



Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
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Sent via email

20 July, 2016

Re: Comments on the 23 June 2016 consultation document, “Review of environmental assessment processes: expert panel draft terms of reference”

To whom it may concern:

We are pleased to submit comments on the draft Terms of Reference (TOR) for the Expert Panel¹ that the Minister of Environment and Climate Change (the Minister) has committed to establish to review environmental assessment (EA) processes associated with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

We provide this input in our respective capacities as Wildlife Conservation Society (WCS) Canada conservation scientists familiar with provincial, northern and federal EA processes in policy and practice. We are all knowledgeable about impacts of large projects and cumulative impacts, particularly in remote regions, and have reviewed numerous EA documents. One of us has testified as an expert in front of a Joint Review Panel. In addition, we have particular experience serving as members of expert advisory panels, which has relevance for some of the practical aspects of this undertaking.

We applaud the initiation of a much-needed review of federal environmental assessment processes, as well as the decision to engage an independent Expert Panel to undertake the first stage of what will be a challenging process. We do, however, have some important concerns about the TOR for this Panel as they are currently drafted that relate to the scope of the review, the mandate of the Panel, and the process itself. Specifically, we have concerns about the constrained mandate of the Panel, the lack of coordination with parallel reviews of northern EA processes, expectations and processes regarding consultation and engagement with outside parties, and the adequacy of support for the Panel.

We discuss each of our concerns in turn, and include specific recommendations for amending the TOR.

¹ <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/eap-draft-terms-reference/draft-terms-reference-ea.html>

1) The mandate of the Panel should not be constrained by a limited definition of Environmental Assessment as currently embedded in CEAA 2012

Federal EA in Canada, particularly CEAA 2012, has lost its credibility and effectiveness. Limited to addressing impacts of selected individual project components in isolation, restricted in scope, and severely lacking in opportunities for indigenous and public participation as well as independent scientific review, it has clearly lost the public trust. Many Indigenous, stakeholder and expert groups have repeatedly raised these concerns, and pressed for serious improvements. Accordingly, in his mandate letter to the Minister of Environment and Climate Change, Prime Minister Trudeau has acknowledged the “immediate” need to “review Canada’s environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes”.

Even beyond CEAA, significant scholarship and experience from 40+ years of environmental assessment practice has revealed many limitations. Therefore, developing a visionary new approach in keeping with the desire for a next-generation EA will necessitate exploration by the Panel of strategic-level solutions to strengthen EA law and practice. This will be required to address complex issues such as Indigenous rights and interests, cumulative effects of multiple projects and concomitant impacts of climate change. This will be required to give careful consideration to the best options for delivering lasting well-being that is fairly distributed while avoiding adverse effects. To be more deliberative and democratic, environmental assessment must become a process through which the public and experts are engaged on deliberations and decisions about significant projects or undertakings. This would also apply to strategic-level policies, plans and programmes as well as projects -- in effect, becoming a public vehicle for environmental governance.

The draft TOR document appears, in the first paragraph of the Context, to continue to view EA only as a process of addressing individual projects, one by one. This is a limited definition of EA -- insufficient given the state of knowledge of cumulative effects and ‘best practices’ for effective EA processes, as well as the necessity of assessing resource projects in the context of Indigenous title and climate change. Such a narrow view of the scope of EA would perpetuate many of the problems encountered in regards to large-scale developments in the country. Such limited perspective is re-emphasized, two paragraphs later, by the reference to “environmental assessments of areas *under federal jurisdiction*”, implying that federal EAs should only consider effects on a few and disconnected “federal” environmental components – as CEAA 2012 does today.

Without a sufficiently broad definition and view of EA, and adequate resources and authority to address this breadth (see below), the Panel’s scope of work will be unhelpfully constrained, thereby missing a once-in-a-generation opportunity to provide new direction to this important topic. For example, the Panel must be afforded the appropriate space to consider how a new federal regime might incorporate provisions for strategic and regional-level EA planning that will guide individual assessments. Otherwise, the limited mandate that is reflected in the draft TOR will conflict with the bulleted list of “new, fair processes” and will fail to address the

“robust oversight and thorough environmental assessments” required in the same section of the draft TOR, as well as the series of questions and considerations that appear as matters that shall be considered as part of the Panel’s mandate (Scope of Review). Even more fundamentally, a constrained mandate will limit the changes of meeting expectations of the Canadian public for this review process to lead to substantive re-thinking of the federal EA regime.

Recommended amendments to the draft TOR:

- *Broaden the definition of Environmental Assessment in the Context section to include broad planning and sustainability goals;*
- *Include the examination of the purpose and goals of EA among the “matters” that the Panel shall consider in the last paragraph under “Scope of Review”; and*
- *Expand the Panel’s mandate to explore strategic-level solutions to strengthening EA law and practice, including legislative reforms addressing (i) the scope of an assessment (all environmental [including social and economic] effects); (ii) strategic, regional and cumulative effects; and (iii) institutional design (i.e. who is responsible for conducting EA’s and related decision-making).*

2) The Panel should coordinate with related processes regarding northern EA regimes

We have significant concerns about direct statements contained in the draft TOR (Complementary Mandates) indicating that that this Panel should effectively distance itself from the parallel process to amend northern environmental assessment regimes led by the Minister of Indigenous and Northern Affairs. Although the northern EA regimes (Nunavut Impact Review Board, the Environmental Impact Review Board [Inuvialuit Settlement Region] Mackenzie Valley Environmental Impact Review Board, and the Yukon Environmental and Socio-Economic Assessment Board) are all uniquely based on land claim agreements and have received recent updates, isolating them from the CEAA review process would be a missed opportunity. We note, for example, a rather vague statement that follows in the “Indigenous Engagement and Consultation” section (“the Panel shall take into account the activities associated with other mandated reviews”), which seems to contradict the last paragraph of the Complementary Mandates section.

We are aware that each of these four northern assessment processes is somewhat variable in its approach, and that these are characterized by both strengths and weaknesses relative to current and best practice. Moreover, in our experience, there are more commonalities between the different geographies that apply to each northern EA regime and CEAA 2012 than is implied by the draft TOR. For example, with much natural resource development potential located in the more remote northern regions of many of Canada’s provinces, the environmental and social context of these undertakings have more in common with the regions ascribed by the northern environmental assessment regimes than with southern Canada. Hence, any revision of CEAA 2012 must carefully consider such complex issues as project development and associated infrastructure in remote areas (and their often disproportionate and growth-inducing impacts),

Indigenous title and rights, and climate change, while giving much more careful attention to cumulative impacts and broader regional and strategic perspectives than project-based EAs will usually allow. This Expert Panel has much to learn from the experiences of northern assessments to date; likewise, whatever review of northern assessment regimes is being conducted by Minister Bennett should not miss out on insights derived from the future work of this Panel.

Recommended amendments to the draft TOR:

- *Amend the last paragraph under “Complementary Mandates” to embrace rather than discourage consideration of northern EA regimes and issues by the Panel, including some kind of deliberate coordination between the two processes, and ensure consistency with the “Indigenous Engagement” section of the report.*
- *Strike the last sentence of “Complementary Mandates” section altogether.*

3) The Panel should engage with Indigenous entities, but consultation is beyond its responsibility

Although it will be vital for the Panel to engage with Indigenous organizations, communities, and individuals at the outset to seek understanding of key issues, its mandate cannot include consultation (as defined by recent Supreme Court rulings) because consultation is the responsibility of the Canadian government.

Recommended amendment:

- *Strike all mention of “consultation” with Indigenous entities from the TOR.*

4) The critical tasks of Indigenous, public, and expert engagement must be set up to succeed

According to the draft TOR, the Panel has only 5-6 months in which to fulfill its mandate, which includes direct and on-line engagement with Indigenous Peoples, members of the public, experts, and a multi-interest advisory committee, preparation of two “engagement plans”, and the production of a report. The careful process of engagement must occur during the same compressed time period during which the Panel will consider a large and complex set of interrelated issues in its review.

Because outside engagement is a key component of the work of the Panel that is crucial for the success of this review, this element of the work plan must be set up to succeed and it would certainly be helpful if the TOR were to contain sufficient detail to set expectations appropriately. Importantly, the timeframe in which the Panel conducts this work must be realistic, the engagement work and process must be adequately supported by the Ministry, and the scope of the Panel’s engagement plans must be well defined. Otherwise, we have concerns that the unbounded language in the draft TOR will create enormous expectations on the Panel to consult with everyone, and that this has the potential to overwhelm and distract from the task of actually writing the report.

We suggest that the Panel prepare an interim report within the current timeframe (31 January 2017) and that the timeline be lengthened to allow for a comment period, during which input

would be welcomed by members of the public and Indigenous organizations, communities, and individuals. This would also provide an opportunity to solicit reviews of the interim report from experts. The Panel's mandate would then have to be prolonged to allow time to consider these comments in a transparent fashion and revise the report accordingly.

Recommended amendments:

- *Extend the timeline of the Panel to provide an interim and a final report and build in a public review period and revisions;*
- *Include both an interim and final report among the deliverables; and*
- *Include more details about the expected scope of public and Indigenous engagement, and indicate that "engagement plans" will be approved by the Minister.*

5) The role of the Secretariat and adequacy of resourcing will need to be clarified

We are relieved to see commitment in the TOR to provide Secretariat support for the Panel, given the significant amount of work (ranging from background research to logistical details like travel and meeting arrangements) that will be required to support this effort. However, we urge the inclusion of more details in the TOR that provide clarity as to the Secretariat's resourcing and role (including that of the Executive Director), along with the nature of the vital assistance it will provide to the Panel. We feel strongly from experience that the Ministry staff in the Secretariat will need to be fully engaged in this one Panel's activities throughout its mandate, without distraction by other civil service duties.

Recommended amendment:

- *Include more details to provide clarity as to the Secretariat's resourcing and role relative to the Panel.*

Thank you for your consideration of these recommendations. Please contact any of us if you require further clarification or information regarding our comments. We are looking forward to the final TOR and to the commencement of this important process.

Sincerely,



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