

September 27, 2024

Mr. Terence Hubbard
President
Impact Assessment Agency of Canada
160 Elgin Street, 22nd Floor
Ottawa, ON
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Email: terence.hubbard@iaac-aeic.gc.ca

Subject: WaterPower Canada Comments Regarding the *Physical Activity Regulations*

Dear Mr. Hubbard:

WaterPower Canada (WPC) is pleased to provide its comments as part of the Impact Assessment Agency of Canada's review of the *Physical Activities Regulations*.

WPC is the national industry association representing the Canadian hydroelectricity sector. Our members include both public and private hydropower producers, equipment manufacturers, engineering and construction firms and other suppliers of goods and services for the hydropower industry.

Hydropower facilities produce over 60% of Canada's electricity. Accelerated investment in maintaining, refurbishing, and expanding existing hydropower facilities and developing new hydropower generation stations are essential for Canada's economic competitiveness and energy security and for achieving our national greenhouse gas emissions reduction targets.

We have had an opportunity to review the Agency's Discussion Paper on the Project List Review¹ as well as the amendments to the *Impact Assessment Act*². We are pleased that the Agency is seeking to streamline the federal assessment process – this will increase regulatory certainty and accelerate the delivery of clean energy projects for Canadians.

However, we believe that changes to the *Physical Activities Regulations* beyond those envisaged in the Discussion Paper need to be made to fully respond to the Supreme Court of Canada's *Impact Assessment Act* reference decision.³

¹ <https://letstalkimpactassessment.ca/43770/widgets/185995/documents/135574>

² [Government Bill \(House of Commons\) C-69 \(44-1\) - Royal Assent - Budget Implementation Act, 2024, No. 1](#)

³ [2023 SCC 23 \(CanLII\) | Reference re Impact Assessment Act | CanLII](#)

Provincial governments maintain jurisdiction over electricity generation projects in Canada under Section 92A (1) (c) of the *Constitution Act*, where provinces have authority over

“... development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.”

Every province⁴ of Canada includes hydroelectric projects in their environmental assessment (EA) triggers, and as can be seen from the table below, the triggers for EA registration are all less than or equal to the current 200 MW federal threshold.

Province	Environmental Assessment Trigger
British Columbia ⁵	<ul style="list-style-type: none"> • New hydroelectric power plant with a rated nameplate capacity \geq 50 MW • Expansions \geq 50 MW, other than by replacement of existing turbines and generators.
Alberta ⁶	<ul style="list-style-type: none"> • Generating of hydro-electric power
Saskatchewan ⁷	<ul style="list-style-type: none"> • Hydropower generation
Manitoba ⁸	<ul style="list-style-type: none"> • Electrical generating facilities with a generating capacity greater than 100 MW
Ontario ⁹	<ul style="list-style-type: none"> • A generation facility that has a name plate capacity of greater than or equal to 200 MW and that uses waterpower as its primary power source.
Québec ¹⁰	<ul style="list-style-type: none"> • Une centrale hydroélectrique égale ou supérieure à 5 MW • Toute augmentation de la puissance d’une centrale hydroélectrique, destiné à produire de l’énergie électrique si sa puissance, avant l’augmentation ou à la suite de celle-ci, est égale ou supérieure à 5 MW, autrement que par le remplacement ou la modification d’équipements techniques afférents à un tel ouvrage qui n’entraînera aucune modification des niveaux minimal et maximal d’exploitation.
New Brunswick ¹¹	<ul style="list-style-type: none"> • All electric power generating facilities with a production rating of three megawatts or more
Nova Scotia ¹²	<ul style="list-style-type: none"> • A production rating of more than 25 MW derived from hydroelectricity
Prince Edward Island ¹³ (Note 1)	<ul style="list-style-type: none"> • Any project which will or may cause public concern because of its real or perceived effect or potential effect on the environment
Newfoundland and Labrador ¹⁴	<ul style="list-style-type: none"> • The construction of hydroelectric power developments with a capacity of more than one megawatt

Note 1: While hydropower is not explicitly referenced in PEI’s EA legislation, a hydropower project in PEI would be captured by the referenced definition.

⁴ Since projects in Yukon, Northwest Territories, and Nunavut are not subject to the *Impact Assessment Act*, this submission only addresses provincial rather than territorial environmental assessment processes.

⁵ [Reviewable Projects Regulation \(gov.bc.ca\)](http://www.gov.bc.ca/reviewable-projects-regulation)

⁶ [RSA 2000, c E-12 | Environmental Protection and Enhancement Act | CanLII](#), Schedule of Activities

⁷ <https://publications.saskatchewan.ca/api/v1/products/113159/formats/137589/download>, page 26

⁸ [Man Reg 164/88 | Classes of Development Regulation | CanLII](#)

⁹ [O. Reg. 50/24: PART II.3 PROJECTS - DESIGNATIONS AND EXEMPTIONS \(ontario.ca\)](#), par. 7

¹⁰ [Q-2, r. 23.1 - Règlement relatif à l’évaluation et l’examen des impacts sur l’environnement de certains projets \(gouv.qc.ca\)](#),

Annex 1, Partie II, Article 11

¹¹ [87-83 - Environmental Impact Assessment \(gnb.ca\)](#), Schedule A

¹² [Environmental Assessment Regulations - Environment Act \(Nova Scotia\)](#), Class II Undertakings

¹³ [Environmental Protection Act \(princeedwardisland.ca\)](#), Section 1 (p)

¹⁴ [NLR 54/03 - Environmental Assessment Regulations, 2003 under the Environmental Protection Act \(assembly.nl.ca\)](#), s. 34.1(d)

Similar provisions exist in provincial environmental assessment frameworks for diversions, dams, and reservoir modifications (water projects). These water works also require provincial water use permits in addition to federal fisheries authorizations.

The same argument applies for public works related to new hydroelectric infrastructure, such as public access roads and highways. The construction of a public road only concerns the jurisdiction where that road is located and is already regulated at the provincial level.

In the absence of a federal EA, all impacts of a hydropower project in any province, including those that fall under federal jurisdiction, will still be managed and effects will be minimized through federal responsible agency participation in the provincial EA process and through federal permitting processes. In all cases, certain permits from federal authorities may be required before it can proceed:

- A *Fisheries Act Authorization* would be required from Fisheries and Oceans Canada, and that authorization would include a fisheries or habitat offset plan as a condition of approval, if the project adversely affects fisheries and/or fish habitat.
- A permit from Transport Canada under the *Canadian Navigable Waters Act* would be required if the project impacts access to navigation.

With respect to avian protection including migratory birds, avoidance, mitigation, and offsetting measures are typically considered during the environmental assessment and included as conditions of the provincial decision/release from environmental. In addition, permits including protection and reporting conditions, may be required pursuant to the *Migratory Birds Convention Act* and regulations should migratory bird nests require removal or relocation.

Similarly, Indigenous consultation has been incorporated into federal permitting processes. Indigenous consultation is also well established in provincial environmental assessment and permitting regimes, and requirements for federal Crown consultation can be coordinated through a provincial environmental assessment.

In short, the mitigation of non-negligible adverse environmental effects under federal jurisdiction, including impacts to Indigenous peoples of Canada, is addressed by federal permitting authorities, regardless of whether the project's environmental assessment is provincially or federally led.

In its decision, the Court found that:

Rather, the “designated projects” scheme intrudes more than incidentally into the provinces’ constitutional sphere. As I explained, that sphere encompasses exclusive legislative jurisdiction to regulate in areas including property and civil rights in the province (s. 92(13)), matters of a local nature (s. 92(16)), local works and undertakings (s. 92(10)), and non-renewable natural resources, forestry resources, and electrical energy (s. 92A)¹⁵.

¹⁵ [2023 SCC 23 \(CanLII\) | Reference re Impact Assessment Act | CanLII](#), par 205

It is incumbent on the federal government to ensure that any assessment of projects it imposes is conducted as efficiently as possible, and for hydropower projects, we recommend that the federal government remove their designation from the *Physical Activities Regulations* and by default participate in provincial environmental assessments as is the case for smaller projects.

Eliminating hydropower projects from the *Physical Activity Regulations* would provide regulatory certainty for most projects without diminishing the federal government's ability to assess projects through case-by-case designation where conditions warrant.

WaterPower Canada therefore recommends that Section 42 of the *Physical Activities Regulations* be repealed in the interest of regulatory efficiency in accordance with Section 6 (3) (a) of the amended *Act*, given that federal authorities can discharge their responsibilities and effective Indigenous consultation and accommodation can take place through provincially led assessments.

The same logic applies to:

- expansions of existing hydroelectric facilities
- water projects, including diversions, and dam and dyke construction and expansions
- highway and access road construction associated with hydroelectric facilities

Provincial EA triggers also exist for water projects and highway infrastructure, and these works would also trigger permitting under the *Fisheries Act* and the *Canadian Navigable Waters Act* if impacts on these federal jurisdictions are identified.

For the same reasons as noted above, WaterPower Canada recommends that Sections 51 and 58 through 61 of the *Physical Activities Regulations* also be repealed in the interest of regulatory efficiency.

While we recommend that new hydroelectric projects and expansions to existing hydroelectric facilities, along with associated works and water projects, no longer be listed in the *Physical Activities Regulations*, we do not see this as a reduction of the federal government's ability to conduct an environmental assessment where circumstances warrant, as the Minister of Environment and Climate Change retains the authority to designate projects under Section 9 (1) of the Impact Assessment Act.

As an example, the IAAC registry records for the Port au Port-Stephenville Wind Power and Hydrogen Generation Project¹⁶ demonstrate how the Section 9 (1) process works, and the points considered by the Minister. While this designation request was made for a large-scale wind and hydrogen project, we believe the same decision-making criteria would equally apply to a hydroelectric project.

¹⁶ <https://www.iaac.gc.ca/050/evaluations/exploration?search=Port+au+Port-Stephenville+Wind+Power+and+Hydrogen+Generation+Project>

Specifically, concerns about the adequacy of a provincial environmental assessment process were rejected by the Minister, and these concerns should not be a reason to retain the designation for hydroelectric projects.

In the case of the Port au Port-Stephenville Wind Power and Hydrogen Generation Project, the Minister concluded designation of that project was not warranted for the following reasons¹⁷:

- *The legislative processes that currently apply to the project and related consultations with potentially impacted Indigenous Peoples provide a framework to address the potential adverse aforementioned effects and concerns raised by Indigenous Peoples and members of the public.*

These processes include:

- *the ongoing provincial Environmental Assessment in accordance with Newfoundland and Labrador's Environmental Protection Act in which Fisheries and Oceans Canada, Environment and Climate Change Canada, Transport Canada, and Health Canada participate as federal experts;*
 - *provincial licences, permits, approvals and reporting requirements that may be required for the project pursuant to the Environmental Protection Act, Endangered Species Act, Water Resources Act, and Management of Greenhouse Gas Act; and*
 - *federal authorizations, approvals, and reporting requirements that may be required under the Fisheries Act; Species at Risk Act; the Migratory Birds Convention Act, 1994; Canadian Environmental Protection Act, 1999; the Canadian Navigable Waters Act; and the Canada Shipping Act, 2001.*
- *The project must be carried out in compliance with federal and provincial legislation, including the Fisheries Act; the Canadian Environmental Protection Act, 1999; the Species at Risk Act; the Migratory Birds Convention Act, 1994; Newfoundland and Labrador's Environmental Protection Act; the Endangered Species Act; the Water Resources Act; and the Management of Greenhouse Gas Act.*

For the largest hydroelectric projects with the greatest potential for adverse environmental effects, we note these have been generally referred to joint review panels for review. This was the case for the Lower Churchill Hydroelectric Generation Project in Newfoundland and Labrador, La Romaine Hydroelectric Project in Québec, and the Site C Project in British Columbia, to cite some recent examples.

As a general principle, each level of government should focus on its own jurisdictional priorities.

For hydropower, where projects always trigger a provincial process, we believe that choosing provincially led processes by default and addressing any specific federal concerns for larger projects through case-by-case designation is appropriate. In other sectors, such as nuclear energy, where federal jurisdiction prevails, following the federal process by default would be appropriate.

¹⁷ <https://www.iaac.gc.ca/050/evaluations/document/153126>

Aligning assessments to primary jurisdiction would provide greater regulatory certainty for proponents, Indigenous groups, and stakeholders and greater regulatory efficiency for governments.

In summary, WaterPower Canada makes the following recommendations in relation to the *Physical Activities Regulations*:

- a) Repeal Sections 42 and 43, since they bring no additional environmental benefit over provincial processes that already apply and contribute to regulatory inefficiency.
- b) Make a fact-based determination as to whether a federal assessment is warranted on a case-by-case basis. The outcome of this determination would be either an integrated federal-provincial process or a referral to joint review panel.
- c) For the same reasons as noted above in a), repeal Section 51 and Sections 58 through 61 as they relate to public highways and water projects.

These recommendations would provide greater clarity to both industry and stakeholders and increase regulatory efficiency by using already-established processes for projects that lie under provincial jurisdiction and thus eliminating duplication of processes.

In all cases, the federal government retains its authority to designate projects on a case-by-case basis for federal assessment, providing a backstop for specific situations where a joint review panel would be warranted.

We are available to discuss this matter in further detail at your convenience.

Sincerely,



Lorena Patterson
President and CEO

cc. André Bernier, Director-General, Electricity Resources Branch, NRCan