Supporting Timely Decision Making for Major Projects

Comments submitted to the Government of Canada

Robert Lyman 6/4/26

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These comments were originally submitted to the government by Robert Lyman, as an individual. His text has been formatted in a report form for the public with no other changes, for the purpose of enlightening the public to loopholes and barriers within existing legislation, that may not be evident to the casual reader or citizen. Lyman is a retired energy economist, former federal public servant and diplomat with deep experience on the related files. Friends of Science Society is publishing these comments to provide broader reach of this information to the public at large.

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SUPPORTING TIMELY-DECISION-MAKING FOR MAJOR PROJECTS

EXECUTIVE SUMMARY

The Government of Canada recently published a discussion paper entitled, "*Getting Major Projects Built in Canada – Discussion Paper on Proposed Legislative, Regulatory, and Policy Reforms*".[1] The stated objective of the proposed reforms is to allow the federal government to make decisions on major projects within two years. The reforms will apply to reviews of major projects that have already been designated by the Major Projects Office as being in the national interest. One year would be allowed for regulatory review and one year for the government to make a decision.

More efficient regulatory review of project proposals is badly needed. Over the past decade the time required to complete reviews of this nature often took at least four years and sometimes well over ten years. While reform is needed, the proposed ones are doomed to fail. There are too many factors that are beyond the control of the regulatory bodies that would be conducting the reviews.

Much of this is due to the requirements of the *Impact Assessment Act*. The Act specifies that a review of a project must assess 23 factors, including notably the anticipated changes to the environment; the health, social and economic effects; the effects of potential accidents; mitigation measures; impacts on indigenous groups; and the purpose and need for the project. It also must assess the extent to which the effects of the proposed project may hinder or contribute to the Government of Canada's ability to meet its environmental commitments in respect of climate change. Gathering evidence and hearing testimony on all these subjects is necessarily time consuming.

The duration of reviews also has lengthened the time needed to conduct public hearings. In the pre-2015 period in Canada, public participation in major project reviews used a "directly and adversely affected" test to decide who might take part in hearings or file a Statement of Concern. Now the *Impact Assessment Act* explicitly provides an opportunity for any member of the public to participate in each phase of an impact

[1] https://www.canada.ca/en/one-canadian-economy/services/simplifying-canada-process/engagement-supporting-timely-decision-making/getting-major-projects-built-canada-discussion-paper-proposed-legislative-regulatory-policy-reforms.html

assessment. This has opened the door to highly-organized campaigns by environmentalist and Indigenous groups to swamp the public hearing process.

Imposing an arbitrary deadline on the duration of a project review process flies directly in the face of Canadian laws that grant regulatory tribunals broad discretion to govern their hearings, as circumscribed by their statutory mandates and common law principles of procedural fairness. Regulatory bodies cannot arbitrarily refuse to consider relevant information or limit the duration of testimony in such a way as to deprive participants of their right to be heard and to respond to the evidence of opposing parties. If the federal regulatory body conducting the impact assessment or hearing the case for a project were to deprive participants of their right, the Federal Court could quash the hearing. The main barriers to sharply reducing the time spent on impact assessments are thus the *Impact Assessment Act* itself and the current statutory framework governing the rules of evidence.

The reforms proposed by the government may slightly accelerate the review and approval of so-called "clean energy" projects, meaning those that involve solar and wind energy, electricity storage, power transmission, carbon dioxide capture and storage and so on. They are unlikely, however, to hasten the review and approval of oil and gas projects. In the case of a proposed oil pipeline from Alberta to the northern British Columbia coast, such a project would be further barred by the legislated moratorium on oil tanker traffic in that region.

The government should be candid in explaining this to the public. It seeks timely approvals of only those projects that support its climate policy and other environmental goals, not those that hasten the economic development and transportation of hydrocarbons.

SUPPORTING TIMELY-DECISION-MAKING FOR MAJOR PROJECTS

Comments submitted by Robert Lyman.

The Government of Canada recently published a discussion paper entitled, "*Getting Major Projects Built in Canada – Discussion Paper on Proposed Legislative, Regulatory, and Policy Reforms*". In its related statement on engagement, the government invited comments, but restricted the questions asked to only those related to engagement with Indigenous peoples.

I submit that the questions of public interest raised by the discussion paper extend far beyond those that only affect Indigenous peoples.

General

The stated objective of the proposed reforms is to allow the federal government to make decisions on major projects within two years. The beginning and end of the two-year period are not specified. One can only assume that it starts with the submission by a private sector sponsor to a responsible federal government regulatory authority of a complete application for the certification and/or other approval to proceed with a project. **The reforms will apply to reviews of major projects that have already been designated by the Major Projects Office as being in the national interest.** This, however, is not stated in the discussion paper. It is incumbent on the federal government to make this as clear as possible.

It should also be noted that the two-year period in question is one in which the federal government must complete a regulatory review of the many economic, technical, social and environmental issues raised by the project proposal. This includes the issues associated with the project's routing. The government also must complete the review of the policy issues, if any, raised by the project, including notably those raised by various social, economic and environmental policy commitments and the purely political issues that usually arise.

The need for efficient regulatory review of project proposals is indeed great. Over the past decade the time required to complete reviews of this nature often took at least four years and sometimes well over ten years. This is especially the case for federal government review of applications to build oil pipelines that transit British Columbia. The former National Energy Board's review of the application by Enbridge to build the Northern Gateway pipeline took four years to complete, with the review panel holding 35 public information sessions and holding public hearings over 180 days. The regulatory review and approval process for the Trans Mountain Expansion Project took about six years, from 2013 to 2019. Reviews of mining projects by the Canadian Environmental Assessment Agency have sometimes taken longer. Viewed in this context, the two-year goal is ambitious indeed.

The real question is whether or not the goal is even feasible.

Federal Review and Decision-Making in no More Than One Year

The proposal to impose a one-year deadline on federal assessment and permit reviews is simply not feasible. There are too many factors that are beyond the control of the regulatory bodies that would be conducting the reviews.

Much of this is due to the requirements of the *Impact Assessment Act*. The federal process under the Act includes three pre-decision phases. These are planning (preparation of the initial project description and preparation by the regulator of a summary of the issues to be examined); impact assessment (submission of an impact statement, gathering of evidence, including holding of consultations, and holding of public hearings); and preparation by the regulator of an impact assessment. The decision phase includes notably submission of a report to the responsible Minister, preparation of a decision document, and decisions by the Minister and sometimes by the federal Cabinet. The time required to complete these stages has been lengthened in recent years.

The Act specifies that a review of a project must assess 23 factors, including notably the anticipated changes to the environment; the health, social and economic effects; the effects of potential accidents; mitigation measures; impacts on indigenous groups; and the purpose and need for the project. It also must assess the extent to which the effects of the proposed project may hinder or contribute to the Government of Canada's ability to meet its environmental commitments in respect of climate change. Gathering evidence and hearing testimony on all these subjects is necessarily time consuming.

Perhaps the single most important factor in the length of this process, however, has been the duration of time needed to conduct public hearings. In the pre-2015 period in Canada, public participation in major project reviews used a "directly and adversely affected" test to decide who might take part in hearings or file a Statement of Concern. Now the *Impact Assessment Act* explicitly provides an opportunity for any member of the public to participate in each phase of an impact assessment.

This has opened the door to highly-organized campaigns by environmentalist and Indigenous groups to swamp the public hearing process. In the past, these groups have slowed down regulatory review of pipelines in Canada using several coordinated, multi-pronged approaches to challenge the Canada Energy Regulator or Impact Assessment Agency of Canada processes. Organizations register as formal intervenors during hearings not only to present scientific evidence, but also to file lengthy interrogatories, cross-examine witnesses, and challenge the scope of assessment. They organize grassroots campaigns, often with hundreds of participants, to flood the regulatory processes with thousands of public comments. They mount petition campaigns and aggressively seek media attention claiming adverse effects of the projects, including increased risks to ecosystems, wildlife and water. If and when they are not successful in altering the regulatory agency's approach or decisions, they sometimes file requests for judicial reviews and lawsuits arguing that regulators failed in their legal duties, such as properly consulting indigenous communities or fully calculating a pipeline's downstream climate impacts. Many of these organizations are ideologically committed to blocking the construction of any project that may increase greenhouse gas emissions. They are well-funded not only by foundations but also by federal and provincial governments. Some are inexorably opposed to any reforms that will accelerate the regulatory review and approval of projects of which they disapprove.

Imposing an arbitrary deadline on the duration of a project review process flies directly in the face of Canadian laws that grant regulatory tribunals broad discretion to govern their hearings, as circumscribed by their statutory mandates and common law principles of procedural fairness. Regulatory bodies have some discretion in this regard but cannot arbitrarily refuse to consider relevant information or limit the duration of testimony in such a way as to deprive participants of their right to be heard and to respond to the evidence of opposing parties. If the federal regulatory body conducting the impact assessment or hearing the case for a project were to deprive participants of their right, the Federal Court could quash the hearing.

The main barriers to sharply reducing the time spent on impact assessments are thus the *Impact Assessment Act* itself and the current statutory framework governing the rules of evidence.

One Crown Consultation Process

The proposal to create within the Impact Assessment Agency a Crown Consultation Hub is, in principle, a highly welcome development. The federal government, however, must steer away from an overly expansive interpretation of the rights of Indigenous peoples to be consulted.

The United Nations Declaration on the rights of Indigenous Peoples (UNDRIP) provisions relating to consultations with Indigenous groups are broadly misunderstood, including by many people in decision-making roles in government. As retired lawyer Andrew Roman has explained, Article 19 of the Declaration requires nothing more than good-faith consultation/cooperation so that indigenous peoples' concerns and interests are taken into account, with the goal of obtaining their agreement through consultation, if possible. **This article does not, as written, require consent as a condition of approving a new project or, more specifically, pipeline construction and operation.** The Supreme Court of Canada has confirmed on a number of occasions that UNDRIP does not give any Indigenous group the right to veto the decision of an elected government of Canada on a matter of public interest.

One Project Decision

The government proposes to make legislative changes for certain projects listed under the *Physical Activities Regulations* of the *Impact Assessment Act* to be subject to one approval by the Minister of Environment, Climate Change and Nature. This seems welcome in principle. Care should be taken, however to ensure that environmental considerations will not trump all other public policy considerations that are normally addressed by line departments. The legislative amendments should be drafted in such a way as to ensure that this is not the result, ideally by requiring the concurrence of the other Ministers whose mandates are also affected.

Single Project Authority

It is highly welcome that the Canada Energy Regulator (CER) and the Canadian Nuclear Safety Commission (CNSC) be authorized to make independent decisions not subject to review and acceptance by the Minister of the Environment, Climate Change and Nature. Those organizations have the technical competence to deal

with the issues independently and are required by their own legislation to take environmental considerations fully into account.

The discussion paper proposes that the Governor-in-Council make the decision about whether a pipeline project with a lengthy route overseen by the CER is in the public interest at “the beginning of the decision making process” before the CER completes its review of the routing details. This may pose serious problems in practice. At that point, a pipeline proposal is little more than a vague idea, without sufficient details to judge most of its site-specific economic or environmental impacts. Empowering a decision at this early stage invites the federal Cabinet to approve or disapprove a major pipeline proposal purely on political grounds. Since the approval of the *Impact Assessment Act*, it has been clear that politics, rather than the objective assessment of public interest considerations, will continue to weigh in pipeline-related decisions; however, they need not dominate.

Enabling Economic Zones Through Regional Impact Assessments

The proposal that the federal government be given authority by regulation or legislation to create Federal Economic Zones, thus removing the need for separate project reviews, is in principle an excellent way to simplify and accelerate the review of projects. For that reason alone, it will be vehemently opposed by those that see the regulatory process as a way to delay projects so as to discourage proponents from proceeding. It remains to be seen whether this can be achieved without the amendment or repeal of the *Impact Assessment Act.*

There may be significant practical and political difficulties in defining the boundaries of the zones.

Streamlined and Efficient Regulatory Environment

Narrowing the types of activities that require navigation permits is long overdue. For many years, since the repeal of the *Navigable Waters Protection Act*, the scope of federal regulation of navigable waters has been the subject of debate, with the stringency of federal regulation and the scope of the waters subject to regulation changed up or down in confusing ways. The fundamental debate has concerned whether the purpose of the regulation was to protect navigation or to be another tool allowing federal government environmental regulation of all waters. The present act essentially covers all waters in Canada, which can be used as a broad weapon against resource development and transportation, as well as placing heavy demands on Transport Canada’s resources. The federal government should be free to focus protection and resources on the navigable waters that need it most.

Similar considerations apply to the regulation of fish habitat.

Other Observations

The discussion paper states that the rationale for the proposed reforms is to support timely decision making with respect to major projects. The major barriers to efficient and favourable review of oil and gas projects, including notably an oil pipeline from Alberta to the west coast, are the provisions of the *Impact Assessment Act* and the *Canada Energy Regulator Act*. These statutes require that the regulator and the federal Cabinet decide on projects based on an assessment of whether they will advance or retard the achievement of the government's environmental goals, and specifically the attainment of net-zero greenhouse gas emissions. That consideration, and the use that will be made of it by many groups that intervene, virtually guarantees that no oil pipeline will be approved. The obstacles to a new west coast oil pipeline also include the legislated moratorium on oil tanker traffic off the northern coast of British Columbia.

The government should be candid in presenting the proposed changes to the regulatory process as ones that will accelerate the consideration and probable approval only of so-called clean energy projects, even as the provisions of the *Impact Assessment Act* and *Canada Energy Regulator Act* continue effectively to bar faster consideration and approval of oil and gas projects.

About Robert Lyman

Robert Lyman is a retired energy economist who previously served for 37 years in the Canadian federal government, working primarily in the fields of energy, environmental and transport policies. After retiring, he served as a Principal in the ENTRANS Policy Research Group, offering policy research and analysis to federal and provincial governments. He resides in Ottawa.