



Guidance for interpreting “substantially begun” under subsection 9(7) and “substantially begin” under subsections 70(1) and 70(3) of the Impact Assessment Act

Background

The *Impact Assessment Act* (IAA) includes references to “substantially begun” and “substantially begin” in relation to the power of the Minister of the Environment and Climate Change (the Minister) to designate a physical activity and to establish the decision statement’s expiration, respectively. These terms are not defined in the IAA.

Objective

The objective of this document is to outline considerations that the Impact Assessment Agency of Canada (IAAC) would consider when evaluating and developing its advice to the Minister regarding whether:

- a physical activity¹ has “substantially begun”; or
- a designated project² will “substantially begin” under the IAA.

While this document is meant to assist IAAC in making recommendations to the Minister, it is not intended to be either exhaustive or restrictive. As such, nothing in this document should be considered to, in any way, fetter the Minister’s discretion under the IAA.

¹ “Physical activity” for the purposes of subsection 9(1) of the IAA.

² “Designated project” for the purposes of subsections 70(1) and 70(3) of the IAA.



Legislative context

Subsection 9(1) provides the Minister the authority to designate a physical activity that is not prescribed by the *Physical Activities Regulations* if, in the Minister's opinion, either:

- the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects; or
- public concerns related to those effects warrant the designation.

Paragraph 9(7)(a) limits the Minister's power under subsection 9(1) by specifying that the Minister must not make the designation if the carrying out of the physical activity has *substantially begun*.³

Subsection 70(1) states that the Minister must, after considering any views provided by the proponent on the matter, establish the period within which the proponent must *substantially begin* to carry out the designated project. Subsection 70(3) states that if the proponent does not *substantially begin* to carry out the designated project within the period established by the Minister, or any extension of that period, the decision statement expires on the last day of that period or any extension of that period.

Comparison to similar legislative provisions

This guidance provides an interpretation of the considerations of whether a physical activity or designated project has “substantially” begun. It is not to be applied to, and is materially different from, the provision “began carrying out the project” used in section 185.1(2)(a) of the IAA transitional provisions. The qualifier “substantially” is absent from section 185 and a higher standard is to be met for section 9(7) and section 70. Likewise, interpretations of other similar terms in the IAA (e.g. “begin,” “began,” “begun” and “substantial”) are not provided through this guidance.

A similar limitation on the Minister's power to designate a physical activity also existed under the *Canadian Environmental Assessment Act, 2012*, where the carrying out of the physical activity had begun and, as a result, the environment had been altered. The introduction of the qualifier “substantially” in the drafting of the IAA also suggests a policy intent to move to a higher standard with respect to this limitation under the IAA. Although the reference to alteration of the environment is no longer explicit under the IAA, this remains an important consideration in light of the purposes and scope of the IAA, as described below.

³ Subsection 9(7) also limits the Minister's authority under subsection 9(1) when a federal authority has exercised a power or performed a duty or function conferred on it under any other Act of Parliament other than the IAA that could permit the physical activity to be carried out, in whole or in part.



Designation of a physical activity

In providing advice to the Minister regarding the exercise of authority under section 9 of the IAA, IAAC must consider whether the carrying out of the physical activity has “substantially begun.” As that term is not defined in the IAA, it should be interpreted in keeping with its ordinary meaning⁴ within the scheme and purpose of the IAA. Interpretations of the term should also take into account the factual record, including information from all relevant sources (e.g., the designation requester, the proponent, federal authorities, provincial departments or ministries, Indigenous groups, the public and other relevant parties). IAAC can conduct research or request the additional information it requires from relevant sources, including from the proponent.⁵

Importantly, this evaluation will be made on a case-by-case basis in light of all relevant facts related to the physical activity that is the object of the designation request.

IAAC’s evaluation of whether the carrying out of the physical activity has “substantially begun” will focus on its material progress. This evaluation will primarily be informed by the extent to which physical undertakings have been carried out to date and consider the following considerations, which are informed by the purposes and scope of the IAA:

- **Direct linkage to the physical activity:**⁶ the physical undertakings that took place, or that are taking place, are directly linked to the physical activity and would not have occurred without the physical activity (e.g., site clearing or remediation that may be linked to other potential projects would not meet this consideration);
- **Permanence:** the physical undertakings that took place, or that are taking place, amount to an essential part of the physical activity that is long-lasting (e.g., present throughout the operation phase), as opposed to temporary;
- **Substantive landscape alteration:** the physical undertakings have physically affected the landscape at the project site in a substantive manner (e.g., extensive clearing of vegetation, land graded for construction of project components); and,
- **Duration:** the physical undertakings that took place, or that are taking place, occurred over an extended period of time (e.g., several weeks of construction days).

The above considerations should not be considered exhaustive. IAAC’s evaluation may include additional considerations reflecting the wide range of projects that may be assessed under the IAA.

⁴ Substantial: *of considerable importance, size, or worth; concerning the essentials of something; real and tangible. (Oxford English Dictionary)*

⁵ IAAC may require any person or entity to provide information with respect to any physical activity that can be designated under subsection 9(1), as per subsection 9(3).

⁶ A direct linkage to the physical activity is a mandatory consideration in the evaluation of whether a physical activity has “substantially begun.”



Decision statement expiration

The functional interpretation of whether the carrying out of a physical activity or a designated project has substantially begun is similar whether applied to a designation request or to the expiration of a decision statement.

In addition to establishing the period within which the project must “substantially begin” to avoid the expiry decision, the decision statement will include a project-specific definition of what constitutes “substantially begin.” There will be an opportunity for public comment on the proposed definition during the public comment period of the proposed conditions. In addition to the considerations described above, the definition will reflect details available through the project description. The project-specific definition for “substantially begin” will allow for a clearer evaluation framework for IAAC in developing its advice to the Minister. The definition will draw from anticipated physical activities that are listed in the impact assessment report, particularly what elements would constitute an important step in the development of the overall designated project. IAAC will include a recommendation to the Minister for the definition of “substantially begin” that would be included in the decision statement, along with a recommended period of time within which the proponent must substantially begin the designated project, the description of the designated project, and the recommended conditions for inclusion.

For enforcement purposes, it is important that the definition of “substantially begin” be articulated in such a manner that it can be practically applied (i.e., prescriptive and sufficiently detailed). The process for extending the period within which the proponent must substantially begin to carry out the designated project is available through IAAC’s [Compliance Promotion and Enforcement Unit](#).