

## Regulatory Affairs: Does Your Project Require a Federal Environmental Assessment? Practical Considerations for Projects on Federal Lands

Jeremy Barretto, Viviana Berkman, Sarah Kemp

April 29, 2022

Welcome back to our *Regulatory Affairs* series, developed to provide timely updates on hot topics across the vast world of regulatory law; strategic insights on regulatory fundamentals; and a look at environmental and Aboriginal law topics, which frequently intersect with regulatory matters. As always, we are here to help.

The *Impact Assessment Act*<sup>1</sup> (the Act) provides the framework for federal assessment of projects. The Act creates various types of assessments, depending on whether or not the project meets the criteria of a “Designated Project.” Where proponents plan smaller projects (short of the materiality thresholds of a Designated Project) on federal lands, they should be aware that an assessment under the Act will still likely be required and understand associated regulatory requirements to expedite approvals for their projects.

### Types of Assessments Under the Impact Assessment Act

The most comprehensive assessment under the Act is the impact assessment. An impact assessment is a comprehensive, complex and potentially lengthy process for consideration of a project’s potential effects on the environment, health, social and/or economic conditions.<sup>2</sup> However, only a subset of projects with significant enough effects will merit an impact assessment. These projects are the ones known as “Designated Projects,”<sup>3</sup> which typically come from a list of projects established by regulation or by direct ministerial designation.<sup>4</sup>

A less known type of federal assessments that projects may undergo is that outlined in Section 82 of the Act. Under Section 82, a project proposed to be carried out on federal lands requires an “assessment of significant adverse environmental effects” (Section 82 Review). Unlike an impact assessment for Designated Projects, a Section 82 Review is a condensed regulatory process entirely run by the federal authority with jurisdiction over the project. As large to mid-scale projects proposed on federal lands will generally meet the materiality threshold of a Designated Project and be subject to an impact assessment, a Section 82 Review will generally be reserved to small projects located within federal lands.<sup>5</sup>

# Cassels

## Section 82 Review Trigger

A Section 82 Review will be triggered by **any** projects proposed to be located on federal lands<sup>6</sup> where a federal authority: (i) is the project proponent; (ii) provides financial assistance for the purpose of enabling the project to be carried out; or (iii) exercises any power or performs any duty or function conferred by legislation.<sup>7</sup> The Section 82 Review process will be conducted directly by the federal authority with jurisdiction over the project (e.g., the Canada Energy Regulator, Transport Canada, the Department of Fisheries and Oceans, port authorities, etc.).

Following a Section 82 Review, a project can only proceed if the federal agency determines that the carrying out of the project is not likely to cause significant adverse environmental effects. If the agency is of the opinion that the projects are likely to cause significant environmental affects, the agency cannot permit the project to be carried out unless the Governor in Council decides that those effects are justified in the circumstances.<sup>8</sup>

## Section 82 Review Process

The Act does not prescribe a process for Section 82 Reviews. It is up to federal agencies to create their own, or rely on existing, environmental assessment processes to meet the requirements of Section 82 of the Act.<sup>9</sup> Notwithstanding this discretion, to make a determination of significant adverse environmental effects pursuant to a Section 82 Review, federal agencies are required to consider the list of factors outlined in Section 84 of the Act:

- i. adverse impacts of the project on the rights of the Indigenous peoples of Canada recognized and affirmed by Section 35 of the *Constitution Act, 1982*;
- ii. Indigenous knowledge and community knowledge with respect to the project;
- iii. comments received from the public about the project; and
- iv. technically and economically feasible mitigation measures to mitigate any significant adverse environmental effects.<sup>10</sup>

When preparing their project applications for a Section 82 Review, proponents should seek to ensure that any Indigenous engagement conducted in support of their project will assist in meeting the requirements of Section 84 of the Act. Under Section 84, a Section 82 Review requires the consideration of potential adverse impacts on the Aboriginal and Treaty rights of Indigenous peoples, as well as any Indigenous knowledge provided in respect of a project.<sup>11</sup>

## Implications for Project Proponents

Proponents should incorporate potentially applicable federal review requirements and timelines into project planning. When planning project applications, as a first step, proponents should first seek to determine whether the project qualifies as a Designated Project under the Act. A second step is understanding whether there are any project components proposed to be located within federal lands. Federal lands could include port lands, military bases, or Indigenous community reserve lands, for example. Proponents of non-designated projects should keep in mind that, if their project has components proposed to be located on federal lands, a Section 82 Review by the federal agency with authority over the project will likely be required.

---

<sup>1</sup> *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].

<sup>2</sup> IAA, s 2, definitions of “impact assessment” and “effects.”

<sup>3</sup> IAA, s 2, definition of “designated project.”

<sup>4</sup> IAA, s 9.

<sup>5</sup> Recent examples of projects that have undergone Section 82 Assessments are Metro Vancouver’s amendments to the Golden Ears Forcemain Project, consisting of changes to the physical works associated with twin sewer forcemains beneath the Fraser River and the construction of a new aircraft hanger and taxiway at the Ottawa International Airport.

<sup>6</sup> Unless the project falls within a class of projects subject to ministerial exemption from a Section 82 Review conferred under Section 88 of the *Impact Assessment Act* (see for example the *Designated Classes of Projects Order*, Can Reg 2019-323).

<sup>7</sup> IAA, s 82.

<sup>8</sup> IAA, s 82.

<sup>9</sup> In order to assist federal agencies in developing environmental assessment processes in support of a Section 82 Review, the Impact Assessment Agency has developed a policy document titled “Projects on federal lands and outside Canada Guidance document on Sections 81 to 91 of the Impact Assessment Act”, available online [Section 82 Guide].

<sup>10</sup> IAA, s 84.

<sup>11</sup> The Crown has both statutory and constitutional responsibilities to consult potentially affected Indigenous peoples. Whether an authority’s contemplated action or decision that would enable a project to be carried out on federal lands triggers the Crown’s duty to consult (and the scope of any such duty) will be determined by the federal agency on a case-by-case basis. Project proponents should seek to ensure that any Indigenous engagement conducted in support of their project will assist the Crown in meeting its duty to consult, where triggered.