmental Planning and Assessment Caucus