



July 20, 2016

Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
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(sent via e-mail)

Re: Draft Terms of Reference for Environmental Assessment Expert Panel

We welcome the opportunity to comment on the draft Terms of Reference for the Expert Panel that will review federal environmental assessment processes.

Since its creation in 1999, MiningWatch Canada has worked on environmental assessments of a large number of mining projects, either directly or on behalf of other groups and affected communities, and we have been very active in trying to improve environmental assessment law, policy, and practice, working with administrative and legislative bodies, and even resorting to litigation when it proved necessary to do so to protect the public interest and the integrity of the environmental assessment process. MiningWatch is a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organisations. It was created in 1999 as a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat and community interests posed by irresponsible mineral policies and practices in Canada and around the world.

We have been very concerned by the limited effectiveness, inefficiency, and biases of environmental assessment in Canada, and in recent years the erosion and dismantling of the aspects of EA that did work in the public interest, and in the interest of sustainability. The recent tribunal ruling under the North American Free Trade Agreement (NAFTA, chapter 11), challenging the EA of the White's Point Quarry in Nova Scotia, is an extremely worrying precedent, potentially restricting the ability of government to undertake any meaningful environmental review and make any kind of informed decision that does not conform with proponents' expectations – or at least do so without risking compensation payouts of hundreds of millions of dollars.

MiningWatch has long advocated for a more coherent, comprehensive and planning-based approach to EA, including strategic assessment of policies, plans, and programs, as well as regional assessments linked to land-use planning processes. Individual projects do not affect the environment or communities in isolation. Decisions should be based on the best information and analysis available, including regional and cumulative impacts, but we have watched as even the inadequate tools available, like the Cabinet Directive on Strategic EA, or panel reviews of proposed projects, have been underused and even ignored. For example, development in Ontario's "Ring of Fire," valued at up to \$60 billion, has been sidelined by the absence of a regional assessment or even a Panel review that would allow the affected communities and proponents to understand how the various proposed projects would combine to affect the region's environment, economy, and cultural life.

The present review is welcome and indeed, long overdue. We are very encouraged that the proposed Panel process includes public participation and recognises the rights of Indigenous peoples, and we are also encouraged by the proposed appointment of a Multi-Interest Advisory Committee to help guide the process. However, the Panel's Terms of Reference need to be revised in a number of respects to help ensure that it is able to meet public expectations and fill the yawning public policy gap in environmental assessment.

First, the "Scope of Review" should be made broader, to allow the Panel to look at the existing practice and historical implementation of EA in Canada, including in different jurisdictions, but also – crucially – to look to the future. Sound and testable public policy has to be developed with an objective in mind; the objective here must be to create a credible, rigorous, and effective assessment regime that will ensure development is in the best long and short term interests of the community, the country, and the planet – and that will meet Canada's commitments and obligations to the international community and to Indigenous peoples.

The starting point of the Panel's work should therefore not be the *Canadian Environmental Assessment Act* (CEAA 2012); CEAA is an important part of the context of the Panel's enquiry, but so are older federal EA regimes, as well as those of the provinces and the those established under comprehensive land claims agreements, in addition to international benchmarks such as the Aarhus Convention or the Akwé: Kon Guidelines. The Panel's mandate should be broad, not prescriptive, so rather than trying to elaborate a comprehensive list of precedents and benchmarks, it would be better to simply remove the definition of EA from the "Context" section. Likewise, the "Scope of Review" section should be re-framed to make it clear that while recent experience has been of EA administered by the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission or the National Energy Board, this is but one possible arrangement for undertaking EAs, and not even a terribly useful one. The Panel should be empowered to investigate a broad range of possible arrangements for the execution of EAs, decision-making (including appeals), and follow-up (monitoring and enforcement).

Second, we would recommend that the Panel be directed to take a broad view of federal authority in assessment. Sound planning and decision making require the greatest possible scope and depth of information and analysis, and while federal authority to make regulatory decisions is clearly limited and shared with other jurisdictions, the federal government has the ability – and a duty – to consider issues and decisions beyond that authority. The "Context" section, if it is to make reference to areas under federal jurisdiction, should specify that this applies in respect of regulatory authority, and that the scope of environmental assessments is not to be considered so restrictively.

Third, in keeping with our first recommendation, the Panel should not be considering EA as simply reducing environmental impacts, but as helping direct government decisions towards sustainability. The reference to best available technology in the "Context" section should instead be framed as an evaluation of alternative technologies as part of the assessment of the need for, and alternatives to, a proposed project, activity, plan or policy. In this respect, the Panel should also actively engage expert advice, including having resources to contract out research and discussion papers – not just allow it to do so once the Multi-Interest Advisory Committee has indicated it is not able to, as provided for in the "Expert Advice" section.

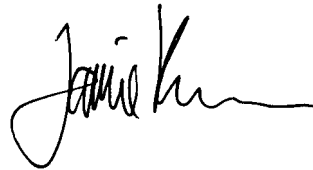
Fourth, while the mandate for "Indigenous Engagement and Consultation" is an important one, the Panel should probably go beyond discussions with the National Indigenous Organisations and include direct discussions with regional organisations, comprehensive land claims bodies, and rights-holders so as to benefit from a broad range of perspectives. The Panel should also take into consideration the *sui generis* protocols of different Indigenous peoples that express their sovereign right to Free, Prior, Informed

Consent, and which will affect not only the Panel's engagement with them but also the relationship between those protocols, the exercise of FPIC, and federal EA.

Finally, it is important that the Panel consider Canada's international obligations. In addition to potentially providing useful benchmarks, as we have suggested above, a progressive and comprehensive assessment regime is a critical element in meeting Canada's climate commitments under the Paris Agreement, the Biodiversity Convention, and so on; this is a clear area of federal jurisdiction that may also help assert a clear federal role in EA. At the same time, the Panel should also address the vulnerability of EA and EA-based decision making under international investor-state dispute settlement mechanisms like chapter 11 of NAFTA, as mentioned earlier, but including other agreements like the Canada-China FIPA (Foreign Investment Promotion and Protection Agreement) and the not-yet-ratified Trans-Pacific Partnership (TPP) and Canada-EU Comprehensive Economic and Trade Agreement (CETA).

Again, we appreciate the opportunity to comment on these draft Terms of Reference and we look forward to working with the Panel in this important task.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jamie Kneen', with a long horizontal flourish extending to the right.

Jamie Kneen
Co-Manager

cc. The Hon. Catherine McKenna, Minister of Environment and Climate Change
The Hon. Jim Carr, Minister of Natural Resources
The Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs
The Hon. Dominic LeBlanc, Minister of Fisheries, Oceans and the Canadian Coast Guard
The Hon. Marc Garneau, Minister of Transport
The Hon. Kirsty Duncan, Minister of Innovation, Science and Economic Development
Jonathan Wilkinson, Parliamentary Secretary to the Minister of the Environment and Climate Change
Marlo Raynolds, Chief of Staff, Minister of the Environment and Climate Change
Jesse McCormick, Director of Indigenous Relations and Regulatory Affairs, Environment and
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