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Environmental Defence Canada

Comments on the Government of Canada's Discussion Paper on the proposed Project List: A Proposed Impact Assessment System

Submitted to:
Canadian Environmental Assessment Agency

Prepared by:
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About Environmental Defence Canada
Environmental Defence Canada (EDC) is a leading Canadian advocacy organization, working to defend clean water, a safe climate and healthy communities. EDC challenges and inspires change in government, business and people to ensure a healthier and prosperous life for all.

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EDC has participated actively in the federal environmental law reform process since consultations began in 2016. Our interventions have often focused on ensuring that the review process and impact assessment regime for energy and industrial projects are aligned with Canada's climate commitments.

Last June EDC submitted comments on the *Government of Canada's Consultation Paper on Approach to Revising the Project List: A Proposed Impact Assessment System to the CEAA*. We participated in good faith and applauded the government for taking a balanced approach to incorporating feedback from stakeholders and the public.

We were therefore quite disappointed when the discussion paper was released, as none of the recommendations that were thoughtfully developed by numerous environmental organizations were reflected anywhere in the contents of the discussions paper, and only minimally addressed in the "what we heard" section. Furthermore, no rationale was given either in the discussion paper or in meetings with officials as to why the voices of civil society have been left out. Government officials will have heard from numerous organizations that there is a collective sense of frustration at the lack of transparency in the development of the project list regulations.

Instead of drafting an entirely new set of detailed recommendations, we are re-submitting our 2018 recommendations - in response to the consultation paper - once more, as all our concerns remain valid. We also have included high-level concerns in response to the discussion paper. The discussion paper outlines proposed regulations that are significantly worse than what was presented a year ago in the consultation document and overall worse than the existing *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*) Project List. As currently proposed, the project list would jeopardize the integrity and utility of the IAA as proposed in Bill C-69 – and thus we cannot support the government moving forward with this regulation.

2018 Consultation Paper Recommendations

We have included our 2018 comments in response to the consultation paper further below in this document. These concerns include:

- The IPCC has warned us that we have less than 12 years to drastically reduce our emissions to avoid the most catastrophic climate breakdown, and we know that Canada is warming at twice the global rate. The Project List must align with an impact assessment (IA) system that contributes to Canada's domestic and international climate targets under the Paris Agreement. EDC is therefore disappointed that the Project List exempts some of the highest-carbon projects in the oil and gas sector, such as in situ tar sands and unconventional gas production (fracking). EDC views this as an abdication of federal responsibility that contradicts Canada's climate targets.

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- EDC is disappointed that the Project List is the principal vehicle under the *Impact Assessment Act* (IAA) for triggering assessments of projects. The project list, in its current form, will result in large numbers of projects with adverse impacts on sustainability and the climate proceeding without assessment. Our recommendation is to instead adopt an approach that lists projects based on a test of likely significant adverse environmental or sustainability impacts in areas of federal interest, rather than only looking at projects with the "greatest" impact.

A lack of a greenhouse gas trigger

We have been calling for - and the original consultation paper proposed - the Project List to include a greenhouse gas trigger to ensure that high carbon projects are federally assessed. This would be an important step towards aligning the impact assessment framework with Canada's climate targets.

Therefore, EDC was extremely disappointed that there was no inclusion of an explicit greenhouse gas threshold. An emissions threshold would be a more equitable approach to assessing projects based on their carbon impact, rather than the current sectorial approach.

EDC recommends including in the Project List the construction or expansion of a facility that is expected to release more than 50,000 tonnes of greenhouse gas emissions per year. We are concerned with the language used in in the 'Designated Projects' section of the discussion paper (page 8), where adverse effects is described as emissions of more than 0.5 Mt of greenhouse gas per year; very few projects, if any, emit that large a quantity of greenhouse gases.

EDC would also like to note that 6,400 Canadians have submitted comments to the Project List consultation paper as of the morning of May 31st, 2019 demanding that all high-carbon projects undergo a federal impact assessment. If the federal government is serious about restoring public trust in Canada's environmental laws and project review process, EDC recommends that the government takes these public concerns seriously.

Concerns with the entries and thresholds in the proposed Project List

For virtually every class of project – such as pipelines, mines, coal mines, nuclear reactors, highways - the proposed project list is weaker than the current *CEAA, 2012* project list. The discussion paper proposes higher thresholds for the size of a project (longer pipelines, bigger mines, etc.) for it to require review - so more projects could be built without assessment – and certain items are simply removed from the list. Only renewable energy projects would face tighter thresholds.

From a climate stability perspective, we are especially concerned with:

- The perplexing decision to only decrease thresholds for renewable energy projects, including changing the threshold for tidal power facilities from 50

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MW to 15, and adding new categories of renewable projects to the list, including wind power generating facilities located in marine or freshwater with 10 wind turbines. In order to align with Canada's climate targets, the Project List should not make it more onerous for renewable energy than for fossil fuel projects.

- Exempting offshore exploratory wells from impact assessment when they are proposed in an area for which a regional assessment has been carried out. Regional assessments are not able to consider project specific impacts, and as such should inform impact assessment, rather than replace them.
- The unnecessary scoping of pipelines to only consider international or interprovincial pipelines (which is inconsistent with court decisions on federal pipeline jurisdiction), with a length of 75 km or more in a new right of way – as well as the decision to remove the decommissioning and abandonment of existing pipelines.
- The threshold increase of coal mines from a coal production capacity of 3000 t/day or 5000 t/day.

The process for arriving at thresholds has been completely opaque. The discussion paper contains no justification or rationale for the addition or removal of project list entries or the seemingly arbitrary thresholds assigned to them. For all of these threshold changes, we have asked the agency for transparency around how the decisions were made. Despite these requests, we have received little information and no documentation on how these new thresholds were arrived at.

This contradicts the intent to use an evidence-based, scientific approach to thresholds or the promise of greater transparency. The government has asked for feedback on what types of projects may be subject to impact assessment, yet has not been at all transparent as to how it developed the proposed thresholds. This information should have been made available to the public alongside the discussion paper. This lack of transparency not only makes it impossible to offer constructive feedback, it undermines the credibility of the entire process.

Conclusion

EDC, along with numerous other organizations, is highly disappointed with both the process run by the Agency as well as the contents of the proposed Project List. It is our position that the Project list as outlined in this discussion paper would leave Canada worse off than the existing *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*) Project List – and threatens the integrity of the IAA. We therefore cannot support the government moving forward with this regulation. EDC supports the request made by Nature Canada and the Canadian Environmental Law Association (CELA) that the government restart the regulatory process with a meaningful multistakeholder engagement.

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Thank you for the opportunity to submit written comments on the process to revise the *Regulations Designating Physical Activities* (the Project List). Environmental Defence Canada (EDC) applauds the government's effort to begin consultation early and to offer multiple opportunities to provide input on the Project List regulations. Bill C-69 demonstrates that the government has taken a balanced approach to incorporating the feedback it heard from stakeholders and the public. It is essential that the public's views continue to be considered as the legislation is implemented and policies and regulations are drafted.

EDC has participated actively in the federal environmental law reform process since consultations began in 2016. In particular, we have intervened on the modernization of the National Energy Board (NEB), the creation of the proposed Canadian Energy Regulator (CER), and the consideration of climate change in impact assessments and Bill C-69. Our interventions have often focused on ensuring that the review process and impact assessment regime for energy and industrial projects are aligned with Canada's climate commitments.

For this reason, EDC's submission will focus on the climate implications of the Project List regulations, arguing that the Project List must align with an impact assessment (IA) system that contributes to Canada's 2030 climate targets and mid-century commitment to decarbonization. EDC's submission will also include key high-level recommendations to improve the Project List, including:

- Addressing the "worst of the worst" approach to triggering impact assessments;
- Ensuring all projects with the potential for adverse environmental effects in areas of federal jurisdiction are assessed; and
- The need for an evidence-based approach to developing the Project List that's based on independent science.
- The need to review the Project List every three years
- Ongoing and meaningful consultation with Indigenous peoples

For additional recommendations to improve the Project List regulations, EDC voices its support for the submissions of its colleagues from the West Coast Environmental Law Association, Ecojustice, the Pembina Institute, Nature Canada, and the Canadian Freshwater Alliance.

Make the Project List climate-safe

Bill C-69 explicitly recognizes that "impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments to respect climate change." The *Impact Assessment Act* (IAA) also requires that "the impact assessment of a designated project must take into account…(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change." And the government is launching a strategic assessment of climate change in the near future, which will lay out how climate change considerations would be integrated in the impact assessment process and in determining whether a project is in the public interest.

The impacts of climate change on the environment, infrastructure and public health are immense and growing rapidly. And Canada is already falling short of its commitment to reduce greenhouse gas (GHG) emissions by 30 per cent below 2005 levels by 2030. The oil and gas sector is responsible for more than a quarter of Canada's GHG emissions and is also the fastest-growing source of emissions. Yet the consultation paper proposes to exempt some of the highest-carbon projects in the oil and gas sector, such as in situ tar sands and unconventional gas production (fracking), from the Project List. EDC views this as an abdication of federal responsibility that contradicts Canada's plan to decarbonize its economy by mid-century.

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EDC would also like to note that 5,300 Canadians have submitted comments to the Project List consultation paper as of the morning of June 1st, demanding that all high-carbon projects undergo a federal impact assessment. If the federal government is serious about restoring public trust in Canada's environmental laws and project review process, EDC recommends that the government takes these public concerns seriously.

In situ Oil Sands

The consultation paper proposed to exempt in situ oil sands projects from the Project List if the projects are proposed in a province that has a hard limit on GHG emissions, such as Alberta's 100 megatonne cap on oil sands emissions.

But a provincial cap is not an adequate reason to exempt in situ oil sands projects. And the Alberta cap is a particularly good example of why granting this exemption based on provincial emissions limits is problematic.

First, the Alberta cap excludes emissions-intensive activities like electricity cogeneration and new upgrading, meaning the 100 MT cap could actually legally allow emissions to exceed the cap by 10 to 15 per cent. This essentially means that the Alberta cap can lead to a 10 to 15 MT hole in Canada's plan to meet its climate targets, solely due to projects that are proposed to be exempted from federal assessment.

Second, the Alberta government has not yet set a timeline for developing regulations for the emissions cap and the cap may not be implemented before the next Alberta election. With the provincial election less than a year away and the provincial Opposition leader pledging to scrap Alberta's Climate Leadership Plan, it is entirely possible that Alberta will not have an emissions cap at all less than a year from now. Considering the imperative of meeting national climate targets, the federal government must put in place a backstop to assess high-carbon projects that could put its targets out of reach.

Third, even if the Alberta cap is fully implemented, it still allows Canada's largest and fastest-growing source of emissions to grow by nearly 40 per cent—at the same time that every other economic sector is expected to cut emissions. This raises issues of fairness in Canada's plan to take a whole-of-government, economy-wide approach to reducing GHG emissions. It would be irresponsible for Canada's impact assessment regime to ignore such a massive source of pollution. *The exemption for oil sands in situ projects that are covered by a provincial cap must therefore be removed.*

Furthermore, in situ oil sands extraction may have other harmful environmental effects that justify federal impact assessment. The effects of solvent-based bitumen extraction won't be broadly understood until the technology is used on a commercial scale, but there is a surprising lack of public information regarding the potential impacts that could arise with full-scale deployment of these technologies. The potential for surface or subsurface contamination from injected solvents is concerning and can be monitored, but not mitigated. If solvent injection is truly the next generation of oilsands production, then rules guiding site selection, resource characterization, operating parameters, and closure and abandonment requirements need to be established early. *With such a lack of information, there is a strong argument for the federal government to undertake IAs of new in situ oil sands projects, regardless of GHG emissions.*

There are also serious adverse environmental effects of in situ oilsands development for species at risk. Although the total geographic footprint from in situ development is smaller per unit of production of bitumen than oilsands mining, the disturbance impact from in situ development on species at risk such as woodland caribou is greater than the footprint from oilsands mining development due to its linear pattern

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and a large network of facilities, wells, roads, and pipelines. In situ developments therefore have the effect of reducing usable wildlife habitat to small, scattered islands.

According to ECCC's assessment of disturbance within caribou habitat, linear disturbance is considered to have a disproportionately larger impact on woodland caribou and critical habitat. Outside the oilsands mineable area, oilsands development primarily consists of in situ extraction. The total extent of the non-mineable oilsands area is 13.8 million hectares, an area over 50 times larger than the oilsands mineable area. Boreal Woodland caribou are considered "threatened" according to the *Species At Risk Act*. *As in situ development continues to be proposed in caribou habitat, it poses a significant continued threat to caribou recovery as outlined by federal species at risk obligations and is clearly an area where increased federal oversight is required.*

EDC recommends that exemptions only be allowed if the condition for exemption is the only area of adverse environmental effects within federal jurisdiction. Moreover, the condition that allows for an exemption must have a demonstrated ability to mitigate the effect. In the specific case of in situ oilsands development, exemptions based on greenhouse gas mitigation measures are inappropriate and an abdication of federal responsibility for protecting species at risk.

Unconventional Natural Gas Development

Also notably absent from the Project List is unconventional natural gas development, in particular hydraulic fracturing, or "fracking". Occurring mostly in British Columbia, Alberta and Saskatchewan, fracking uses massive amounts of fresh water, is linked to contamination of groundwater, increases the risk of asthma, birth defects and cancer, and even triggers earthquakes. These environmental concerns have led several jurisdictions in Canada to ban fracking, including moratoriums in New Brunswick, Nova Scotia, Prince Edward Island, Quebec, Newfoundland and Labrador, and the Yukon.

These risks alone should be enough to justify the inclusion of fracking projects on the Project List. But fracking's inclusion becomes undeniable when one considers the carbon-intensity and absolute emissions associated with projects. Fracking emits significant amounts of methane, a GHG 84 times more potent than carbon dioxide over the short-term. Fracking accounts for two-thirds of domestic natural gas production in Canada. A recent analysis shows that the expansion of fracking to grow B.C.'s natural gas industry would make the province's climate targets virtually impossible to reach.

The B.C. government has faced criticism for failing to reconcile its climate targets with its natural gas development ambitions. If Canada is to meet its national climate commitments, the federal government cannot let provinces off the hook. *The federal impact assessment regime must align all energy and industrial projects with Canada's climate targets. Fracking must therefore be added to the Project List*.

All high-carbon projects must get a federal impact assessment

In situ oil sands and fracking are two examples of industrial sectors for which projects should be added to the Project List. However, to ensure Canada's impact assessment regime is climate-safe, other oil and gas projects should be added to the Project List, including:

- Construction or expansion of a facility that is expected to release more than 50,000 tonnes of GHG emissions per year;
- Construction or expansion of a hydraulic fracturing (fracking) project to extract shale gas, coal methane or shale oil;
- Construction or expansion of a steam-assisted gravity drainage (in situ) oil sands project;

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- Construction of an oil, gas or commodity pipeline or electrical transmission line longer than 50 km;
- Exploratory offshore oil and gas seismic activities.

Canada is heading in the wrong direction in meeting its climate targets. And it's largely because of growing emissions from the oil and gas industry. Canada has an obligation to decarbonize its economy by mid-century. The impact assessment process can be an essential tool in the carbon reduction toolkit, but only if given the teeth to help move the country toward a zero-carbon future.

Canada has a crucial opportunity to align its environmental laws and project review process with its climate targets. Exempting high-carbon projects, like fracking and in situ oil sands, from the Project List would be an abdication of the federal government's responsibility and inconsistent with the letter and spirit of Bill C-69.

Triggering of Impact Assessments

EDC is disappointed that the Project List is the principal vehicle under the IAA for triggering assessments of projects, as it likely means that a wide variety of federal decisions that adversely affect the natural environment or sustainability will not be assessed in advance for their impacts. The federal government should have robust information about adverse environmental impacts of all projects over which it has decision-making responsibility before decisions are made. The 2017 Report of the Expert Panel on Environmental Review Processes also supports our view, declaring that "Federal IAs should only be conducted on a project, plan or policy that has clear links to matters of federal interest. These federal interests include, at a minimum, federal lands, federal funding and federal government as proponent, as well as species at risk; fish; marine plants; migratory birds; Indigenous Peoples and lands; greenhouse gas emissions of national significance," etc.

The exceedingly narrow application of CEAA 2012 has meant that numerous federal decisions have been made concerning important projects likely to have significant adverse environmental or sustainability impacts in areas of federal interest without good information about these impacts.

Given that the Project List is of critical importance to the utility of the IAA as proposed in Bill C69, EDC is further disappointed that the consultation paper indicates that the Project List would "focus federal impact assessment on projects that would have the most potential for adverse environmental effects in areas of federal jurisdiction". In essence, the consultation paper is saying that only the worst of the worst projects will be included on the Project List for possible impact assessment. This means even bad projects with serious adverse impacts in areas of federal jurisdiction may not be listed so long as there are other projects that have more serious adverse impacts. This exceedingly narrow approach to project listing taken in the Consultation Paper is nowhere reflected in the text of Bill C-69.

EDC urges you to abandon this "only the worst of the worst" approach to the Project List and instead adopt an approach that lists projects based on a test of likely significant adverse environmental or sustainability impacts in areas of federal interest.

Furthermore, the consultation paper states that projects "with potential for smaller effects in areas of federal jurisdiction would continue to be subject to other federal regulatory processes such as those under life-cycle regulators…" However, this is not necessarily true as drafted in Bill C-69. For instance, section 214(1) of the *Canadian Energy Regulator Act* (CERA) allows the CER Commission to exempt pipeline projects from "any and all provisions" for acquiring a certificate of public convenience and necessity.

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This leaves the door open to non-designated projects that fall under the purview of the CER proceeding without an IA.

EDC recommends that projects be listed based on a test of likely significant adverse environmental or sustainability impacts in areas of federal interest rather than including only projects with the "most potential" for adverse environmental effects. Additionally, EDC urges the government to elaborate on how it proposes to assess the cumulative effects of projects that are not listed. This should include how regional impact assessments (RIAs) and strategic impact assessments (SIAs) might serve as an additional tool for listing projects and what interim measures will be taken prior to the completion of RIAs and SIAs to protect species at risk, biodiversity, fish, marine plants, migratory birds, Indigenous Peoples and lands, and GHG emissions of national significance.

Relevant Federal Laws as Criteria

In addition to the anticipated environmental effects of a project, additional criteria are required to ensure all projects with adverse environmental effects in areas of federal jurisdiction are assessed. These should include whether the project requires permits or has implications for federal laws established to protect the environment or promote sustainability. For instance, projects that interfere with the critical habitat of species listed under the *Species at Risk Act* should be included in the project list. Similarly, projects requiring permits under the *Canadian Navigable Waters Act* should also be listed.

Further, Section 16 of the IAA permits the Minister of Environment and Climate Change to determine that an IA is not required for a designated project. This gives the Minister discretion to allow projects with minimal or no adverse environmental effects to be screened-out. *Rather, a more comprehensive approach of investigating projects in federal jurisdiction would provide important information on projects affecting federal jurisdiction even if such projects did not proceed to a full impact assessment.*

Scientific, criteria-based approach to developing the Project List

EDC supports an approach to listing projects and determining thresholds that depends on science-based environmental criteria to the greatest extent possible. The expected number of projects in a given project category that may be subject to impact assessment in any given year should not be a criterion either for listing or for the determination of a threshold.

Unfortunately, the expected number of projects in a project category was indeed the most important criterion in developing project categories and thresholds for the 1995 Comprehensive Study List and the CEAA 2012 Project List (which was almost entirely cribbed from the 1995 list). Thresholds for individual project categories (e.g. production capacity of a mine measured in tonnes per day) were determined largely based on the number of federal project assessments that would be triggered by that threshold, and not by any science-based analysis of environmental or sustainability impacts associated with that threshold.

EDC submits that an effective, robust criteria-based approach to developing the Project List needs scientific, engineering, and local and Indigenous community input for most if not all project categories. The consultation paper claims that the federal government holds relevant "experience to date" with respect to project listings, and, presumably, related project thresholds. In addition, EDC is aware that CEAA, as well as Environment and Climate Change Canada and possibly other departments have carried out some research and analysis on these matters in relation to the CEAA 2012 Project list and as part of the planning for Bill C-69.

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Therefore, EDC requests that this experience to date, together with supporting research and analysis relating to environmental impacts and possible thresholds, be shared publicly as soon as possible so that the consultation process may be as well informed as possible. For example, presumably CEAA has relevant information on thresholds and what kinds of projects or exercise of federal authority (including federal funding) may result in adverse impacts. This data should be made public.

How often should the project list be reviewed?

The Project List regulation should be reviewed every three years. Any review of the regulation should be based on empirical evidence of efficacy in protecting areas of federal jurisdiction and Indigenous peoples from adverse and cumulative environmental effects. Reviews must be transparent, open to public engagement, and undertaken in collaboration with Indigenous groups.

Consultation with Indigenous peoples

EDC strongly supports the inclusion of the United Nations Declaration of the Rights of Indigenous Peoples in Bill C-69 and believes that the composition of the Project List will have a direct impact on the government's ability to effectively fulfill its commitment to Indigenous rights and reconciliation. EDC recommends consulting with Indigenous groups to determine if additional criteria or approaches are necessary to support the intent of the IAA and protect the inherent and treaty rights of Indigenous peoples.

Conclusion

EDC looks forward to continuing to work with the government to ensure that the implementation of Canada's new environmental laws supports a credible IA regime and ensuring that IAs for energy and industrial projects are aligned with Canada's climate commitments. If you have any questions about the contents of this submission, do not hesitate to get in touch with me using the contact information below.

Sincerely,
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