

Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa ON
K1A 0H3

Re: Comments on the Federal Environmental Assessment Expert Panel Review Terms of Reference

To Whom It May Concern:

This document sets out my comments and suggestions with respect to the draft Terms of Reference for the Environmental Assessment Expert Panel review. For convenience, the draft Terms of Reference include the following five questions as setting the proposed scope of the Expert Panel's review:

1. How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?
2. How to ensure decisions are based on science, facts and evidence and serve the public's interest?
3. How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?
4. How to require project advocates to choose the best technologies available to reduce environmental impacts?
5. How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?

I. General Observations and Comments

In reviewing the draft Terms of Reference, which in addition to the five questions above include excerpts from the various mandate letters sent to Minister for Environment and Climate Change, the Minister for Fisheries and Oceans, the Minister for Transport, the Minister for Natural Resources and the Minister for Science, I was struck by how relatively narrow this review has been framed. Bearing in mind also the compressed timeline within which the Expert Panel is to complete its work (by January 31, 2017) (roughly the same timeline that the Standing Committees on Fisheries and Oceans, and Transport, Infrastructure and Communities have been given for their reviews of the *Fisheries Act* R.S.C. 1985 c. F-14 and the *Navigation Protection Act* R.S.C. 1985 c. N-22 respectively), I get the impression that the government is not envisioning a fundamental restructuring of the federal environmental assessment regime or its ancillary parts (i.e. project reviews under the *Fisheries Act* and the *Navigation Protection Act*) but rather some tinkering at the margins.

This lack of ambition is deeply problematic. It has been nearly 25 years since Canadians have been engaged in anything like a proper law reform process in the environmental context. At that

time, the original *Canadian Environmental Assessment Act* SC 1992, c 37 was being debated in Parliament, world leaders had just convened in Rio de Janeiro and signed the Rio Declaration on Environment and Development,¹ and the Supreme Court of Canada had just handed down its decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)* 1992 CanLII 110 (SCC). Both the Parliamentary debates and the *Oldman River* decision affirmed a strong role for the federal government in environmental protection, a role that, on paper at least, found considerable expression in the original CEAA.

Since that time, there have been considerable developments: some good, most bad. On the positive side, there have been significant advancements in our understanding of ecological processes and their fundamental role in maintaining human welfare. On the down side, however, those same advancements have been coupled with stark warnings that the planet's various ecosystems and the services they provide are in serious decline (see e.g. the 2005 Statement from the Board of the United Nations Millennium Ecosystem Assessment).² With respect to Canada, with the exception of the North, most of our watersheds are under threat,³ less than a quarter of our fish stocks are healthy⁴ and the plight of endangered species continues to worsen.⁵ With respect to environmental assessment, we now have almost twenty-five years of experience and report⁶ after report⁷ (I could go on) making clear that it is not living up to its promise. Canadian environmental law generally is regarded by most observers to be failing (see e.g. David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003); Stepan Wood et al., "What Ever Happened to Canadian Environmental Law?" (2010) 37 *Ecology Law Quarterly* 981), an assessment that predates the previous Conservative government but that certainly deteriorated under its tenure (see e.g. Martin Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28(1) *J. Env. L & Prac.* 1; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) *Review of Constitutional Studies* (forthcoming)).

The foregoing is not intended to dishearten reformers but rather to help establish a clear baseline and to make the case for both the enormity of the task ahead and the need for bold and innovative thinking. Bold and innovative thinking, in turn, requires broad public understanding of the magnitude of the problem. It is in this respect that the truncated nature of this process is most concerning.

II. Specific Comments

The next part contains specific comments on the draft Terms of Reference. Because of the way in which the five questions are worded (i.e. ambiguously) and because I have no sense of the basis upon which they were formulated, I also comment on what I think is missing from the Terms of Reference, which may or may not fit within the parameters of those relatively open-ended questions. Rather than leave it to chance, I have decided to state these issues here explicitly.

The Proposed Terms of Reference

¹ <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>

² <http://www.millenniumassessment.org/documents/document.429.aspx.pdf>

³ See <http://watershedreports.wwf.ca/#canada/by/threat-overall/profile>

⁴ See <http://www.oceana.ca/en/publications/reports/heres-catch-how-restore-abundance-canadas-oceans>

⁵ See e.g. <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0113118>

⁶ See http://www.oag-bvg.gc.ca/internet/English/att_e_39879.html

⁷ See http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_01_e_33196.html

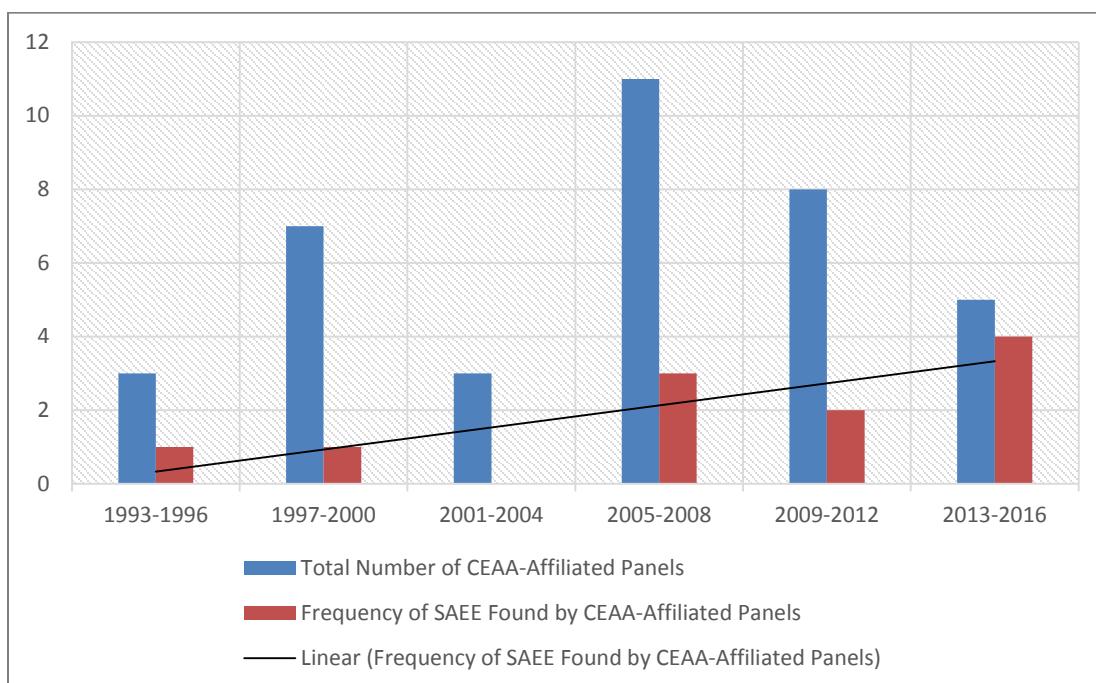
Timeline: In light of the above, it should come as no surprise that I consider the timeline for this review to be too compressed. Although not an exact science, a doubling of the review period (to 8 months) would be more appropriate for the task ahead.

Question 1: “How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?

My first comment is that this should not be the first question. The first question should go to the core of this review and the many failings of current environmental assessment practice:

What is, or should be, the purpose of federal environmental assessment?

Confusion about this purpose was on full display during the original *CEAA*'s truncated review in the fall of 2011. Some industry representatives suggested that environmental assessment is not about denying projects but rather making sure that they are carried out in the least environmentally harmful way. Others suggest that environmental assessment, or sustainability assessment,⁸ should screen out unsustainable projects altogether, while others are concerned primarily with rationality, transparency, and accountability in decision-making. If past experience is any indication, it would appear that the first view has prevailed. The following figure (gratefully borrowed from a recent paper written by University of Calgary J.D. candidate Christopher Phillips (2017)) demonstrates that the number of major projects found likely to result in “significant adverse environmental effects” has gone up since the introduction of federal environmental assessment legislation back in 1992, especially during the previous Conservative government’s tenure:



⁸ Gibson, Robert B. and Doelle, Meinhard and Sinclair, A. John, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2015) 29 J. Env. L. & Prac.; available at <http://ssrn.com/abstract=2670009>.

There are, of course, several potential explanations for this trend, including an increased willingness for Panels to conclude that significant adverse environmental effects are likely (a trend that I have noted previously, if only anecdotally). The one conclusion that does not seem supported, however, is that federal environmental assessment legislation is dissuading private proponents from proposing projects that are likely to result in significant adverse environmental effects, the vast majority of which the federal government has subsequently deemed “justified in the circumstances” and approved without explanation. As a starting point then, and as a guide for future reform, Parliament and Canadians should come to terms with the purpose for environmental assessment.

As for the actual draft first question, the phrase **“of areas under federal jurisdiction”** should be reworded. I assume that the government wasn’t referring to actual places (e.g. national parks) but rather areas of federal jurisdiction, but even this distinction is unhelpful, as the New Prosperity Mine panel made abundantly clear in its report,⁹ wherein it made the federal government consider and justify the proposed mine’s impacts to grizzly bears because those effects would be directly linked to Fisheries and Oceans Canada’s issuance of a subsection 35(2) authorization for the destruction of fish habitat. The following passage is worth noting in particular:

There are many linkages between and among environmental changes, including changes that are environmental effects defined under CEAA 2012 and those that are not. For example, the Panel determined that the Project would generate seepage of pore waters from the tailings storage facility... This seepage would also result in a change in surface water quality when it would seep into Fish Lake (Teztan Biny) which is located down slope from the tailings storage facility. That change in water quality in Fish Lake would be considered an environmental effect under the former Act but it would not, by itself, fall within one of the listed categories defining an environmental effect under subsection 5(1) of CEAA 2012. Fish Lake, however, consists of fish habitat which sustains a viable population of fish, namely rainbow trout. The change in the water quality in Fish Lake would have an adverse effect on both the fish habitat and the fish which are both within the listed environmental effect categories.

Moreover, Fish Lake (Teztan Biny) is used by the Tsilhqot’in for traditional purposes and as part of their cultural heritage. The changes caused to the Lake would affect the Aboriginal cultural heritage as well as the current use of land and resources by Aboriginal peoples for traditional purposes. These too would be environmental effects under subsection 5(1) of CEAA 2012.

Simply put, it is extremely difficult – and unhelpful – to try to parse the ‘environment’ into areas of federal or provincial jurisdiction. No such attempt is ever made with respect to the ‘economy’, and yet the two are essentially on the same constitutional footing: neither is explicitly referred to in the *Constitution Act, 1867* but rather touches upon several of the heads of power assigned to the respective levels of government. As Canadian courts have emphasized numerous times, environmental matters (like economic ones) will almost always have a double aspect: one federal, one provincial. Furthermore, the effect of the Supreme Court of Canada’s 2010 decision

⁹ Available online:

https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwihheeE6-HNAhUW7mMKHfr1DS4QFggeMAA&url=https%3A%2F%2Fwww.ceaa-acee.gc.ca%2F050%2Fdocuments%2Fp63928%2F95790E.pdf&usg=AFQjCNEEheifYBzERv9M_3eW8P82Az6bFQ&sig2=ZV4oOPXj-gFK02EBrcDjnw&cad=rja

in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 is clear: once federal jurisdiction is engaged, there is no constitutional or administrative law barrier preventing the federal government from considering the totality of the environmental consequences flowing from the exercise of that jurisdiction. In light of this reality, I suggest the following wording:

"How to restore robust oversight and thorough federal environmental assessment of areas under federal jurisdiction while working with the provinces and territories to avoid duplication?"

The reference to federal environmental assessment without further qualification (e.g. "of projects") is deliberate and relates again to the seemingly narrow focus of the draft Terms of Reference. In light of the Commissioner of the Environment and Sustainable Development's most recent report,¹⁰ it is clear that this review should also consider the role and implementation of *strategic environmental assessments* (e.g. of policies, plans and programs). Presently, there is no legislative requirement for strategic environmental assessment at the federal level, only the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*.¹¹ As noted by the CESD, this Directive is essentially being ignored: audited departments "did not adequately apply the Cabinet Directive" and "did not report adequately on the extent and results of their strategic environmental assessment practices as required." The Expert Panel should consider the merits of legislating a strategic environmental assessment process.

2. How to ensure decisions are based on science, facts and evidence and serve the public's interest?

This is a good and important question to ask when designing an environmental assessment regime; there are numerous opportunities within the process for increasing the extent to which decisions reflect these factors. However, and again rather than leave it to chance, this question should be amended to make clear that it includes mechanisms both within and outside of the environmental assessment process. With respect to the latter, I mean the ability to meaningfully challenge environmental assessments that may be deficient. Consideration should be given to the current supervisory role of Canadian courts in ensuring that environmental assessments comply with the intent and spirit of the legislation. In light of recent jurisprudence, it may be time to consider the merits of a specialized federal environmental court.

In addition, **science, facts, and evidence should also be explicit guiding principles for the Expert Panel review** (i.e. part of the Terms of Reference). Moreover, and bearing in mind the compressed timelines, the government should now (or as soon as possible) ensure that relevant research and analysis (like the figure above with respect to the number of review panels/year) is available to the Panel. Unlike the previous 2011 review and the previous government's approach to the *Fisheries Act*, this review should not be based on anecdotes, such as isolated incidence of permitting delay (as was made clear by subsequent studies, both Fisheries and Oceans Canada and Transport Canada were processing permit applications in a reasonably timely manner).¹²

¹⁰ See http://www.oag-bvg.gc.ca/internet/English/att_e_41036.html

¹¹ See <http://www.ceaa.gc.ca/default.asp?lang=En&n=b3186435-1>

¹² See Derrick Tupper de Kerckhove, Charles Kenneth Minns, and Brian John Shuter, "The length of environmental review in Canada under the *Fisheries Act*" *Can. J. Fish. Aquat. Sci.* **70**: 517–521 (2013) and Amanda K. Winegardner, Emma E. Hodgson, Adrienne M. Davidson, "Reductions in federal oversight of aquatic systems in Canada: implications of the new *Navigation Protection Act*" *Can. J. Fish. Aquat. Sci.* **72**: 602–611 (2015).

As noted at the outset, the government now has 25 years of environmental assessment experience and a wealth of data under two different regimes to consider.¹³ It is critical to the legitimacy of any future reforms that the Panel members have access to results and analysis with respect to the following:

- a) **Triggering Mechanics:** What are the strengths and weaknesses, in terms of environmental outcomes, of a ‘trigger’ approach (original *CEAA*) v. a ‘project list’ approach (*CEAA, 2012*)?
 - o This should include a consideration of the environmental consequences of no longer having any reliable system for tracking and accounting for the 3,000+ projects that were subject to screenings under the original *CEAA*;
 - o It should also include an assessment of the current experience with the *CEAA, 2012* section 67 environmental assessments, which are subject only to policy guidance from the departments to which that section applies;
- b) **Quality and Rigor of Environmental Assessments:**
 - o What, if anything, is the difference between Agency EAs v. substituted EAs?
 - o What, if anything, is the difference between federal panels v. joint review panels (the latter including those with federal regulators such as the National Energy Board and the Canadian Nuclear Safety Commission)?
- c) **Mechanisms for Avoiding Duplication and Overlap:**
 - o What has been the experience with joint review panels with provincial agencies, substitutions, and equivalency agreements?
- d) **Monitoring and Follow-Up:**
 - o Are proponents submitting adequate monitoring reports?
 - o What are the strengths and weaknesses of the *CEAA, 2012* decision-statement mechanism v. exclusive reliance on existing regulatory permits and authorizations (e.g. *Fisheries Act* section 35 authorizations)?
 - o What is the track record of **adaptive management** where it has been invoked by proponents?
- e) **Cumulative Effects:**
 - o Bearing in mind previous studies,¹⁴ what progress has been made in the assessment and mitigation of cumulative effects?
 - o What are the barriers to **federal regional environmental assessment**, explicitly authorized by section 73 – 77 of *CEAA, 2012*, bearing in mind the growing popularity of regional planning in several provinces and territories and its potential benefits, as a recent study¹⁵ has highlighted?

The foregoing is just a preliminary list; there are undoubtedly other angles and lenses that could be applied to the past 25 years of experience to ensure that the Expert Panel’s recommendations are rigorous and evidence-based.

¹³ For example, there are almost twenty Agency Department Performance Reports (DPR) available at <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=C5C19E38-1>

¹⁴ See e.g. http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201110_02_e_35761.html

¹⁵ See <http://www.macdonaldlaurier.ca/making-aboriginal-voices-heard-in-environmental-assessment-mli-paper-by-bram-noble/>

A final point that fits comfortably in a section on the role of science: the **Panel should have an explicit mandate to consider the role that technological advances, especially in IT, remote sensing and GIS, could play in improving the federal environmental assessment regime**, and federal regulatory processes more generally. These technologies have advanced leaps and bounds since the original CEAA was introduced (to say nothing of the *Fisheries Act* and *Navigation Protection Act*). The current CEAA Registry (<http://www.ceaa.gc.ca/050/index-eng.cfm>) is an existing example of the use of these tools, but it is limited in certain respects. How could it be improved? What other applications might improve environmental assessment?

With respect to environmental monitoring and reporting specifically, the above-noted advancements – especially in IT – have also led to the emergence of “citizen science”, wherein members of the public are engaged in the collection and analysis of environmental data. In Alberta, the Miistik Institute is engaged in several citizen science projects.¹⁶ **The Panel should have an explicit mandate to consider the role of citizen science in any future environmental assessment regime.**

3. How to provide ways for Canadians to express their views and opportunities for experts to meaningfully participate?

This question seems adequate as worded. I have no additional comment except to note that this could also be the question through which the role of citizen science could be considered.

4. How to require project advocates to choose the best technologies available to reduce environmental impacts?

This question is reasonable enough, but an additional and arguably better question would be **“How to ensure that proponents explore all alternatives to their proposed projects in a meaningful way?”**

5. How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?

This is a critical issue, with respect to which Canada’s Indigenous peoples should obviously have first say. For my part, I will point out that by focusing only on major resource development projects the question is clearly too narrow. Respecting Aboriginal and Treaty rights means managing not only major projects but also the cumulative effects of multiple smaller projects on the landscape. This underscores the importance of ensuring that sufficient consideration is given to regional environmental assessments, discussed under Question 2.

I hope these comments and suggestions are useful to you. Please don’t hesitate to contact me should you wish to follow up with respect to any of the above.

Best regards,

Martin Olszynski
Assistant Professor
University of Calgary Faculty of Law

¹⁶ See <http://www.rockies.ca/projects.php>