

Annotations on the 23 June 2016 draft terms of reference for the expert panel review of federal environmental assessment processes

prepared by

Robert B. Gibson, School of Environment, Resources and Sustainability, University of Waterloo

Meinhard Doelle, Professor, Schulich School of Law, Dalhousie University

A. John Sinclair, Professor, Natural Resources Institute, University of Manitoba

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

Review of environmental assessment processes: expert panel draft terms of reference

Context

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.

The mandate letter of the Minister of Environment and Climate Change (the Minister) directs her, as a top priority, to “immediately review Canada’s environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes that will:

- Restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication;
- Ensure decisions are based on science, facts and evidence and serve the public’s interest;
- Provide ways for Canadians to express their views and opportunities for experts to meaningfully participate, and
- Require project advocates to choose the best technologies available to reduce environmental impacts.”

In carrying out this review, the Minister is to be supported by the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Minister of Natural Resources, the Minister of Indigenous and Northern Affairs and the Minister of Science.

The Minister is establishing an Expert Panel (the Panel) to conduct a review of environmental assessment processes associated with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). The Panel will engage and consult with Canadians,

Comment [RG1]: This is a common version of EA’s perceived role in Canada and elsewhere. But it is fundamentally contradictory. Most Canadian federal EA practice has indeed focused on mitigation of the anticipated adverse effects of proposed new projects. But that was never the only or most advanced option and cannot possibly deliver serious sport to sustainable development.

(i) The definition of EA here excludes the founding laws of EA. Neither the world’s first EA legislation (in the US’ National Environmental Policy Act of 1969) nor Canada’s first EA law (Ontario Environmental Assessment Act of 1975) centred on mitigation of negative project effects. Both were about comparing alternatives and choosing most desirable options. Moreover, both defined the scope of environment and environmental effects broadly to incorporate social, economic and cultural as well as biophysical considerations and the interactions of all of these. And both applied to plans as well as projects.

(ii) Sustainable development arose more recently (the World Commission on Environment and Development report of 1987) as a response to the combined unsustainability of biophysical demands on the biosphere and persistent insufficiency for billions of the global human population. Nothing in the roots, conceptualization or experience with sustainable development supports the notion that sustainability is achievable through mere mitigation of the adverse effects of ever more conventional projects.

(iii) All of the key topics now facing environmental assessment in Canada today involve issues and options beyond mitigation of adverse project effects. Due attention to Aboriginal rights and interests, cumulative effects, strategic level undertakings, climate change commitments, meaningful public engagement, continuous institutional learning, collaboration with other jurisdictions, efficient ways to be effective and fair, and serious contributions to sustainability – all demand a broader scope that can cover

- strategic as well as project level undertakings (with the two levels effectively linked);
- a comprehensive definition of “environment”; and

Indigenous peoples and key stakeholders and develop recommendations on ways to improve federal environmental assessment processes.

Mandate

The Panel shall conduct a review of the environmental assessment processes associated with CEAA 2012 in a manner that is consistent with these Terms of Reference.

The Panel shall prepare a report that sets out:

- The conclusions, recommendations and rationales [for the conclusions and recommendations](#) of the Panel, and
- A summary of the input received from the public, Indigenous peoples and any other interested group or organization and from a Multi-Interest Advisory Committee or other experts.

The Panel shall submit the report to the Minister, and on request of the Minister, clarify any of the conclusions and recommendations set out in its report.

Complementary Mandates

In addition to the Minister's mandate to review environmental assessment processes, other Ministers have also been mandated to carry out reviews and propose reforms to matters that intersect with environmental assessment. These include:

- Minister of Fisheries and Oceans and the Canadian Coast Guard– review changes to the *Fisheries Act*, restore lost protections and incorporate modern safeguards;
- Minister of Natural Resources – modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development and Indigenous traditional knowledge, and
- Minister of Transport – review changes to the *Navigable Waters Protection Act*, restore lost protections and incorporate modern safeguards.

The Panel shall focus on those relevant matters that intersect with environmental assessment. For example, this will include the roles of federal expert departments in supporting the Canadian Environmental Assessment Agency as it conducts assessments and carries out compliance and enforcement activities. If matters are raised that are outside the scope of environmental assessment, but are related to the other mandated reviews [\(or within the scope of environmental assessment but also related to the other mandated reviews\)](#), the Panel will receive the information and forward it to the appropriate secretariat or department supporting the mandated review.

The Minister of Indigenous and Northern Affairs has launched a process to amend northern environmental assessment regimes. As CEAA 2012 has limited application in the north, matters related to northern environmental assessment regimes will be

redirected as appropriate to the process launched by the Minister of Indigenous and Northern Affairs to amend northern regimes. Matters relating to northern environmental assessment regimes are outside the mandate of this Panel, except where northern assessment experience can illuminate options for federal EA processes and where possible responses to federal EA process issues may affect northern jurisdictions.

Scope of Review

In carrying out the review, the Panel shall consider the following matters raised in the Minister's mandate letter and the mandate letter of the Minister of Indigenous and Northern Affairs (Question 5):

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?*

In doing so, the Panel shall consider:

- the overall purposes, scope and design of the current processes, from initial requirements and guidance to final decommissioning and monitoring;
- in particular how the strengths, limitations and alternatives to current approaches to federal environmental assessment review processes that are currently conducted by the three responsible authorities under CEAA 2012, namely the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission or the National Energy Board;
- needs for and means of assessing undertakings (e.g., regional or sectoral plans, policies and programmes at the strategic level, and categories of smaller undertakings that may have important cumulative effects); and
- the nature of an integrated package of reforms to the existing law and processes to address the identified issues and opportunities in an effective, fair and efficient manner.

This will include the practices and procedures associated with the conduct of environmental assessment, such as Indigenous consultation, public participation, the role of science and harmonization with other orders of government. In assessing the practices

Comment [RG2]: Information about approaches to and experiences with EA and related deliberations in the northern regimes may be illuminating and valuable in the review of federal processes. Also, many of the major issues facing federal EA processes (e.g., how to incorporate serious attention to the implications of climate change mitigation commitments) affect northern processes as well. Such overlaps between the two reviews should be recognized explicitly in the expert panel review's mandate.

Comment [RG3]: The mandated scope here needs significant expansion.

(i) The federal environmental assessment processes include more than the review component currently applied by the three listed bodies. Proponents do most of the actual impact assessment and associated planning before the review process is initiated and the process continues in monitoring of effects and compliance, etc., long after the review and decision making stages.

(ii) Assessment review by the three listed bodies is a feature of the current Act that should be open to critical reconsideration, with careful avoidance of any implication that it represents the most sensible approach.

(iii) The range of application of the current processes is also unduly limiting. As noted in comment 1(iii), above, the panel review will not be able to respond adequately to the most significant EA issues and opportunities if its scope is limited to major project reviews.

Many of the most important areas for EA reform – for process efficiencies as effectiveness and fairness – involve undertakings at the strategic level.

Also the current law ended a long tradition of assessing smaller undertakings that may, at least cumulatively, have significant adverse effects and/or significant potential for much more positive effects.

and procedures associated with the conduct of environmental assessments, the Panel shall consider the relationship between environmental assessment processes and the Aboriginal and treaty rights of Indigenous peoples and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples. The Panel shall also consider how to enhance regulatory certainty in the development of major projects in Canada.

The Review Process

The Panel

The Minister will appoint individuals to the Panel that have knowledge or experience relevant to environmental assessment processes.

The Panel will consist of at least three members, including one Chairperson. In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister determines otherwise. In such circumstances the Minister may choose to replace the Panel member.

By way of letter from the Chairperson, the Panel may request clarification of its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response in order to comply with the timelines of these Terms of Reference.

The Panel shall issue a notice to the public regarding any clarifications to its Terms of Reference and shall make those clarifications available on its website.

By way of letter from the Chairperson, the Panel may request an amendment to its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response from the Minister in order to comply with the timelines of these Terms of Reference.

The Panel Secretariat

The Panel Secretariat will provide administrative, technical and procedural support as requested by the Panel and shall be comprised of staff from the federal public service, under the direction of an Executive Director. The Secretariat will report to the Panel and will be structured to allow the Panel to conduct its review in an efficient and cost-effective manner. The Secretariat will liaise and facilitate the flow of information with the relevant bodies supporting the other related mandated reviews. Members of the Secretariat shall be guided in their work and professional conduct by the *Values and Ethics Code for the Public Service*.

Conduct of the Review

Timeline

Comment [RG4]: Clarification of the intent behind this phrase is needed. The phrase has been used variously to represent diverse interests' hopes for certainty of approvals or for unchanging rules, or for firm lines between what is and is not allowed – which are understandable but ill-suited to the dynamic world we actually inhabit. If the intent is to consider how to clarify the core purposes and expectations, and consequential requirements, in public decision making on proposals for major projects and other undertakings subject to EA (and on post-approval monitoring, adjustment, etc.), then that language should be used.

The Panel shall complete its review and provide its report with recommendations to the Minister by January 31, 2017.

Public Access to Information

The Panel shall create and maintain a website which makes public the information it receives during the course of the review. The website shall include the equivalent of a registry of all comments submitted to the Panel.

Public Engagement

The Panel shall communicate directly with a broad cross-section of interested groups, organizations and individuals during its review to gain an understanding of issues and opportunities related to federal environmental assessment processes.

The Panel shall prepare a Public Engagement Plan outlining how and when it will conduct in-person events and how it will seek and facilitate other input from the public, including through on-line opportunities. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This plan shall be posted on the Panel's website.

The Panel shall also include any procedures necessary for the timely, efficient and fair conduct of the events. The procedures will allow for the events to be "open" to the public and be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold in-person engagement events in regions or communities where project environmental assessments have been recently conducted or where interest has been expressed in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of in-person engagement events.

The Panel shall also conduct online engagement with Canadians and provide procedures for sending in submissions. Any submissions received shall be posted on the Panel's website.

Indigenous Engagement and Consultation

The Panel shall directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to federal environmental assessment processes.

The Panel shall prepare an Indigenous Engagement Plan, outlining how and when it will conduct Indigenous in-person consultation activities, as well as seek and facilitate other

Comment [JS5]: There are pressing needs both for effective action to improve federal EA law and processes, and for ensuring that the actions taken are well conceived – forward-looking, carefully integrated, credible and workable. Given the time needed to prepare and implement two engagement plans in an effective, efficient and fair way, and to address a large and complex set of difficult and interrelated issues, this end date is overly optimistic for a final report. The 31 January 2017 report should be treated in the Terms of Reference as the Panel's initial report, to be followed by a public comment period and with opportunity for the Panel to revise the report in light of comments received.

Comment [JS6]: A complete registry of comments provided should be established to aid transparency. It would post all input the panel receives in the course of its duties. The registry could be a component of a larger panel website

Comment [JS7]: Given the need to complete public consultations by the end of this year the panel needs gain public confidence in the engagement plan quickly.

input, including through on-line opportunities. The Panel shall meet with the leadership of National Indigenous Organizations in the preparation of the Plan. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This Plan shall be posted on the Panel's website. The Panel shall work with regional Indigenous organizations in the planning and hosting of Indigenous in-person consultation activities.

The Panel shall also include any procedures necessary for the timely and efficient conduct of these activities. The procedures will allow for the events to be "open" and to be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any Indigenous in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold Indigenous in-person consultation activities in regions or communities where project environmental assessments have been recently conducted or where communities have expressed interest in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of Indigenous in-person consultation activities.

Multi-Interest Advisory Committee

A Multi-Interest Advisory Committee with representatives of Indigenous organizations, industry associations and environmental groups will be established by the Minister to provide advice to the Panel.

The Panel will identify a select number of issues which may benefit from discussion by the Multi-Interest Advisory Committee. The Panel will, by way of a letter to the Canadian Environmental Assessment Agency, as convener of the Multi-Interest Advisory Committee, describe the issues for which it seeks advice and provide any relevant context to support the discussions by the Multi-Interest Advisory Committee.

The Multi-Interest Advisory Committee will meet as required in order to discuss the issues and will provide its consensus advice, to the extent possible, for the Panel's consideration and in accordance with any timeline provided by the Panel. Any advice provided to the Panel will be posted on the Panel's website. The Panel will include a summary of any advice provided in its Report.

Expert Advice

Where expertise cannot be provided by the Multi-Interest Advisory Committee, the Panel may retain the services of independent non-government experts to provide advice on certain subjects within its mandate. Any advice provided to the Panel will be posted on the Panel's website.

Comment [RG8]: Resources will need to be made available for this.

EA Review Report

The report shall include:

- An executive summary of the report;
- The conclusions, recommendations and rationale for the conclusions and recommendations of the Panel with respect to the relevant issues within the mandate provided to the Panel; and
- A summary of any comments received.

The Report shall reflect the views of each member of the Panel.

Upon receiving the report of the Panel, the Minister will make the report available to the public for comment. Following the comment period the Minister will ask the Panel to consider revisions to the initial report in light of comments received. All comments received will be posted in the review registry on the Panel website.

Comment [RG9]: See comment 6 above.

Participant Funding

The Canadian Environmental Assessment Agency will offer participant funding to Indigenous organizations, groups, communities and individuals to support their participation in the review.

Deliverables

- Public Engagement Plan
- Indigenous Engagement Plan
- Report

Official Languages

All deliverables and any other documents produced by the Panel for the purpose of communicating information to the public must be produced and made publicly available in both official languages. Documents provided to the Panel will be made publicly available in the language that they were received.

Confidentiality

All information gathered by the Panel in the course of its work is subject to the provisions of the *Access to Information Act* and the *Privacy Act*.

23 June 2016