

## Environmental Impact Assessment: A Legal Toolkit for New Brunswick

This volume of the East Coast Environmental Law Summary Series provides an overview of the federal and provincial environmental impact assessment processes for New Brunswick. The volume highlights key opportunities for public involvement. The goal of this publication is to assist members of the public in their understanding of the environmental impact assessment process and where they can contribute within it.

Definitions of words used in this publication can be found at the end of the document. This publication, as well as past volumes of our Summary Series and other environmental legal resources, can be found on our website at [www.ecelaw.ca](http://www.ecelaw.ca).

### Environmental Impact Assessment: An Overview

#### What is Environmental Impact Assessment (“EIA”)?

Environmental impact assessment (“EIA”) is a planning process to consider the potential environmental effects of a proposed project before it is carried out. EIA seeks to anticipate adverse effects, design measures to mitigate those effects, and predict whether the impacts, even after mitigation, will be significant. In cases when the EIA shows that significant impacts will arise, the project may not proceed or will proceed under conditions or modifications to minimize its negative effects. EIA may also be used to explore the project’s potential socio-economic impacts, including its effects on employment, local economy, and cultural traditions.

EIAs were first performed in Canada in the 1970s; however, it was not until the 1990s that EIA laws were adopted in Canada. The original federal law was the *Canadian Environmental Assessment Act* (“CEAA”), which was introduced in 1992. CEAA has been amended several times over the years, and in 2019 it was replaced by the *Impact Assessment Act* (“IAA”).

Provincial EIAs are administered by the Minister of Environment and Local Government and the Environmental Impact Assessment Branch. The provincial process is set out by the *Environmental Impact Assessment Regulations* (“EIA Regulations”) under New Brunswick’s *Clean Environment Act* (“NB CEA”). *A Guide to*

*Environmental Impact Assessment in New Brunswick* (“Provincial Guidelines”) supplements the NB CEA and the EIA Regulations by providing greater details regarding the information and corresponding considerations at each stage of the process. It should be noted, however, that the Provincial Guidelines do not necessarily create binding obligations like those within the EIA Regulations.

#### Do not confuse “environmental impact assessment” with:

“environmental impact statement” or “environmental assessment report”, which are documents produced, usually by consultants, to describe the potential environmental effects of a proposed project as part of the EIA process;

“environmental site assessment”, which is a report that assesses the extent and nature of potential environmental contamination liabilities of a site (this can be done on any piece of real estate and is not part of the EIA process described in this publication); or

“environmental audit”, which is an evaluation used to identify environmental management and regulatory compliance of a specific operation and is not part of the EIA process.

#### Why is there a federal law and a provincial law to address EIA?

The authority to make laws is divided between the Parliament of Canada and the provincial legislatures. Article 91 of the Canadian *Constitution* defines the legislative authority of the

federal government; Article 92 does the same for the provinces. There are also areas of shared jurisdiction, such as immigration and agriculture. Anything local and private in nature falls under the jurisdiction of the provinces, along with provincial Crown lands and natural resources. Criminal law, navigation, fisheries, and interprovincial and international trade fall under the jurisdiction of the federal government. As a result, the environment does not fall solely under federal or provincial jurisdiction, and both federal and provincial governments have established environment departments. Where an activity falls within a federal area of constitutional jurisdiction, a federal impact assessment may be required; where it falls within a provincial area of constitutional jurisdiction, a provincial environmental impact assessment may be required. Sometimes both are required.

## The Federal Impact Assessment Process

### What is the *Impact Assessment Act*?

The *Impact Assessment Act* (“IAA”) significantly amended the federal government’s approach to EIAs. Where *CEAA*’s primary role was assessing, avoiding, and mitigating “significant adverse environmental effects”,<sup>1</sup> the *IAA*’s scope is broader than just environmental considerations and requires an assessment of both cultural and social impacts as well.<sup>2</sup> This change is not only reflected in the *IAA*’s title and the shift from the Canadian Environmental Assessment Agency to the Impact Assessment Agency (the “Agency”), but it is also reflected by core considerations throughout the impact assessment (“IA”) process, which calls for an assessment of “adverse effects” more generally.<sup>3</sup> Additionally, the IA procedure has been modified and is now organized into the following five-phase approach:

- (1) Planning;
- (2) Impact Statement;
- (3) Impact Assessment;
- (4) Decision-making; and
- (5) Post Decision.

The federal Minister of Environment and Climate Change (the “federal Minister”) remains the authority that governs the *IAA*, and providing opportunities for public participation remains fundamental to the federal assessment process.<sup>4</sup> The procedures, considerations, and timelines for each phase of the IA process are outlined below, with special attention drawn to opportunities for public engagement.

All documents that are subject to public comment are posted publicly to the Impact Assessment Registry, which can be accessed through the following link: <https://IAAC-aeic.gc.ca/050/evaluations>.

### Phase One: Planning

#### **When is a project subject to an Impact Assessment?**

Typically, only those projects listed in the *Physical Activities Regulations* are subject to an IA,<sup>5</sup> but the federal Minister does have the ability to subject non-listed projects to the IA process as well.<sup>6</sup> If the project is subject to an IA, the proponent must provide the Agency with an Initial Project Description.<sup>7</sup> The description must meet the requirements of the federal *Information and Management of Time Limits Regulations* and must include information about the objectives, benefits, and location of the project as well as information about the local communities and Indigenous groups that may be affected.<sup>8</sup> When the Initial Project Description is submitted, the Agency may accept it or request more information from the proponent.<sup>9</sup>

**Public Participation Opportunity:** Once the Project Description has been accepted, the Agency has 180 days to determine whether an IA should be conducted. If an IA is necessary, the Agency will post the Notice of Commencement on the registry once they make their decision.<sup>10</sup> During this time the Agency must meaningfully engage with the public in order to provide an opportunity for comments on the Initial Project Description.<sup>11</sup> In addition to this public consultation, the Agency must also consult, or offer to consult, with:

- a lifecycle regulator<sup>12</sup> (if the project is regulated by one);<sup>13</sup>
- federal authorities who may have relevant expert information;<sup>14</sup>
- provincial, territorial and Indigenous jurisdictions that may have responsibilities in relation to the assessment;<sup>15</sup> and
- Indigenous groups who may be affected by the project.<sup>16</sup>

The Agency then creates a Summary of Issues document, which must reflect any issues raised during consultation.<sup>17</sup> In response, the proponent must prepare a Revised Project Description that adequately addresses the concerns outlined by the Summary of Issues.<sup>18</sup> The Agency will then review the revised description before deciding whether an IA is required for the proposed project.<sup>19</sup> In making this decision, the Agency must consider any potential adverse impacts within federal jurisdiction, any comments received during

consultation, any potential impact on Indigenous rights, and anything else the Agency considers relevant.<sup>20</sup>

## Phase Two: Impact Statement

### ***After determining that a federal IA is necessary, what are the next steps?***

Along with the Notice of Commencement, the Agency will also post a Public Participation Plan and Tailored Impact Statement Guidelines (“Guidelines”) on the registry at the end of the Planning Phase.<sup>21</sup> The Guidelines serve as the terms of reference for the proponent’s Impact Statement. In this way, the Guidelines set out any studies that must be conducted by the proponent, the relevant considerations that must be included for the subsequent assessment, and any other information necessary.<sup>22</sup> Once these documents are posted, the proponent has 3 years to develop and submit their Impact Statement to the Agency in accordance with the Guidelines before it is assessed in Phase Three.<sup>23</sup>

**Public Participation Opportunity:** In addition to the opportunities set out in the project-specific Public Participation Plan, a draft of the Guidelines will be posted to the Registry for public comment.<sup>24</sup> In this way, the public not only has an opportunity to participate during the proponent’s development of the Impact Statement, but the public may also influence the scope of its considerations.

## Phase Three: Impact Assessment

### ***Who conducts the Impact Assessment?***

Once the Notice of Commencement is posted on the registry, the Minister has 45 days to determine if it is in the public interest to have the project referred to a Review Panel, otherwise the assessment is conducted by the Agency.<sup>25</sup> In making that decision, the Minister must consider multiple factors, including public concerns related to the adverse effects of the project.

### **Agency Assessment**

The Agency reviews the proponent’s Impact Statement (“IS”) to ensure that it complies with the Guidelines, considering the scope of the information provided and its sufficiency in addressing concerns. If necessary, the Agency may send the IS back for additional information.<sup>26</sup> Once the IS is complete, the Agency has 300 days to prepare an Impact Assessment Report (“IAR”), which outlines the likely adverse effects of the proposed project, the significance of those effects, and any public comments received.<sup>27</sup> The finalized

IRA acts as the Agency’s recommendation to the federal Minister and informs their decision as to whether the proposed project is in the public interest and should be approved or whether the decision should be referred to the Governor in Council (“GIC”).<sup>28</sup>

**Public Participation Opportunity:** The Agency must ensure that the public is provided opportunity to meaningfully participate during the Agency assessment.<sup>29</sup> Specifically, a draft IRA is posted to the registry and is subject to public comments, which must be considered before the Agency finalizes the report.<sup>30</sup>

### **Review Panel Assessment (“RPA”)**

Within 45 days of determining that a RPA is necessary, the federal Minister establishes the terms of reference for the Review Panel, and the Agency must appoint members to the panel that are unbiased and possess relevant expertise.<sup>31</sup> The Agency remains responsible for reviewing the IS to ensure compliance with the concerns outlined in the Guidelines, but the Panel will review the IS for sufficiency in addressing those concerns. Following any necessary amendments, the Panel will hold public hearings to obtain all information necessary for an accurate assessment of the adverse effects of the project.<sup>32</sup> The Panel has a maximum of 600 days to provide the Agency with their findings.<sup>33</sup> Those findings act as the basis for the Agency’s recommendations to the federal Minister before the Minister refers the matter to the GIC to determine if the project is in the public interest and should be approved.<sup>34</sup>

**Public Participation Opportunity:** The RPA must hold public hearings. The Panel determines the hearing procedures, including summoning witnesses and ordering witnesses to present evidence and produce relevant records.<sup>35</sup> Interested parties may present evidence, concerns, and comments regarding the project’s potential adverse effects, all of which must be reflected in the Review Panel’s final report.<sup>36</sup>

### ***Do the processes vary if the project is regulated by a lifecycle regulator?***

If the project’s activities fall under the authority of a lifecycle regulator, the IA must be completed by an Integrated Review Panel (“IRP”).<sup>37</sup> Generally, the IRP assessment follows the same procedures and considerations as an RPA, but the IRP’s terms of reference must be developed by the federal Minister in consultation with the respective regulatory authority.<sup>38</sup> Additionally, the appropriate lifecycle regulator must be represented by at least one member on the review panel, but such representation cannot form a majority.<sup>39</sup>

## Phase Four: Decision-Making

### **Who makes the final decision regarding the project's approval, and what are the considerations?**

The federal Minister or the GIC will make the final determination as to whether a proposed project's anticipated adverse effects are in the public interest.<sup>40</sup> In making this determination, the Minister or GIC must take the Impact Assessment Report into account as well as specific public interest factors, including:

- the extent to which the project contributes to sustainability;
- the significance of the adverse effects,
- the mitigation measures;
- the impact the project may have on the rights of Indigenous peoples; and
- the extent to which the project hinders or contributes to Canada's ability to meet environmental obligations and commitments to mitigating climate change.<sup>41</sup>

If the Minister or the GIC is of the opinion that the project is in the public interest, despite its adverse effects, the project may move forward, but it may be subject to follow-up programs and conditions mitigating adverse effects.<sup>42</sup>

## Phase Five: Post Decision

### **How are the follow-up programs or mitigation measures monitored for compliance?**

The federal Minister must post a Decision Statement on the registry within 30 days if the Minister made the final determination, and within 90 days if the decision was referred to the GIC.<sup>43</sup> The Decision Statement is the document that outlines necessary mitigation measures, follow-up programs, and detailed reasons justifying the final decision and its corresponding conditions.<sup>44</sup>

Generally, the Agency is responsible for monitoring the proponent's compliance with the approval's conditions, and the Agency issues compliance reports regularly;<sup>45</sup> however, if the project is under the authority of a lifecycle regulator, that regulator takes on this monitoring role.<sup>46</sup> In cases where the Agency discovers non-compliance, enforcement officers and analysts will work with the proponent to help bring the activity back to conformity with the Decision Statement and the rest of the *IAA*.<sup>47</sup> During the process of reviewing non-compliance, the Agency will continue to post relevant information on the registry, including any reports prepared by the

officers or analysts, any notice of non-compliance, and any written orders issued.<sup>48</sup>

### **Can the approval conditions be updated or amended?**

The federal Minister may amend any conditions attached to the Decision Statement but cannot change the substantive outcome of their decision.<sup>49</sup> Furthermore, such amendments to the Decision Statement are only permitted if the federal Minister is of the opinion that making them will not increase any adverse effects related to the project.<sup>50</sup> If the project is under the authority of the *Canada Nuclear Safety Commission*, then the Minister cannot amend the approval conditions.<sup>51</sup>

**Public Participation Opportunity:** If the Minister intends to amend the Decision Statement, a notice that reflects the intended amendments will be posted on the registry and will be subject to public comment before the amended Decision Statement is finalized.<sup>52</sup>

## Federal Process under IAA



# New Brunswick's Environmental Impact Assessment Process

## What projects require a provincial environmental impact assessment?

According to the EIA Regulations, those undertakings that are listed in "Schedule A" require the project's proponent to submit a Registration Document with the Department of Environment and Local Government for an EIA.<sup>53</sup> It is not only the initial development of those projects listed in "Schedule A" that are considered undertakings for the purposes of an EIA, but also any modification, including any extension, abandonment, or demolition, to those existing projects as well.<sup>54</sup>

## What must be included in the Registration Document?

The EIA Regulations state that the Minister of Environment and Local Government (the "Minister") may require the proponent to provide any information that they consider necessary for determining whether or not a complete EIA is required.<sup>55</sup> The Provincial Guidelines outline that such information typically includes the potential environmental effects of the proposed project, the significance of those effects and how they will be addressed by the proponent, as well as details about the undertaking like the location, all associated activities, and the existing environment.<sup>56</sup>

In addition to providing information about the undertaking, the proponent is responsible for paying a registration fee, which varies depending on the project's classification in the EIA Regulations.<sup>57</sup> However, if the proponent is a local government, a Band Council, a Canadian charitable organization, or is proposing an undertaking that relates to the construction or maintenance of a residence, the registration fee is waived.<sup>58</sup>

Proponents can submit their registration document in either English or French, but translation may be necessary depending on the language capacity of those potentially impacted by the project.<sup>59</sup>

## Are there different procedures for assessing the proposed undertaking?

All projects that have been registered are first subject to a Determination Review. This stage of the EIA process is focused on the assessment of any environmental impacts and the corresponding mitigation measures set out by the proponent,

which seek to reduce the significance of those effects. At the end of the Determination Review, the Minister may order one of the following:

- A Certificate of Determination, which sets out the project's approval with terms and conditions;
- A Comprehensive EIA; or
- The denial of the proposed project, but only with assent from the Lieutenant Governor in Council ("LGIC").<sup>60</sup>

## What are the processes for a Determination Review?

This stage of the EIA is administered by a project manager from the EIA branch, who receives advice from a Technical Review Committee ("TRC").<sup>61</sup> The TRC is made up of project-specific experts from varying government departments and agencies at the federal, provincial and municipal levels.<sup>62</sup> Upon reviewing the initial Registration Document, the TRC typically requires the proponent to submit additional information in order to better inform their assessment. This may require that the proponent conduct additional studies so as to adequately address the questions and concerns raised by the TRC. Only when the Registration Document is finalized and does not require additional information can the Minister make one of the three decisions above.<sup>63</sup>

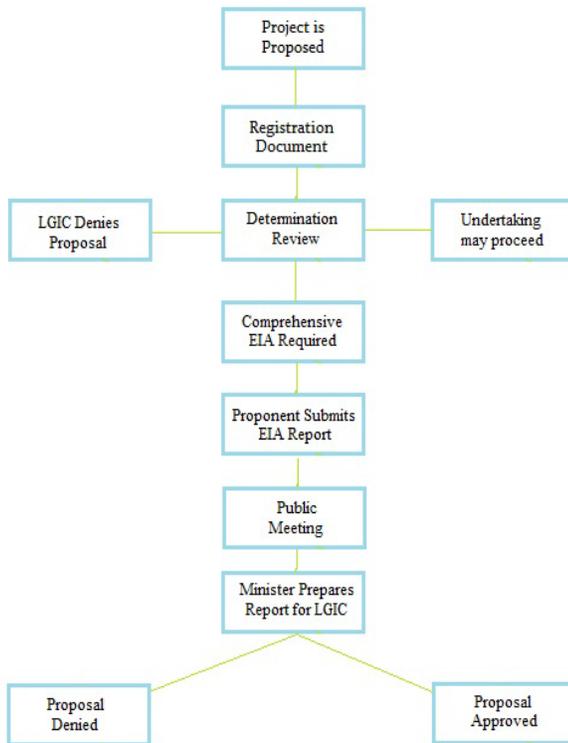
## What are the processes for a Comprehensive EIA?

The TRC must draft guidelines for the Comprehensive EIA, which seek to identify the necessary environmental issues that should be considered in the subsequent assessment of the proposed project.<sup>64</sup> The proponent then provides the Minister with their Terms of Reference, which outline how they intend to respond to the issues addressed in the guidelines.<sup>65</sup> Generally, the proponent must gather information concerning the socioeconomic, biological, and physical aspects of the project and the interactions between the proposed activity and that environment. In assessing this interaction, the proponent's studies must continue to consider the potential impact and options for mitigation, as well as the consideration of alternatives to the undertaking and their methods for ensuring the accuracy in assessing the potential impacts and their significance.<sup>66</sup>

The proponent then provides a draft EIA report to the TRC, which outlines the findings of their studies.<sup>67</sup> The TRC may accept the draft report, if they find that it complies with their guidelines, or may send the report back to the proponent for

revision.<sup>68</sup> Once the EIA report is finalized, a public meeting will be held to address any outstanding public concerns.<sup>69</sup> Such concerns are summarized and provided to the Minister, and, along with all other information that resulted from the Comprehensive EIA, form the basis for the Minister's recommendation to the LGIC concerning the final approval or denial of the proposed undertaking.<sup>70</sup>

## Provincial EIA Process



## Public Participation in Provincial Environmental Assessments

The Provincial Guidelines outline that adequate public participation is necessary for all projects that are subject to review. The degree and frequency of that public participation varies depending on the stage of the assessment and the decisions made by the Minister. These engagement opportunities and the timelines for each stage of the EIA are outlined below.

### How do I find out when an EIA has begun?

When a proponent submits their registration document, a copy of it will be posted on the

Department of Environment and Local Government's online registry. One of the registries contains the documents and corresponding determinations for the Determination Reviews, while the other lists those projects that are subject to a Comprehensive EIA.

Determination Review Registry:  
[www2.gnb.ca/content/gnb/en/departments/elg/environment/content/environmental\\_impactassessments/registrations.html](http://www2.gnb.ca/content/gnb/en/departments/elg/environment/content/environmental_impactassessments/registrations.html)

Comprehensive EIA Registry:  
[www2.gnb.ca/content/gnb/en/departments/elg/environment/content/environmental\\_impactassessments/comprehensive\\_reviews.html](http://www2.gnb.ca/content/gnb/en/departments/elg/environment/content/environmental_impactassessments/comprehensive_reviews.html)

## Determination Review

Once the registration document contains all necessary information and is considered complete, the Minister has 30 days to make their decision at the end of the Determination Review.<sup>71</sup> Where the TRC and the EIA branch typically require the proponent to submit additional information, which can be done multiple times before the registration document is considered adequate, the timeline for this stage of the process is generally longer than just 30 days.<sup>72</sup> The Provincial Guidelines outline that those requests for additional information should also be made within 30 days of the proponent submitting their registration document and that the proponent's responses to those requests should be made within a reasonable time period.<sup>73</sup>

Although the public does not submit their comments on the Registration Document directly to the Minister in a provincial EIA, the proponent must conduct public consultation and prepare a summary report containing their responses to the concerns raised by the public, First Nations, and relevant stakeholders before the information can be considered adequate and the Minister can make their decision.<sup>74</sup> Generally, the proponent will conduct consultation after submitting their initial Registration Document; however, where the proponent is responsible for organising opportunities for public involvement, they may conduct consultation beforehand.<sup>75</sup> Regardless, the proponent should inform the EIA branch of any consultation opportunities so that the public can be notified accordingly.<sup>76</sup>

## Comprehensive EIA

The opportunities for public involvement in a Comprehensive EIA are much more extensive and regimented than those within the Determination Review. There are also several opportunities for public comments to be submitted directly to the

Minister rather than being addressed and summarized by the proponent. Each opportunity for involvement during a Comprehensive EIA is outlined below in chronological order.

### **Opportunity #1: Comment on Draft EIA Guidelines**

Once the Minister has determined that a Comprehensive EIA is necessary, the TRC has 60 days to develop and submit the draft EIA guidelines.<sup>77</sup> Following submission, a 30-day public comment period begins where anyone may provide written response to the Minister on the guidelines.<sup>78</sup> In this way, members of the public have an opportunity to affect the scope of the subsequent review and ensure that their concerns will be considered during the assessment. After closing the comment period, the Minister has another 60 days to consider the public's input and finalize the EIA guidelines.<sup>79</sup>

### **Opportunity #2: Comment on the Proponent's Terms of Reference ("TOR")**

Although not mandatory, the proponent may be required to seek public input on their TOR.<sup>80</sup> In this way, the public can provide input on whether or not the TOR is actually in compliance with the EIA guidelines. The timeline for this participation is likely determined on a case-by-case basis.

### **Opportunity #3: Review of the Proponent's EIA Report**

Although the proponent submits a draft EIA report to the Minister, which may be subject to further revision, the public only becomes involved in the review of the EIA report once the report has been finalized and approved by the Minister. However, once accepted, the Minister must make a copy of the EIA report, along with a summary of its contents, available to the public within 30 days of approval.<sup>81</sup> The summary at the report itself must be made available in both official languages.<sup>82</sup> When these documents are made public, the Minister invites anyone to submit written comments prior to the start of the public hearing.<sup>83</sup> This public comment period must be open for at least 30 days.<sup>84</sup>

### **Opportunity #4: Public Meetings**

Information concerning the time and location of the public meeting(s) is given when the EIA report and its summary are made public.<sup>85</sup> At least one of the public meetings must be conducted near the location of the proposed undertaking, but more can be held if necessary.<sup>86</sup>

The public meetings are led by the Department of Environment and Local Government, but a panel

of independent experts may be asked to chair the meetings when necessary.<sup>87</sup> These meetings should provide an opportunity for interested parties to make comments, raise concerns, and ask questions about the proposed project and the contents of the EIA report.<sup>88</sup> These concerns are not only reflected in a report prepared by the review panel,<sup>89</sup> but a verbatim transcript of the meetings must also be produced following the consultation.<sup>90</sup>

### **Opportunity #5: Additional Comments and Summary of Public Participation**

After the meetings are held, the Minister opens a 15-day public comment period, providing the last opportunity for the public to voice concerns about the proposed project through written submissions.<sup>91</sup> Following this period, the Minister must prepare a summary of public participation, which reflects all previous written submissions and the verbatim transcripts from all public meetings.<sup>92</sup> This summary is not only made public, but is also sent directly to all who have previously provided written comments or participated in the public meetings.<sup>93</sup>

The summary, along with all other documents created throughout the EIA process, is considered by the Minister before the Minister makes their commendation to the LGIC concerning the final approval or denial of the proposed project.<sup>94</sup>

## **Overarching Questions**

### **Does a federal or provincial process apply?**

For both jurisdictions, the statute and regulations set out a list of designated activities or undertakings that will trigger the beginning of the EIA process. For the IAA, the list can be found in the *Physical Activities Regulations*.<sup>95</sup> Provincially, "Schedule A" of the *Environmental Impact Assessment Regulations* outlines the activities that are classified as undertakings and subject to the process.<sup>96</sup> These lists are your primary resources for determining whether or not an EIA will apply to a project and for which jurisdiction.

*Physical Activities Regulations:*  
[www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html](http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html)

*Environmental Impact Assessment Regulations:*  
[laws.gnb.ca/en/ShowPdf/cr/87-83.pdf](http://laws.gnb.ca/en/ShowPdf/cr/87-83.pdf)

## Federal EA in New Brunswick

Since the amendments to *CEAA* in 2012, the only project in New Brunswick that was subject to the federal EIA process was the proposed Energy East Pipeline, which has since abandoned the portion that would include New Brunswick.

Federal Project Registry: [www.ceaa-acee.gc.ca/050/evaluations/exploration?culture=en-CA](http://www.ceaa-acee.gc.ca/050/evaluations/exploration?culture=en-CA)

## Examples of when provincial EIA applies

Since 1997, New Brunswick has reviewed close to 1000 projects through its EIA process. Some examples of current projects being assessed include:

- an iron processing facility;
- construction of a septage pre-treatment facility;
- groundwater production; and
- a cricket farm.

List of all projects registered after 1997: [www2.gnb.ca/content/gnb/en/departments/elg/environnement/content/environmental\\_impactassessment/registrations.html](http://www2.gnb.ca/content/gnb/en/departments/elg/environnement/content/environmental_impactassessment/registrations.html)

Additionally, New Brunswick has been supporting research on Small Modular Reactors (“SMRs”) as prospective sources of nuclear energy.<sup>97</sup> SMRs are regulated by the Canadian Nuclear Safety Commission (“CNSC”), a lifecycle regulator under the *IAA*, but, for reasons concerning the scale and prospective siting of the SMRs currently being developed, SMR developments in the province may not trigger the IA process.<sup>98</sup> Instead, these projects will be subject to both the provincial and the CNSC EIA processes, likely with coordination between the provincial EIA branch and the CNSC.

For more information about the interest in SMRs, see NB Power’s “Powering Growth” brochure: [www.nbpower.com/media/846311/powering-growth-brochure-eng.pdf](http://www.nbpower.com/media/846311/powering-growth-brochure-eng.pdf).

## How do the federal and provincial processes interact?

The *IAA* provides guidance for cooperation between jurisdictions. Generally, the Agency, or the federal Minister if the IA is to be conducted through a review panel, must offer to cooperate with any jurisdiction defined within the Act, so long as they have powers or responsibilities related to the designated project.<sup>99</sup> More specifically, if any part of the IA may be conducted within another jurisdiction, the responsible federal authority may delegate that aspect to the appropriate authority.<sup>100</sup>

Additionally, the federal Minister of Environment and Climate Change may substitute some, or all, of the processes under *IAA* with those of the provincial regime or another appropriate jurisdiction.<sup>101</sup> However, this substitution must be requested by the other jurisdiction, and the public must have an opportunity to comment on the proposed substitution.<sup>102</sup> Comments from the public must be considered by the Minister before approving the substitution.<sup>103</sup> Substitution and delegation do not replace the federal decision-making power; they only alter the process leading to the federal decision. These substitutions may also be subject to additional terms and conditions before the Minister’s approval is given.<sup>104</sup> IAs overseen by a review panel or a lifecycle regulator cannot be substituted.<sup>105</sup>

## Are there funding programs for participation in the EA process?

The federal Agency administers a Participant Funding Program to provide financial assistance to individuals, not-for-profits, and Indigenous groups in order to prepare them for participation at certain stages in the IA process.<sup>106</sup> This is only applicable to reviews conducted by the Agency or a federal review panel and does not include substituted projects.<sup>107</sup>

In order to qualify for funding, you must show that your contribution will add value to the IA process, and you must meet at least one of the following criteria:

- have a direct, local interest in the project or engagement initiative, such as living or owning property in the project area;
- have community knowledge or Indigenous traditional knowledge relevant to the IA or engagement initiative;
- plan to provide expert information relevant to the anticipated effects of the project or engagement initiative; or
- have an interest in the potential impacts of the project on treaty lands, settlement lands, or traditional territories and/or related claims and rights.

For more information on how to apply, visit: [www.canada.ca/en/impact-assessment-agency/services/public-participation/participant-funding-application-environmental-assessment.html](http://www.canada.ca/en/impact-assessment-agency/services/public-participation/participant-funding-application-environmental-assessment.html).

## Can I challenge the decision made as a result of an IA or EA?

It is very difficult to challenge the results of an IA or EA. There is no legislated right to appeal the decision at the federal level. Provincially, it is only

the proponent that has a legislated right of appeal in the context of an EIA.<sup>108</sup> Therefore, the only option for parties other than the proponent to challenge the EIA decisions is to start a judicial review application.

Judicial review is the term used to describe a court's examination of the conduct or decision of a decision-maker such as a board, committee, or Minister to ensure that the conduct or decision was proper in law. Judicial review can only be sought by someone who has "standing",<sup>109</sup> which can require different kinds of connection to the issue in different circumstances.

If you wish to consider a judicial review proceeding, you should consult a lawyer who can explain the process in more detail and provide appropriate guidance.

### Do the processes meet the Crown's duty to consult?

The Government of Canada and the Government of New Brunswick each have a duty to consult Indigenous peoples before engaging in activities that could threaten constitutionally protected Aboriginal or treaty rights.

Canada's courts have set out requirements for the duty to consult in a number of judicial decisions. The duty is defined by the common law (the law established through judicial decision-making) rather than by government statute or regulation.

Under Canada's constitutional common law, the duty to consult is triggered when the federal government or a provincial or territorial government knows about an Aboriginal claim or right and is considering some kind of action that could affect that Aboriginal claim or right negatively. The issuance of IA or EIA approvals is government action that triggers the duty to consult.

Section 35 of Canada's *Constitution Act, 1982* protects Aboriginal and treaty rights that are held by Indigenous peoples in Canada. The Crown's duty to consult flows from that constitutional protection, which means that it is a constitutional duty that exists over and above any public participation or Indigenous consultation processes established in IA or EIA regimes.

Indigenous participation in the provincial EIA process will not necessarily meet the duty to consult, as the EIA process is designed to assess proposed projects' impacts on the environment, whereas the duty to consult requires the government to consider proposed projects' impacts on Indigenous rights.

At the federal level, new processes for Indigenous participation and consultation now included in the *IAA* reflect much of the common law on the duty to consult and will likely make it easier for federal departments and agencies to meet their constitutional duties by following the IA process.

The scope of the Crown's duty to consult varies on a case-by-case basis and is informed by the strength of the Aboriginal claim or right at stake as well as the prospect of harm. Ultimately, although consulting with Indigenous peoples using the frameworks or timelines of IA or EIA processes may sometimes fulfill the duty to consult, it will not necessarily do so. The scope of the duty is unique in every case, and there is no "one size fits all" approach.

## Definitions

### *Impact Assessment Act, Section 2*

**Agency:** means the Impact Assessment Agency.

**Designated Project:** means one or more physical activities that are carried out in Canada or on federal lands and are designated by the *Physical Activities Regulations* or designated in an order made by the federal Minister under subsection 9(1) of the *IAA*.

**Effects:** means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive or negative consequences of these changes.

**Environment:** means the components of the Earth, and includes

- a) land, water and air, including all layers of the atmosphere;
- b) all organic and inorganic matter and living organisms; and
- c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

**Follow-up Program:** means a program for verifying the accuracy of the impact assessment of a designated project and determining the effectiveness of any mitigation measures.

**Impact Assessment:** means an assessment of the effect of designated project that is conducted in accordance with the *IAA*.

**Indigenous Peoples of Canada** has the meaning assigned by the definition of *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.

**Proponent:** means the person or entity – federal authority, government or body – that proposes the carrying out of, or carries out, a designated project.

**Sustainability:** means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.

### ***Clean Environment Act, Section 1***

**Environment:** means the air, water or soil.

## For more information

Please visit East Coast Environmental Law at [www.ecelaw.ca](http://www.ecelaw.ca) to access other legal resources and our free online Information Library. To find the full text of the federal and provincial laws detailed in this Summary Series, go to:

[\*Impact Assessment Act  
Physical Activities Regulations  
Information and Management of Time  
Limits Regulations\*](#)

[\*New Brunswick Clean Environment Act  
Environmental Impact Assessment  
Regulations\*](#)

## Disclaimer

Please note that this volume cannot cover all environmental impact assessment issues or all options available to you, nor should it be interpreted as legal advice. While East Coast Environmental Law works hard to update its materials, some information contained in this Summary Series may become out-dated as statutes, regulations, and policies are updated and amended.

## East Coast Environmental Law Association

This Summary Series was developed by the East Coast Environmental Law Association, an environmental law charity based in Halifax, Nova Scotia that engages in public-interest environmental law throughout Atlantic Canada.

The East Coast Environmental Law Association responds to community inquiries, carries out legal and policy research, and presents educational resources and opportunities to increase public awareness of environmental laws throughout Atlantic Canada. Our objective is to build capacity in the public and among legal practitioners so that we can work together to ensure that environmental laws are effectively used and strengthened.

## Support

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## The Environmental Law Summary Series

The Environmental Law Summary Series was one of the first public legal education activities undertaken by East Coast Environmental Law. Each volume of the Summary Series serves as a quick reference resource. The volumes are topical and generally address an area of interest or concern raised by communities or organizations.

Following is a list of East Coast Environmental Law's summary series documents:

- Volume 1 (2007), Overview of Environmental Legislation (Nova Scotia)
- Volume 2 (2008), Enforcing Environmental Laws (Nova Scotia)
- Volume 3 (2009), Bringing a Private Prosecution
- Volume 4 (2010), Who Owns the Coast (Nova Scotia) [updated, see Volume 10]
- Volume 5 (2010), Environmental Law for Land and Sea (Prince Edward Island)
- Volume 6 (2010), Environmental Law for Land and Sea (New Brunswick)
- Volume 7 (2011), Environmental Assessment Legal Toolkit (Prince Edward Island)
- Volume 8 (2011), Environmental Assessment: A Legal Toolkit for Nova Scotians
- Volume 9 (2018), The PEI Water Act (Prince Edward Island)
- Volume 10 (2018), Who Owns the Coast (Nova Scotia)



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## References

- <sup>1</sup> *Canadian Environmental Assessment Act*, SC 2019, c 28 at s 52(4).
- <sup>2</sup> *Impact Assessment Act*, SC 2019, c 28 at s 6(1)(b) [“IAA”].
- <sup>3</sup> IAA, *supra* note 2 at ss 22(1), 36(2), 63.
- <sup>4</sup> *Ibid* at Preamble and s 6(1)(h).
- <sup>5</sup> *Physical Activities Regulations*, SOR/2019-285; IAA, *supra* note 2 at s 2, “Designated Project” [“Physical Activities Regulations”].
- <sup>6</sup> IAA, *supra* note 2 at s 9(1).
- <sup>7</sup> *Ibid* at s 10.
- <sup>8</sup> *Information and Management of Time Limits Regulations*, SOR/2019-283.
- <sup>9</sup> IAA, *supra* note 2 at s 15(1).
- <sup>10</sup> *Ibid* at s 18(1).
- <sup>11</sup> *Ibid* at s 11.
- <sup>12</sup> The lifecycle regulators (formerly known as “Responsible Authorities”) are now the (1) Canadian Nuclear Safety Commission, (2) Canada Energy Regulator (formerly the National Energy Board or “NEB”), (3) Canada-Newfoundland and Labrador Offshore Petroleum Board, and (4) Canada-Nova Scotia Offshore Petroleum Board.
- <sup>13</sup> *Ibid* at s 13(2).
- <sup>14</sup> *Ibid* at s 13(1).
- <sup>15</sup> *Ibid* at s 12.
- <sup>16</sup> *Ibid*.
- <sup>17</sup> *Ibid* at s 14(1).
- <sup>18</sup> *Ibid* at s 15(1).
- <sup>19</sup> *Ibid* at s 16(1).
- <sup>20</sup> *Ibid* at s 16(2).
- <sup>21</sup> *Ibid* at s 18(1)(b).
- <sup>22</sup> *Ibid* at s 18(1)(a).
- <sup>23</sup> *Ibid* at s 19(1).
- <sup>24</sup> *Ibid* at s 18(2).
- <sup>25</sup> *Ibid* at s 36(1).
- <sup>26</sup> *Ibid* at s 19 (3).
- <sup>27</sup> *Ibid* at ss 28(2), (3), (3.1), (3.2).
- <sup>28</sup> *Ibid*, ss 60(1).
- <sup>29</sup> *Ibid* at s 27.
- <sup>30</sup> *Ibid* at s 28(1).
- <sup>31</sup> *Ibid* at s 41(1).
- <sup>32</sup> *Ibid* at s 51(1)(c).
- <sup>33</sup> *Ibid* at s 37(2)
- <sup>34</sup> *Ibid* at ss 51(1)(d), 55.1(1).
- <sup>35</sup> *Ibid* at ss 53 (1), (2).
- <sup>36</sup> *Ibid* at s 51(1)(d).
- <sup>37</sup> *Ibid* at s 43.
- <sup>38</sup> *Ibid* at ss 44(1), 47(1).
- <sup>39</sup> *Ibid* at ss 44(3)-(4), 47(3)-(4).
- <sup>40</sup> *Ibid* at ss 60, 62.
- <sup>41</sup> *Ibid* at s 63.
- <sup>42</sup> *Ibid* at ss 60, 62.
- <sup>43</sup> *Ibid* at ss 65(1)-(4), 66.
- <sup>44</sup> *Ibid* at s 65(1)(b), (2).
- <sup>45</sup> *Ibid* at 105(2), 156(2)(e); Government of Canada, *Impact Assessment Process Overview*, “Phase 5” (8 November 2017), online: <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview/phase5.html>> [“IA Overview”].
- <sup>46</sup> *Ibid*.
- <sup>47</sup> *Ibid*.
- <sup>48</sup> *Ibid*.
- <sup>49</sup> IAA, *supra* note 2 at s 68(1).
- <sup>50</sup> *Ibid* at s 68(2).
- <sup>51</sup> *Ibid* at s 68(4)
- <sup>52</sup> *Ibid* at ss 69(1)-(2).
- <sup>53</sup> *Environmental Impact Assessment Regulation*, NB Reg 87-83 at ss 3(1), 4, 5(1) [“NB Regulations”].
- <sup>54</sup> *Ibid* at s 3(2.)
- <sup>55</sup> *Ibid* at s 6(1).
- <sup>56</sup> Department of Environment and Local Government, *A Guide to Environmental Impact Assessment in New Brunswick*, (January 2018) at 2, online: <<https://www2.gnb.ca/content/dam/gnb/Departments/env/pdf/EIA-GuideEnvironmentalImpactAssessment.pdf>> [“Provincial Guidelines”].
- <sup>57</sup> NB Regulations, *supra* note 53 at ss 5(3), 5.1.
- <sup>58</sup> *Ibid* at s 5.2.
- <sup>59</sup> Provincial Guidelines, *supra* note 56 at 2.

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- <sup>60</sup> *Ibid* at 3, elaborating on NB Regulations, *supra* note 53 at s 6(3).
- <sup>61</sup> Provincial Guidelines, *supra* note 56 at 2.
- <sup>62</sup> *Ibid*.
- <sup>63</sup> *Ibid* at 2.
- <sup>64</sup> NB Regulations, *supra* note 53 at ss 9(1)(a), 9(2).
- <sup>65</sup> *Ibid* at s 10(1).
- <sup>66</sup> Provincial Guidelines, *supra* note 56 at 4.
- <sup>67</sup> NB Regulations, *supra* note 53 at s 11(1).
- <sup>68</sup> *Ibid* at ss 11(2)-(4).
- <sup>69</sup> *Ibid* at s 14.
- <sup>70</sup> *Ibid* at ss 16(1)-(2).
- <sup>71</sup> *Ibid* at s 6(3).
- <sup>72</sup> Provincial Guidelines, *supra* note 56 at 3.
- <sup>73</sup> *Ibid*.
- <sup>74</sup> *Ibid*, referencing NB Regulations, *supra* note 53 at s 6(1).
- <sup>75</sup> Provincial Guidelines, *supra* note 56 at 24.
- <sup>76</sup> *Ibid*.
- <sup>77</sup> NB Regulations, *supra* note 53 at s 9(1).
- <sup>78</sup> *Ibid* at s 9(1)(d).
- <sup>79</sup> *Ibid* at s 9(2).
- <sup>80</sup> Provincial Guidelines, *supra* note 56 at 4.
- <sup>81</sup> NB Regulations, *supra* note 53 at ss 12(1)-(2), 13(a).
- <sup>82</sup> *Ibid* at ss 12(1)-(2)(a).
- <sup>83</sup> *Ibid* at s 13(d).
- <sup>84</sup> *Ibid* at s 13(d)(ii).
- <sup>85</sup> *Ibid* at s 13(d)(i).
- <sup>86</sup> Provincial Guidelines, *supra* note 56 at 5.
- <sup>87</sup> *Ibid*, elaborating on NB Regulations, *supra* note 53 at s 14.
- <sup>88</sup> Provincial Guidelines, *supra* note 56 at 5.
- <sup>89</sup> *Ibid*.
- <sup>90</sup> NB Regulations, *supra* note 53 at s 14.
- <sup>91</sup> *Ibid* at s 15(1).
- <sup>92</sup> *Ibid* at s 15(2).
- <sup>93</sup> *Ibid* at s 15(4).
- <sup>94</sup> *Ibid* at ss 16(1)-(2), elaborated by Provincial Guidelines, *supra* note 56, at 5-6.
- <sup>95</sup> *Physical Activities Regulations*, *supra* note 5.
- <sup>96</sup> NB Regulations, *supra* note 53 at "Schedule A".
- <sup>97</sup> NB Power, *Powering Growth: Building New Brunswick's Energy Future*, online: <<https://www.nbpower.com/media/846311/powering-growth-brochure-eng.pdf>>
- <sup>98</sup> *Physical Activities Regulations*, *supra* note 5.
- <sup>99</sup> *IAA*, *supra* note 2 at s 21.
- <sup>100</sup> *Ibid* at s 29.
- <sup>101</sup> *Ibid* at s 31(1).
- <sup>102</sup> *Ibid*.
- <sup>103</sup> *Ibid* at ss 31(1)-(3).
- <sup>104</sup> *Ibid* at ss 33,34.
- <sup>105</sup> *Ibid* at ss 32(a)-(b). Additionally, the Minister cannot approve the substitution of a process if the activities are regulated under the *Canada Oil and Gas Operations Act*, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, or the *Canada Transportation Act*.
- <sup>106</sup> *Ibid* at s 75.
- <sup>107</sup> *Ibid* at s 75(2).
- <sup>108</sup> *Clean Environment Act*, RSNB 1973, c C-6 at s 14(1).
- <sup>109</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 36.