

July 20, 2016

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

Re: Comments on Environmental Assessment Expert Panel Draft Terms of Reference

We are pleased to submit comments on the above-referenced draft Terms of Reference on behalf of the Environmental Planning and Assessment Caucus of the Réseau Canadian Environmental Network (RCEN). Since 1988 the Caucus has worked independently as well as engaging with the Agency (and its predecessor, FEARO) to improve environmental assessment (EA) law, regulations, policies, and practices; to provide guidance to federal departments; and to facilitate meaningful public participation in EA policy development and individual EAs.

This review is sorely needed, and the proposed Panel process – including public participation, engagement with Indigenous peoples, the appointment of a Multi-Interest Advisory Committee, and the ability to directly engage expert advice – is a welcome, well-designed, and much-needed initiative. At the same time, the Panel Terms of Reference need to be strengthened to ensure that the Panel is best equipped to investigate and report on leading-edge law, policy and practice to allow the Government to fulfill its mandate and build the next-generation of environmental assessment for Canada.

Core recommendation: Broaden the scope of review

We are concerned that the Panel may interpret the Terms of Reference as written as limiting the scope of questions and solutions it may investigate in the review. It is broadly acknowledged that the *Canadian Environmental Assessment Act* (CEAA 2012) has failed to work for the public, affected communities, project proponents, or Indigenous peoples; previous approaches under CEAA 1992 also had serious failings. In our view, building better environmental assessment processes will require changes in the way we fundamentally view and approach assessment, which in turn will require significant legislative changes.

To that end, the Panel should have a broad mandate and the authority, encouragement and resources to ask bigger-picture, strategic questions, seek out leading thinking from experts, undertake broad and deliberative public consultations, and collaborate with Indigenous governments. Some key strategic issues that will need to be examined – and potentially rethought – include how to: effectively assess and manage cumulative effects; prioritize assessments at the regional and strategic levels, and link “tiers” of assessment and decisions at all levels of assessment, planning and decision-making; build meaningful public participation into federal EA processes; define a strong federal role in EA where development proposals may affect areas of federal jurisdiction; build processes that truly lead to sustainability-enhancing outcomes; assess climate impacts in such a way as to best help ensure that Canada meets its international commitments; and implement UN Declaration on the Rights of Indigenous Peoples in a federal EA regime that is consistent with the principles of Free Prior Informed Consent for Indigenous peoples and actively facilitates the exercise of those rights.

Our specific recommendations are:

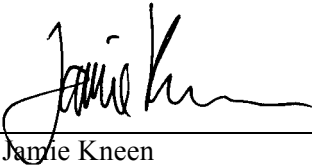
- 1. Remove the definition of environmental assessment.** Currently, the “Context” section provides a narrow and arguably outdated definition of the role of EA. We recommend that this definition be deleted and the Panel be mandated to, as a first task, explore and define the goals and purpose of modern-day EA to set the context for the new process.
- 2. Direct the Panel to consider broadly the federal role in environmental assessment.** The Terms of Reference restrict the Panel’s consideration of environmental assessments to areas under federal jurisdiction. While the federal government’s regulatory powers are limited to areas under its jurisdiction, the Supreme Court of Canada has recognized that environmental assessment is an information-gathering process. Moreover, adequate consideration of multijurisdictional assessment and cumulative effects assessment will require considering information in areas beyond federal jurisdiction. Therefore the Panel should be directed to consider how to establish robust federal oversight and thorough federal environmental assessments.
- 3. Explicitly require the Panel to examine leading-edge solutions to key issues.** In addition to the purpose and role of EA, the Panel should be tasked with examining key issues in federal EA, such as sustainability versus environmental assessment, regional and strategic EA and the life cycle of assessment. In considering those issues, the Panel should be directed to consider leading-edge solutions beyond just what has been done in Canada to date.
- 4. Commission discussion papers and other expert advice.** We were encouraged to see that the Terms of Reference enable the Panel to retain expert advice. However, this option should be built in as a requirement to help ensure that the best available leading thinking in EA and right strategic questions come before the Panel, as well as to focus the engagement of Indigenous peoples, the public, other jurisdictions and stakeholders. Moreover, because the Panel’s timeline for conducting the review and producing its report is very short, we recommend that the Minister or Agency begin commissioning initial scoping discussion papers in advance of the Panel’s appointment (e.g., on core themes, key principles, and major design principles).
- 5. Do not presuppose reviewing and decision-making bodies.** The Terms of Reference ask the Panel to assess how the NEB and CNSC are conducting environmental assessments. In our view, the review should also ask whether they should be doing so at all. The Panel should be tasked with examining and advising on institutional arrangements more generally, such as where the assessment body, decision-making and appeal body should be housed, as well as how to ensure they have adequate and appropriate authority and capacity.
- 6. Require the Panel to examine implementation and oversight of EA processes.** In addition to investigating and making recommendations regarding what bodies undertake reviews and make decisions based on those reviews, the Panel should also consider implementation and oversight. For example, the Privy Council Office is currently charged with ensuring that strategic assessments are carried out under the Cabinet Directive; the Panel should therefore review its role in ensuring effective strategic environmental assessments. Likewise, the Panel should consider the roles and responsibilities of other federal agencies and departments as regulators and experts in informing and participating in EAs, and in following through on their conclusions.
- 7. Require the Panel to demonstrate how comments are considered.** While we support the requirement that the Panel summarize public comments received during the review in its report, we recommend that it also explain how those comments were applied in reaching its rationale.

8. Establish a public review period on the draft report. Once it is appointed, the Panel will have a momentous task ahead of it. Also, we anticipate that many participants and Indigenous groups will be heavily invested in this review and its outcome. To further assist the Panel with its ultimate task and provide additional accountability and assurance for participants and other governments, we recommend that the Terms of Reference establish a comment period on the draft Report.

In addition, we would like to note what we view is a shortcoming of the overall environmental review package: the lack of a review of the Canadian Nuclear Safety Commission. We were pleased that there will be a separate review of the National Energy Board. However, similar to the NEB, the CNSC has been accused of regulatory capture, bias, ineffectiveness and incompetence when undertaking environmental assessments as well as regulatory activities. These are very serious concerns and, in our view, warrant a detailed and separate review of the CNSC beyond what will be considered in the EA review.

Thank you again for this opportunity to comment on the draft Terms of Reference. We would be pleased to discuss these recommendations and look forward to working with you further on federal EA reform.

Yours sincerely,



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Co-Chairs of the EPA Caucus of the Canadian Environmental Network

cc: The Hon. Catherine McKenna, Minister of Environment and Climate Change
The Hon. Jim Carr, Minister of Natural Resources
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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 Canada
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