SUBMISSION TO THE GOVERNMENT OF CANADA REGARDING CONSULTATION PAPER ON APPROACH TO REVISING THE PROJECTS LIST

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We are pleased to have the opportunity to provide comments on the *Consultation Paper on Approach to Revising the Project List* under the proposed *Impact Assessment Act* (*IAA*; Bill C-69). We provide this submission in our respective capacities as Wildlife Conservation Society (WCS) Canada[1] scientists familiar with provincial, territorial, and federal impact assessment (IA) processes in policy and practice. We are conservation biologists conducting scientific research to support policy and legislation on species at risk and environmental planning for terrestrial and freshwater ecosystems, in northern (north of 50°) Canada.

WCS Canada is a member of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network (EPA Caucus); one of us (Ray) currently serves as a member of the Steering Committee. In this capacity, we have worked with many colleagues from environmental and academic institutions since the government's announcement in June 2016 of the federal law reform process. We have submitted formal comments (to you, the Expert Committee, or the Standing Committee) at various stages of the process, which can be retrieved from: (add link)

It is through these collaborations that we have already expressed our collective concern about the process to revise the *Regulations Designating Physical Activities* through a recent letter to Minister McKenna[2]. Similar to the 2017 *Report of the Expert Panel on Environmental Review Processes*, we pointed out in our letter, among other things, the dangers of continuing with the exceedingly narrow approach to project listing under *CEAA 2012* and using the Project List itself as a starting point.

It is impossible to review the Consultation Paper without also considering the current wording in the *IAA*, specifically that the Impact Assessment Agency of Canada can "exempt designated

[1] WCS Canada's (www.wcscanada.org) mission is to save wildlife and wild places in Canada through science, conservation action, and inspiring people to value nature. Our trademark is "muddy boots" biology, which we do by getting in the field and conducting the necessary research to fill key information gaps on Canada's fish, wildlife, and ecosystems. We then use relevant information and our expertise, working with Government and regulatory agencies, conservation groups, indigenous communities and industry, to resolve key conservation issues.

[2] August 31, 2017 https://canada.wcs.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=33718&PortalId=96&DownloadMethod=attachment

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projects" from IA (section 16) regardless of the Project List. This language immediately creates uncertainty and inconsistency in the use of IA as a planning or decision-making tool and provides little confidence in the approach being proposed in the Consultation Paper. Herein, we provide our responses to two questions posed in the Consultation Paper.

Question 1: What are your views on using this criteria-based approach to guide the review of the Projects List?

For the purpose of this submission, we are interpreting the Consultation Paper to offer three "sets" of criteria that define the proposed project listing approach to "ensure that projects with the greatest potential for adverse effects in areas of federal jurisdiction related to the environment are assessed":

1) factors or areas that define "federal jurisdiction" (p. 3-4),
2) factors that qualify the "potential nature" of effects for project types (p. 4 and elaborated on in Annex B); and
3) factors where special consideration might have additional influence ("areas with environmental objects or standards") (p. 4-5) on project impacts.

We first note that no criteria are in the *IAA*, making their consideration here unclear in terms of process. As we discuss below with respect to each, our overarching conclusion is that the proposed approach offered in the Consultation Paper is too narrow in scope, too discretionary in its application, and will be ineffective in dealing with cumulative effects.

1) Federal "jurisdiction" as defined in this proposed approach is too narrow as scoped to capture the range of projects that may affect components of the environment of federal interest. As a result, we think the defined approach will continue the pattern of many projects of potential environmental significance not being assessed as has been evident under *CEAA 2012*. We appreciate that the proposed regulation is seeking to assuage some discretion in determining whether a project requires an IA by asserting an openness to modifying the project list and promising to "establish clear criteria and a transparent process to periodically review and update" it. But, the continued focus of this assessment regime on projects with the "most potential for adverse environmental effects in areas of federal jurisdiction" (*sensu* "worst of the worst") runs counter to the current statutory commitments in the *IAA* to sustainability, precaution, environmental protection and reconciliation with Indigenous Peoples, which collectively a considerably more comprehensive and precautionary approach than the Consultation Paper purports.

   We strongly recommend that the approach follow the recommendation by the Expert Panel[3] i.e., that "Federal IAs should only be conducted on a project, region, plan or policy that has clear links to matters of federal *interest*" (italics are ours).

[3] http://eareview-examenee.ca/

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Accordingly, there are several such factors related to the federal interest that are missing from the Consultation Paper, namely:

- Projects receiving federal funding and investment, including infrastructure and within the context of stimulus packages.
- Projects requiring a disposition of federal land.
- Projects with a federal proponent, including a federal department or a Crown corporation.
- Projects located in or adjacent to any federal terrestrial or marine protected area, including National Parks and National Wildlife Areas, on federal lands within the borders of internationally recognized natural areas such as World Heritage Sites, RAMSAR wetlands, and Key Biodiversity Areas (e.g., Important Bird Areas).
- greenhouse gas emissions of national significance that could also affect Canada's international treaty obligations;
- Indigenous Peoples and lands; and
- navigation and shipping.

2) Regarding *factors that describe the "potential nature of effects" of project types,* we highlight two issues of concern: a) the failure to address cumulative effects with respect to the Annex B factors and b) the rating of effects thresholds associated with project types.

a) Annex B factors and the failure to address cumulative effects: A key missing criterion in addition to the six that are offered (p. 4, Annex B), is the growth-inducement potential of the project. By this we mean the likelihood that the approval of one project to stimulate or enable additional projects and expansion of infrastructure, (e.g., to provide access in a previously undeveloped region for which no current regional plan or strategy exists such as the Ring of Fire in northern Ontario[4]). Experience demonstrates that it often takes one project to "open" a region where there is a great deal of natural resource potential, (e.g., mineral deposits). As such, the first project plays a greater role in when considering cumulative effects assessment as it enables other projects become economically feasible where they were not previously due to remoteness.

To be absolutely clear, we consider the addition of this criterion even more necessary now that we know the provisions in the *IAA* for regional and strategic assessment will be discretionary with no legislated schedule of regions that require IA in Canada. This is unfortunate as these regional and strategic instruments would include data and cumulative effects assessment at higher levels that would benefit the proponent when they are considering cumulative effects assessment at the project-level. Judging from past experience, it's hard to imagine that there will be more than a small handful of

[4] See WCS Canada's comments to the Standing Committee on the Environment and Sustainable Development on Bill C-69, submitted on April 6, 2018: https://canada.wcs.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=34049&PortalId=96&DownloadMethod=attachment

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circumstances whereby such instruments will be actually used in the new IA regime, even though there are clearly places or circumstances where they would be beneficial[4].

Indeed, this Consultation Paper delivers mixed messages about the role of strategic and regional impact assessments in relation to project-level assessment. Where these are mentioned in the document, they are invoked as a potential mechanism to exclude projects from project-level assessments. For example, if a regional assessment has been undertaken for offshore oil and gas, wells may be excluded from project-level assessment (pg. 5). Yet, this is not how we understand the role of regional and project-level assessments working together, particularly with respect to cumulative effects assessment. The irony is that Annex A contains a rather vivid description of the utility of these instruments for informing project-level assessments, including the "essential" consideration of cumulative effects, the sole mention of this term. We make this point to once again underscore the need to bring in much more deliberate consideration of the project's contribution to cumulative effects rather than rely on a Project List.

b) *The ratings of effects thresholds associated with project types.* The proposed scheme, as described in Annex B, envisions a "rating" of these various listed factors as "low", "medium", or "high" as measured against baseline conditions or other standards, guidelines or objectives. While a few conceptual examples (e.g., emissions) are offered in this paper, we do not consider this to be scientifically rigorous or defensible, given both the absence of standards or agreed-upon baseline conditions for most of the factors (which would have to be evaluated with respect to project type), let alone any clear delineations for the three categories of severity. It seems that evaluation of this set of factors alone would lead to an unnecessarily complex pre-assessment phase that would become hopelessly arbitrary in its implementation. For one thing, the time frame (e.g., within 10 years, 50 years, 100 years) for assessing some of these factors, such as reversibility, will shift in relation to the expected life cycle of the project being considered. We also caution that even if there is compliance with some standards (e.g., discharge of contaminants into air or water), the current approach to cumulative effects assessment in IA increases the likelihood that an approach based on standards will contribute to and lead to significant environmental harm through bioaccumulation and synergistic effects if it remains limited to the project level.

It is not at all clear to us how the evaluation of factors in Annex B relative to project type will inform the revision of "thresholds" that currently appear in the *Existing Regulations Designating Physical Activities* under *CEAA 2012* (Annex C), all of which currently relate to production capacity of physical activities and "serve as a representation of scale or size" (p. 2). In a general sense, as scientists, we caution against reliance on a pre-defined threshold approach for determining whether a project meets the test of having "the greatest potential to cause effects", for a number of reasons:

- Distinct ecological tipping points in terms of impact of a single project are rarely known and difficult (if not impossible) to isolate to the particular undertaking;

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- Degree of ecological and social impact is more dependent on context (e.g., geography, environmental sensitivity, position of other development, etc.) than project type;
- The experience under *CEAA 2012* was to develop production thresholds with an eye towards controlling the expected number of projects in a given project type, rather than relative impact. Although the paper indicates an openness to amending these to "environmentally-based thresholds", we consider it highly problematic that the starting point for doing so is the production thresholds from *CEAA 2012*;
- With the focus on identifying the "worst of the worst" projects as eligible for federal assessment in this approach, many projects in Canada will not meet the size or production thresholds, but it is well known that the smaller projects (or multiple small undertakings) can contribute importantly to adverse and significant cumulative effects. In spite of the stated interest by this government in management cumulative effects, as with *CEAA 2012*, the *IAA* also has no provisions for generic environmental guidance for categories of small projects, and no mechanisms for considering the cumulative effects of multiple small undertakings;
- While the Consultation Paper makes mention of "amending, as appropriate, existing entries and thresholds in the current Project List in light of experience to date", the document offers no hint of such experience or learnings from the regime's application. We are highly skeptical, in fact, that the quality and consistency of also before this time) has been sufficient to generate relevant knowledge. We are, moreover, incredulous that members of the public will be expected to furnish this information through this process; and
- There is a well-documented tendency for developers to staying just below the threshold for production within project types to avoid assessment, including purposefully designing the development so that it comes online in increments (e.g., Holmes River hydro project, BC), phases (e.g., Wataynikeneyap Power, ON), or extensions (Tango Extension at Victor Diamond Mine, ON).

From all this we conclude that in order to follow through on the stated intentions of this Consultation Paper to amend the *CEAA 2012* Project List to something that is more meaningful and reflective of impact, the agency should: 1) add the growth-inducement potential as a criterion to the Annex B list in order to explicitly consider the project's contribution to cumulative effects, 2) eliminate the *CEAA 2012* production thresholds, and start with a blank slate, 3) gather relevant information from IA experience to inform the formulation of scientifically-based thresholds that are indicative of relative impact of project type where it exists; 4) task an expert committee (the precursor to the legislated committee under *IAA* [s. 157]) with developing the Project List and effects thresholds *where relevant*; and 5) re-evaluate and revise these thresholds on a regular basis with new experience, as per question #2 below.

3) *Environmental objectives and standards set in relevant legislation, regulation and policy* receive attention as a third set of factors that would be considered in determining the eligibility for the project list. While these may be relevant, the examples provided are a

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mixture of those that a) belong on the earlier list (#1 above) of matters of federal interest (e.g., "federal protection objectives", greenhouse gas emissions, and transboundary air emissions) or b) allow for further consideration and qualification of the nature of effects based on "well defined standard mitigation measures" and "regional or location-specific factors".

With respect to b), we recommend strongly that this proposal be eliminated as potentially qualifying factors relative to project effects. There has been little systematic or sufficiently rigorous testing of mitigation methods throughout the history of impact assessment in Canada and this community of practice is neither publicly available for review nor has it adequately been considered with respect to legislation, policy, and regulations. We are concerned with the proposal to allow consideration of mitigation measures at this pre-assessment stage of the process as a factor affecting the rating of the nature of effects (e.g., reversibility) based solely on the proponent's project description. Our experience is that "standard mitigation" measures already tend to be optimistic assertions in impact assessments and require critical and broad consultation and assessment. We suspect including mitigation options within the process of determining whether an IA is required would also encourage further assertions of the same in order to avoid the impact assessment process. Such a scenario invites the erosion of public trust in the process and is not transparent.

We suggest that in order to consider any of these criteria more critically, it is necessary for the federal government to maintain a registration system for all projects, including those that aren't subject to federal IA. This system should be publically accessible and searchable and enable interested parties and the public the opportunity to understand which projects are happening and where they are occurring as well as the level of assessment they are receiving. Projects that trigger permitting under federal legislation such as the *Fisheries Act*, *Canadian Navigable Waters Act*, *Canada National Parks Act*, etc. should also be included. This system may also offer more opportunity to consider the role of mitigation outcomes and monitoring than is currently available in a more transparent way. Ultimately, all projects and undertakings would also benefit from this information as they go through IA.

In conclusion, we predict that defensible criteria and production thresholds that will successfully distinguish the "major" projects will be difficult, if not impossible in some cases, to apply consistently under the process described in this Consultation Paper. We urge the agency to make use of an expert committee and experience applying true adaptive management, which means not only careful monitoring but a willingness for a nimble adjustment of course with new information. We also suspect that the ongoing focus on the projects with the "most potential for adverse environmental effects" will ignore the cumulative effects of "minor" projects and lead to increased issues on areas of federal interest, particularly with Indigenous Peoples and species at risk.

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That said, we encourage an approach based on evidence and recommend that the Project List be expanded to include a more complete list of project types[5], given that inclusion on the Project List does not necessarily mean it will be subject to IA as currently described in the *IAA*. We also anticipate that the project list regulation, including criteria and production thresholds should be subject to technical review by the expert committee (s. 157 of the *IAA*) and the advisory council (s. 158).

Question 2: Do you have suggestions on the frequency for future reviews of the Project List?

The Consultation Paper does not propose any timeframe for review nor does it specify how or who will be conducting the review. It also offers little consideration of the need for learning to understand whether the regulation is actually working and "good projects are going forward". We suspect the review should happen sooner than later and occur at least every 3 years in the early years of the Act's implementation at the outset, and 5 years thereafter. In addition to technical review by the expert committee (s. 157), we anticipate that the project list regulation would be subject to regular reviews and reporting to the Minister by the advisory council (s. 158).

The regulation should make clear how proposed additions and revisions to the Project List with explicit timelines for review and decision-making by the federal government. The decisions should be made available for public review.

[5] See submission of Canadian Environmental Law Association, Richard D. Lindgren and Kerrie Blaise, Appendix A http://www.cela.ca/sites/cela.ca/files/1186-CELASubmissionsReProjectListingCriteria.pdf

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