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West Coast Environmental Law

Ensuring Sustainability through Impact Assessment

Submissions on Consultation Paper on the Approach to Revising the Project List

June 1, 2018

We are pleased to provide these comments on the Government of Canada's *Consultation Paper on the Approach to Revising the Project List*,[1] the regulation that is the primary mechanism for determining the application of federal impact assessment to undertakings. We are providing a separate submission on the *Consultation Paper on Information Requirements and Time Management Regulations*.[2]

West Coast Environmental Law Association (West Coast) is a British Columbia-based non-profit environmental law organization dedicated to safeguarding the environment through law. One of Canada's oldest environmental law organizations, West Coast has provided legal support to British Columbians to ensure their voices are heard on important environmental issues and worked to secure strong environmental laws for over 40 years.

Since its founding, West Coast has been involved with various aspects of provincial and federal environmental assessment (EA). West Coast was involved in the development of the *Canadian Environmental Assessment Act*[3] (CEAA) and its seven year review, and made submissions to the House of Commons and Senate committees that reviewed the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).[4] We have been deeply engaged in the development of the proposed new *Impact Assessment Act* (IAA),[5] including appearing before the Standing Committee on Environment and Sustainable Development (Standing Committee) as a witness and providing submissions on Bill C-69. In addition to providing legal services to First Nations, community groups and individuals involved in EA processes, West Coast co-Chairs the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, and is

[1] Government of Canada, *Consultation Paper on the Approach to Revising the Project List: A proposed impact assessment system* (February 2018), online: **https://www.impactassessmentregulations.ca/project-list**.

[2] Government of Canada, *Consultation Paper on Information Requirements and Time Management Regulations* (February 2018), online: **https://www.impactassessmentregulations.ca/information-management-and-time-management**.

[3] SC 1992, c 37.

[4] SC 2012, c 19.

[5] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (1st reading) [Bill C-69].

a delegate on the Minister of Environment and Climate Change's (the Minister) Multi-Interest Advisory Committee. Since the review of federal EA processes began in 2016, we have been deeply involved in advancing leading-edge thinking on next generation EA for Canada.

Summary and introductory remarks

When the federal government tabled Bill C-69 in February 2018, West Coast, along with numerous other environmental and Indigenous groups, noted that the proposed new IAA falls far short of the next-generation environmental assessment standard identified by experts across Canada and supported by the Expert Committee appointed to review federal EA processes.[6] While the Standing Committee introduced a number of important measures to strengthen the IAA, it remains short of the next generation mark. One of the most conspicuous gaps is in its application. Rather than establishing a flexible, scale-appropriate stream for smaller undertakings and triggering all projects within federal jurisdiction that have implications for sustainability, the IAA only establishes two assessment streams: assessment by Agency, or by review panel. It does not contain triggers beyond the Project List or the Ministerial discretion to designate. Moreover, there are no triggers for or assurances of regional and strategic assessments to identify and address the cumulative effects of smaller projects, making the risks to sustainability high.

Happily, it is still possible to establish a broad application of the IAA in order to meaningfully address project-level and cumulative effects. As the Consultation Paper notes, not all undertakings listed on the Project List need to proceed to a full impact assessment; the planning phase may be an opportunity to modify project design and ensure mitigation of effects such that a full assessment would not be required for all undertakings. For those that do proceed to an impact assessment, the IAA does not establish minimum timelines, and the planning phase holds much promise for designing assessment processes "fit for purpose," from shorter assessments of smaller projects with likely lower-consequence impacts, to full-length and detailed assessments of larger projects with more serious implications.

Rather than focusing on projects with the "most potential" for environmental impacts within federal jurisdiction, as the Consultation Paper suggests, we urge the government to take advantage of the assessment design flexibility provided by the planning phase and include in the Project List a broad list of undertaking types and assessment triggers, in order to help ensure the Act achieves its goal of fostering sustainability.

With that caveat, we generally support the criteria-based approach to guide the review of the Project List, subject to the following recommendations:

1. That the exercise of determining what should be on the Project List be broadened to a) lower the threshold of potential for adverse effects from moderate to high, to simply moderate; b) include activities and strategic undertakings, in addition to physical

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[6] West Coast Environmental Law *et al*., *Making the Mid-Term Grade: A Report Card on Canada's New Impact Assessment Act* (February 2018), online: **https://www.wcel.org/publication/making-mid-term-grade-report-card-canadas-new-impact-assessment-act**; Anna Johnston, West Coast Environmental Law, *Federal Environmental Assessment Reform Summit Proceedings* (August 2016), online: **https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf**; Expert Panel, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017) at 41, online: **https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf**;

activities; and c) include such factors as potential impacts on Aboriginal rights and title, and Indigenous human rights as set out in the UN Declaration, and contribution to cumulative effects.

2. That the federal jurisdictional triggers not be artificially limited to enumerated ones, but include all areas within federal jurisdiction
3. That the determination, including the criteria and methodologies used and data relied on be transparent for each determination.
4. That the factors to consider be expanded, for example to include the potential to contribute to cumulative effects, potential impacts on Aboriginal rights and title, and concerns by the public, Indigenous peoples or other jurisdictions; and that the interaction among factors be considered.
5. That caution be used when relying on mitigation measures for determinations that undertakings will not be placed on the Project List.
6. That while conditions and qualifiers, such as the location of undertakings, should be used to identify projects that should be subject to impact assessment, they should not be used to exempt projects.
7. That while environmental objectives and standards can be useful in identifying undertakings that should be subject to the IAA, caution should be used when using them to identify the magnitude of effects, as standards may be out-of-date, inaccurate as indicators of magnitude, or unable to capture cumulative effects.
8. That classes of projects (class assessments) be allowed to be identified in the Project Regulations.
9. That the Expert Committee established by the Agency under the IAA be tasked with making periodic recommendations on undertakings that should be on the Project List.

We recommend that subsequent reviews be sufficiently frequent to reflect the need for learning, allow for timely alterations to avoid environmental, social and health impacts, and recognize new and newly-recognized project types.

In addition to the above recommendations, we would like to observe that the current Regulations Designating Physical Activities[7] under *CEAA 2012* is in need of revision, and it is neither necessary nor advisable to make updating it contingent upon the IAA passing. While we appreciate the government's engagement on the Project List update, and agree with the general approach and timelines, should the passing of the IAA be delayed for whatever reason, or should the Project List revision be completed early, we recommend replacing the current Regulation with the new Project List regulation in the interim.

Question 1: Views on the criteria-based approach

1. Broaden the List

The Consultation Paper suggests that the Project List would focus federal impact assessment on projects with "the most potential for adverse environmental effects in areas of federal jurisdiction."[8] In our view, this focus is far too narrow to fulfil the purpose of the IAA to foster

[7] SOR/2012-147.

[8] Consultation Paper, *supra* note 1 at 2.

the sustainability.[9] Unless the IAA applies to undertakings with the potential for impacts on federal jurisdiction that may not be addressed through other federal environmental or regulatory processes (e.g., under the *Fisheries Act* or the proposed new *Canadian Energy Regulator Act*), Canada is certain to experience negative environmental trends, failure to meet environmental obligations and commitments and uphold its obligations to Indigenous peoples, and continued strife over resource development proposals.

The Consultation Paper states that "[p]rojects with potential for smaller effects in areas of federal jurisdiction would continue to be subject to other federal regulatory processes" and that projects on federal lands would be subject to environmental assessment under the IAA.[10] However, neither potential regulatory processes nor the federal lands provisions in the IAA can be relieved upon to ensure that important effects are avoided or mitigated, and that the public has a meaningful say in projects that affect them. For example, the *Navigable Waters Act* even as amended by Bill C-69 will not require consideration of environmental factors for works subject to that Act. Stronger environmental laws, such as the *Fisheries Act*, do not require the same participatory, planning-based processes as IA, and often officials determine that no authorization is required. Also, the federal lands provisions under the IAA requires only a weak self-screening process that cannot reasonably be considered an assessment; rather, they simply require a comment period on a determination that almost certainly will have been already made by the federal proponent.

Instead of a narrow focus on projects with the most potential for adverse effects, we recommend broadening what goes on the Project list to:

- undertakings with the potential for adverse environmental effects in areas of federal jurisdiction,
- federally-regulated undertakings with the potential for adverse social, environmental, economic or health effects,
- undertakings with the potential for adverse environmental effects on federal lands, or where there is a federal proponent or federal funding,
- undertakings with the potential to infringe Indigenous peoples, or Aboriginal rights or title, and
- undertakings with the potential to contribute to cumulative effects.

This broadening entails three fundamental shifts:

- First, lowering the threshold from "the most potential for adverse effects" to "potential for adverse effects,"
- Second, including potential impacts on Indigenous peoples or Aboriginal rights or title, as well as contributions to cumulative effects, as factors to consider, and
- Third, along with "physical activities" (which may be read narrowly as physical projects"), including activities (e.g., low-level flying) and strategic undertakings (e.g., five-year forestry plans).

We agree that the complexity of effects and the complexity of potential mitigation measures should be considerations, as well as whether an undertaking type is novel. Additionally, we

[9] Bill C-69, *supra* note 5, cl 1, s 6(1)(a).

[10] Consultation Paper, *supra* note 1 at 3.

recommend adding "likelihood of the undertaking contributing to cumulative effects, in combination with similar or other types of undertakings."

Further, undertakings should be put on the list when effects are identified as moderate, rather than moderate to high. The Consultation Paper rightly acknowledges that the planning phase may be used to determine alternative means, alternatives to, and avoidance or mitigation measures that, if applied, would mean a project would not have to undergo an assessment (e.g., where there is no longer the potential for effects within federal jurisdiction). Thus, the threshold for projects to be on the Project List should be lower, because a) of the potential to address potential effects before the assessment, and b) some projects would not need to proceed to assessment, and therefore the higher amount of undertakings defined in the Project List, would not result in the same number of undertakings having to undergo IA.

Similarly, we recommend narrowing the standard for when projects will *not* be put on the list from when effects *may potentially* be low to when effects *are likely o be low and are not likely to contribute to cumulative effects.*

Finally, the Consultation Paper does not indicate how the factors will be collectively measured. Will they be averaged, or will one "moderate" or "high" ranking trigger the undertaking type being added to the list? Will the number of potential effects matter, or will one effect with a moderate or high nature be sufficient? We would recommend the latter.

2. Do not limit the federal jurisdictional triggers to enumerated ones

The Consultation Paper suggests that federal jurisdiction will be a prerequisite for determining which projects will be added to the Project List, and lists a subsect of environmental areas within federal jurisdiction. We have two observations. First, it will not always be known whether an undertaking's impacts will be on areas within federal jurisdiction until an assessment is underway or completed. While the Consultation Paper does state that *potential* for adverse effects within areas of federal jurisdiction is sufficient for a project's potential for being added to the List, we would urge that the threshold for potential be low. Where a project has any potential for moderate impacts, or to contribute cumulatively to impacts, within federal jurisdiction, it should be listed.

Secondly, there is no need to arbitrarily limit federal jurisdiction for the purposes of triggers to a narrow, enumerated subset. As Stewart Elgie pointed out in his submissions to the Standing Committee on Environment and Sustainable Development, defining federal jurisdiction is unnecessary and likely to unduly narrow the application of federal impact assessment.[11] As a result, absent from the enumerated areas of federal jurisdiction in the Consultation Paper are such important matters as climate, navigation and marine pollution, to name a few. Also, narrowly restricting the matters within federal jurisdiction does not provide flexibility for recognizing new and emerging areas to be recognized and act as triggers for impact assessment.

We recommend removing the enumerated matters within federal jurisdiction, and broadening the federal jurisdictional requirement to all environmental matters within federal jurisdiction.

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[11] Stewart Elgie, "Bill C-69: Submission to the Committee on the Environment and Sustainable Development" at 9, online: **http://www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9825951/br-external/ElgieStewart-e.pdf**.

3. Transparency in application of the criteria, data relied on and methodologies used

The Consultation Paper states that a primary goal is to establish a transparent process for periodically reviewing and updating the Project List.[12] We commend this goal. However, it is unclear from the Consultation Paper how transparency will be achieved. For example, what measures and environmental standards will be used to guide the analysis of the extent to which potential effects are potentially adverse? Will the methodologies and data relied upon be made publicly available? Will there be metrics for applying the criteria, and if so, will those metrics, and how undertaking types are applied to them, be made publicly available?

It is important to recognize that member of the public, Indigenous peoples, stakeholders and jurisdictions may at any time request a change to the Project List. Such requests should be made publicly available, and the Minister should similarly respond publicly to the requests.

In our view, transparency in the process increases the likelihood of the Project List including the undertakings requiring an assessment in order to foster sustainability and satisfy the concerns of the public and Indigenous peoples.

4. Expand upon the factors to consider

We do not contest the suggested factors for determining the potential nature of effects for the purpose of adding undertakings to the List, although we recommend adding the following factors:

- The potential to contribute to cumulative effects. As we note above, cumulative effects should be an important consideration in the determination of whether projects are subject to the IAA.
- The potential for effects to impact Aboriginal rights or title. Because of the fiduciary duty owed by the Crown towards Indigenous peoples, this factor should be given additional weight (e.g., a ranking of "low" would be sufficient to have a project listed).
- Public or Indigenous concern related to the effect. Environmental values may have special significance to Indigenous and non-Indigenous communities. Moreover, communities may have local or Indigenous knowledge about areas of special concern or sensitivity. Therefore, Indigenous or public concern should be factors to consider when determining whether an undertaking type is listed.[13]

Additionally, it is important that the interaction of factors be considered. For example, the duration of effects should also consider their magnitude, along with environmental goals, thresholds and commitments. A pipeline's GHG emissions may seem of low consequence the year it is built, but given the Paris Agreement commitment to pursue increasingly ambitious objectives over time,[14] the magnitude of the same emissions will be higher 10, 20 or 40 years after it commences operations. Likewise, the frequency of effects may be low (e.g., 1-2 times

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[12] Consultation Paper, *supra* note 1 at 1.

[13] For an example of a similar approach, see the *Mackenzie Valley Resource Management Act*, SC 1998, c 25, s 125(1)(a), (2)(a), under which the potential of a development to cause public concern is a trigger for environmental assessment following a preliminary screening.

[14] *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties from 30 November to 13 December 2015—Addendum Part Two: Action taken by the Conference of the Parties at its twenty-first session*, 29 January 2016, Decision 1/CP.21, CP, 21st Sess, FCCC/CP/2015/10/Add.1 at 21-36, arts 3, 4.1-3, 4.9, online: UNFCCC **http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf**.

per year), but if they occur during sensitive times (e.g., spawning or rutting season, or during migration), their consequence may be high.

5. Be careful when considering mitigation

The Consultation Paper states that mitigation measures will be considered when analysing certain factors, such as duration and reversibility. While the Paper suggests only considering "standard mitigation measures that are always adopted as a matter of practice" and that are subject to federal or provincial regulatory requirements and have been proven effective, we would urge caution when relying on such measures. Standard mitigation measures may not be appropriate in all contexts (for example, in sensitive ecosystems or near communities), and may not be applied in all circumstances. Decision-makers should have a high degree of confidence that mitigation measures will be applied wherever needed and will be effective in achieving their intended goals in all circumstances before relying on them to determine the nature of potential effects.

6. Considering undertakings based on conditions, qualifiers and environmental thresholds

In general, we agree with this approach as it is applied to putting undertakings on the Project List, but not with the approach as it would be applied to determining that undertakings not be on the List. We recommend that a low threshold be used to determine whether undertakings in sensitive or protected areas are listed. For example, undertakings in wetlands, species at risk habitat, and protected and sensitive areas should be listed when even one factor for determining the potential nature of effects is described as moderate or low-moderate, or when there is the potential for contribution to cumulative effects. Especially in sensitive ecosystems and protected areas, it is preferable to apply a low threshold and then in the planning phase, screen out individual projects with no potential effects within federal jurisdiction.

We also agree with the use of environmentally-based thresholds and entries in order to capture undertakings not easily defined by project type. In particular, we recommend that the Project List describe a "climate trigger" based on greenhouse gas emissions. The trigger should include total and annual emissions, and include a consideration of how the lifespan emissions implicate Canada's commitment under the Paris Agreement to implement progressively ambitious reductions over time.[15] We also recommend there be a trigger where there is the potential for an effect within federal jurisdiction to impact Aboriginal rights or title.

However, the suggestion in the Consultation Paper that environmentally-based entries would encourage proponents to adopt best available practices that would be taken into account when determining whether an impact assessment is required raises the question of whether the Agency or Minister is able to impose binding conditions on projects that do not proceed to an assessment. If not, then then there may be no obligation on the proponent to use those best available technologies and practices it has indicated that it will apply in order to avoid an impact assessment. In order to rely on such measures, we suggest that the Agency or Minister must be able to require them.

Conversely, we do not agree with the use of regional (REA) or strategic assessments to determine exclude undertakings from assessment. There is nothing in the IAA that ensures that REAs will establish binding direction or conditions on project-level undertakings, or be anything

[15] *Ibid*.

more than information-gathering exercises. Moreover, REAs intentionally do not examine specific undertakings and their unique potential effects, which may be based on location, design and other project-specific factors; that is the role of project assessment. Thus, while REAs can help ease the burden on proponents, the public and authorities in project assessment, such as by supplying baseline data, cumulative effects information and ecological thresholds, it should not be assumed that they can be relied upon under the IAA to impose binding conditions, such as mitigation measures, technologies and means. In other words, REA should *inform* planning phase determinations and project assessment, not replace them.

We also strongly disagree with the use of qualifier conditions to exempt classes of project, such as in-situ oil sands mines in a jurisdiction with a carbon cap, or marine terminals where there is a land use plan. A hard cap does not address the many other potential effects within federal jurisdiction, or effects related to areas within federal jurisdiction (i.e., the socio-economic and health effects related to impacts on areas within federal jurisdiction). Similarly, a land use plan may not address the myriad impacts that marine terminal have on areas within federal jurisdiction, such as marine species at risk, fish and fish habitat, navigation and shipping, marine pollution or climate, and consequently would not address the broader socio-economic and health impacts related to those effects.

If classes of project are exempt, other effects within federal jurisdiction may go unidentified and therefore unmitigated. These project types require assessment in order to consider those impacts within federal jurisdiction, as well as the broader effects related to areas within federal jurisdiction. Thus while conditions such as the existence of an emissions cap or land use plan should be factors to *consider* in an assessment, they should not reasons to exempt an undertaking from one.

7. Clarify the use of environmental objectives and standards

While we agree that environmental objectives and standards can be useful in identifying undertakings that should be subject to impact assessment, we urge caution when using them to determine the magnitude of effects. In particular, environmental standards may not capture cumulative effects. Standards become out-of-date, and individual projects that would fall under the standards may, where there are multiple projects with similar effects, cumulatively rise above the standard.

The use of standards also raises the question of how they would be considered if there is no federal jurisdictional trigger? For example, what is the relevance of a defined level of greenhouse gas emissions or the Paris Agreement if projects are exempt from assessment due to the existence of a hard cap?

8. Add class assessment triggers

The original CEAA allowed for class assessments of similar types of projects. While the IAA does not explicitly provide for such class assessments, we see no reason why the Project List cannot include a trigger for class screenings. For example, such a trigger could be for where an undertaking, when considered individually, may not merit addition to the Project List, but where multiple similar undertakings are proposed or reasonably foreseeable (especially within a region) that would contribute to cumulative effects.

9. Task Expert Committee with recommending undertakings

Finally, we recommend that the Expert Committee that will be established by the Agency under the IAA be tasked with periodically recommending undertakings for inclusion, revision or removal from the Project List. The Minister should have a concurrent obligation to respond to the Expert Committee's recommendation, and recommendation by the Expert Committee should be an additional factor to consider when determining undertakings to be placed on the List.

Recommendations by the Expert Committee, especially as compared to the Ministerial Advisory Committee, would provide an independent, non-interest, scientific and Indigenous knowledge-based perspective on how to best ensure that undertakings with consequences for sustainability are captured appropriately by the IAA.

Question 2: Subsequent reviews

We recommend that subsequent reviews be sufficiently frequent to reflect the need for learning, allow for timely alterations to avoid environmental, social and health impacts, and recognize new and newly-recognized project types. The Minister should retain the discretion to add an undertaking or class of undertakings to the List at any time, not just following a periodic review.

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