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Sent via email

July 13, 2016

Re: Comments on environmental assessment processes: Draft Terms of Reference for Expert Panel

Dear Sirs/Mesdames,

Thank you for this opportunity to comment on the draft Terms of Reference for the Expert Panel that the Minister of Environment and Climate Change (the Minister) will establish to review environmental assessment (EA) processes associated with the Canadian Environmental Assessment Act, 2012 (CEAA 2012).

In light of the multitude of difficulties CEAA 2012 has presented for the environment, public and Indigenous peoples since its enactment in addition to the problems faced under the preceding CEAA, Canada needs substantial legislative changes that usher in a visionary new approach to assessing the potential benefits, harms, risks and uncertainties of development proposals. Developing a visionary new approach requires that the independent expert panel have a broad mandate and the authority and resources to commission expert analysis and reports, undertake broad and inclusive public participation, and collaborate with Indigenous governments, to ensure that the necessary substantive legislative changes are brought forward.

We were encouraged to see that the Minister has decided to appoint an independent panel to conduct the review, as recommended by West Coast Environmental Law and other groups.

In these submissions, we recommend ways that the Terms of Reference and review process can better help ensure that the Panel, participants, Indigenous governments and the federal government have the scope and quality of information and sufficient tools necessary to build the best possible EA regime for Canada. They are:

1. Ensuring that the Scope of Review is broad enough to identify strategic-level solutions to strengthening EA, and not merely incremental improvements to project-level assessment;
2. Recognition in the TOR of the need for the Panel to explore and define the goals and purpose of modern-day EA to set the context for the new process;
3. The commissioning of discussion papers on the best available information on leading-edge assessment approaches;
4. A requirement in the TOR that the Panel report on how it considers comments received; and
5. Designation in the TOR of a public review and comment period on the draft Panel report.

6. Direction in the TOR for the Panel report to include specific and detailed recommendations for legislative changes, as well as where changes should occur in policy or guidance.

Ensure strategic-level solutions are on the table

The Scope of Review must be broad enough to, among other things: a) address the issues which undermine "public trust" in current environmental assessment processes, b) to ensure that best practices and leading thinking in the field of environmental assessment inform the Panel's recommendations, and c) uphold the federal government's commitments to implementation of UNDRIP.

The narrow definition of environmental assessment that appears in the Context section of the draft Terms of Reference,[1] to the extent it informs the Scope of Review, does not support these objectives. The practice of strategic and regional assessment, the essential tasks of assessing and managing cumulative (and not merely project-based) effects, and the current and potential role of Indigenous co-management bodies in assessment and planning are all examples of issues that should be squarely before the Panel, and which appear to be excluded by the definition of environmental assessment in the current draft Terms of Reference.

Similarly, point 5 in the Scope of Review related to the involvement of Indigenous peoples refers only to "major resource development projects", despite additional sections of Minister Bennett's mandate letter that provide for a more expansive review of legislation to ensure Indigenous, Aboriginal and Treaty rights are upheld and the recommendations of the Truth and Reconciliation Commission implemented.[2]

Finally the Scope of Review section appears to limit Panel consideration to "how" environmental assessment processes are conducted by the three responsible authorities under CEAA 2012, without asking the essential and preliminary question "whether" agencies like the Canadian Nuclear Safety Commission or the National Energy Board are the appropriate bodies for this role.

We submit that the Terms of Reference should be amended to clarify that the Panel is mandated to explore strategic-level solutions to strengthening EA law and practice, including legislative reforms to address strategic, regional, and cumulative effects assessment, and institutional design issues (i.e., who is responsible for conducting EA's and related decision-making).

Purpose and role of EA

Further, we recommend that the Terms of Reference be amended to delete the role of EA in the "Context" section or to greatly broaden it to recognize its broad planning and sustainability-based goals, and to include the examination of the purpose and goals of EA as an enumerated matter under "Scope of Review."

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[1] "Environmental assessment informs government decision-making and supports sustainable development by identifying opportunities to avoid, eliminate or reduce a project's potential adverse impact on the environment before the project is undertaken, and by ensuring that mitigation measures are applied when a project is constructed, operated and decommissioned."

[2] For example the following: "Undertake, with advice from the Minister of Justice, in full partnership and consultation with First Nations, Inuit, and the Métis Nation, a review of laws, policies, and operational practices to ensure that the Crown is fully executing its consultation and accommodation obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights." Additionally the Minister is mandated to work collaboratively "to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*," which include recommendations related to the recognition and implementation of Indigenous law in decision-making processes.

As noted above, to enable the Panel to make the best possible recommendation to the Minister, the Terms of Reference should not presume a narrow definition of EA.

For example, one of the enumerated purposes of both CEAA 1992 and CEAA 2012 was and is to encourage responsible or federal authorities to "take actions that promote sustainable development."[3] EA has been variously described as a planning tool,[4] a "a mechanism for evaluating options to achieve valuable societal goals,"[5] "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made,"[6] and "minimum regret planning,"[7] among other things. In other words, there is no single, agreed-upon purpose and role of EA.

Moreover, its purpose is not static, but rather evolves with experience, advances in thinking and the recognition of new problems. As an example of where Canada may want to head, Gibson, Doelle and Sinclair suggest that the goal of EA should be as follows:[8]

> The core purpose of next generation environmental assessment is to ensure that deliberations and decision making on new and renewed undertakings at the project and strategic (policies, plans and programmes) levels foster proposal development, approvals and implementation that deliver the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects. More generally, the objective is to protect and enhance the resilience of desirable biophysical, socio-ecological and human systems and to foster and facilitate creative innovation and just transitions to more sustainable practices.

As the Terms of Reference acknowledge, the Minister has been mandated with introducing new, fair processes that, among other things, serve the public's interest. For the Panel to effectively and fulsomely examine and recommend what those processes should be, it needs to be empowered to first examine what should be the overarching and fundamental purposes and goals of federal EA. While as currently worded the Terms of Reference do not preclude such an examination, we recommend that the Terms of Reference explicitly task the Panel with undertaking it, and including recommendations in this regard.

Furthermore, we propose that the TOR enable the Panel to conduct an initial round of Indigenous, public and stakeholder engagement to canvass perspectives on: a) major issues or challenges associated with EA today; and, b) what goals environmental assessment should be seeking to achieve.

Outcomes from this phase could be:

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[3] *Canadian Environmental Assessment Act*, SC 1992, c 37, s 4(b); *Canadian Environmental Assessment Act, 2012*, CS 2012, c 19, s 4(h).

[4] Canadian Environmental Assessment Agency, "Basics of Environmental Assessment," online: http://www.ceaa.gc.ca/default.asp?lang=En&n=B053F859-1#gen02.

[5] Rachel S. Forbes et al, "Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws," (2012), online: http://wcel.org/sites/default/files/publications/A%20Checklist%20for%20Strong%20Environmental%20Laws%20February%202012.pdf at 5.

[6] International Association for Impact Assessment, "What is Impact Assessment?" (October 2009), online: http://www.iaia.org/uploads/pdf/What_is_IA_web.pdf at 1.

[7] John Sinclair *et al*., "Ensuring the road to enhanced environmental protection in Manitoba through a futures oriented environmental assessment process: Response to the *Environment Act* Consultation" (no date), online: https://www.gov.mb.ca/conservation/eal/registries/5711/13_u_of_m_natural_resources_institute.pdf at 1,

[8] Robert B. Gibson, Meinhard Doelle, A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 *J. Env. L. & Prac.* 251 at 255.

- A draft set of principles for EA in Canada that capture the substantive goals of EA
- Identification of core themes/major design questions in EA and environmental planning to focus the Panel's work and the production of further discussion/options papers to inform subsequent phases of its work (see comments below).

Advance discussion/options papers

Discussion papers or similar documents setting out an overview of an issue and options for addressing it based on best practices and leading thinking in the field, can greatly help focus and guide discussions and participation in the review of regulatory and policy frameworks. Such resources can be greatly helpful for government and non-government participants in regulatory review and drafting processes.

We support the inclusion in the Terms of Reference the enabling of the Panel to retain the services of non-governmental experts to provide advice. However, given the size of the task at hand and the relatively constrained timeline, we recommend that the Minister or Agency commission a discussion paper or papers on the substantive goals and principles of EA, and options and recommendations for addressing key issues in EA based on best practices and leading thinking in the fields of environmental assessment and planning, consistent with these principles, in advance of or alongside the Panel's appointment. Doing so would, in our view, ease the burden on the Panel once it's appointed, help guide any additional expertise the Panel may wish to retain, and assist participants (including the Multi-Interest Advisory Commission), especially in their early participation in the review.

We note that in developing discussion papers or otherwise seeking expert analysis, particular attention should be paid to ensuring that Indigenous laws and knowledge are seen as equally important drivers for shaping a visionary new EA law and related processes.

In a similar vein, in our view it would be a mistake to isolate the review of northern environmental assessment regimes completely from the Panel's process. Lessons learned from northern review processes, often conducted by Indigenous co-management bodies and under legislative regimes that mandate the consideration of Indigenous knowledge, have the potential to offer important lessons learned for the evolution of EA in the rest of Canada.

Report on consideration of comments

To be credible, environmental decision-making must be transparent and accountable. We support the requirement in the Terms of Reference that the Panel report include a summary of comments received, and recommend that this requirement be extended to include a) a summary of the results of any other methods of engagement and dialogue with the public, Indigenous peoples and stakeholders; and b) a demonstration of how those comments and other forms of dialogue are reflected in the Panel's conclusions, recommendations and rationale.

Review of Panel report

We recommend that the Terms of Reference be amended to include a public review and comment period on the draft Panel Report. CEAA 2012 recognizes the importance of public comment opportunities on drafts of final documents by requiring public comment periods for draft EA reports where the Agency is the

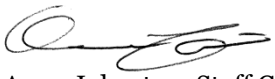
responsible authority.[9] A similar comment period on a draft of the Panel report would enable participants to assess whether the Panel has understood and accurately reflected recommendations in its report and help generate a stronger final document. Direct government-to-government engagement with Indigenous governments and with Indigenous peoples organizations regarding the recommendations of the Panel report should also be provided for.

Guidance on regulatory changes

Finally, to facilitate the post-report phase of reforming EA processes, it would be helpful for the Panel's report to be as specific as possible regarding what legislative changes are necessary to implement its recommendations. We recommend that the "EA Review Report" section be amended to include a direction that wherever applicable and to the extent possible, the Panel's recommendations contain specific and detailed legislative changes needed to implement the Panel's conclusions and recommendations. The TOR could also include a direction to specify where EA reforms might also best occur through policy or guidance.

Thank you for considering these recommendations. If you have any questions or would like to discuss these or other matters further, please do not hesitate to contact us.

Regards,



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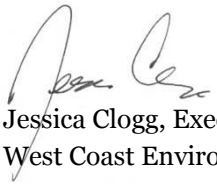

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[9] Canadian Environmental Assessment Act, 2012, CS 2012, c 19, s 25(1).

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