

July 20, 2016

*Sent via email*

Review of Environmental Assessment Processes  
Canadian Environmental Assessment Agency  
160 Elgin Street, 22nd Floor  
Ottawa ON K1A 0H3  
CEAA.EARReview-ExamenEE.ACEE@ceaa-acee.gc.ca

Ecojustice Environmental Law  
Clinic at the University of Ottawa  
216 – 1 Stewart St.  
Tel: 613-562-5800 x 3382  
Fax: 613-562-5319  
infoclinic@ecojustice.ca

Attention: Review Secretariat,

**Re: Ecojustice comments on the review of environmental assessment processes:  
Expert panel draft terms of reference**

We thank you for the opportunity to comment on the June 20, 2016, draft Terms of Reference (“TOR”) for the expert panel being established by the Minister of Environment and Climate Change (the “Minister”) to the review the federal environmental assessment (“EA”) processes.

We are pleased that the federal government has made the review of the existing EA regime a priority. We look forward to providing our input on this important topic as the review process proceeds.

Our proposed amendments to the TOR are provided below. The rationale for the proposed amendments are explained first, followed by a listing of the specific text amendments being proposed.

Definition of EA

The panel should not be limited to adhering to a narrow definition of EA, such as the one provided for in the Context section of the draft TOR. Our proposed amendment (1) sets out the broadest possible framing of EA, which is where a review to determine the best federal EA regime should begin. If the panel were to rely on a narrow definition of EA to guide its review it would artificially and unnecessarily narrow the scope of the review, such as removing consideration of strategic assessments, sustainability assessments, and other modern assessment methodologies.

## CEAA 2012

The TOR should not be focused on the operation of *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”). While that legislation may have some valuable aspects, it is essential that the panel have the leeway to consider broad and visionary reforms and to move away from the fundamental approach in CEAA 2012. Our proposed amendments (2), (3), (5), (10), and (11) all seek to make it clear that the goal of the panel is to build a new, forward looking, EA regime, not tinker with CEAA 2012.

Specifically, the TOR suggest that the panel is limited to considering how EAs are conducted by the three responsible authorities under CEAA 2012, rather than considering whether those are the bodies that should be conducting the assessments in first place. There are important questions the panel must address about whether the NEB and CNSC should be conducting federal EAs in the future and the TOR should make clear that the panel may examine these issues. This is addressed in our proposed amendment (11).

The TOR also provide a view that the Canadian Environmental Assessment Agency will remain at the centre of federal EA, which may or may not be the panel’s recommendation. It is important that the panel have the freedom to review who might best carry out EAs federally. This is addressed in our proposed amendment (5).

In order to adequately address the existing deficiencies and develop a new and effective system, the panel review needs to go beyond a post-mortem of how the current system is working. The panel needs to be tasked with providing recommendations on what state of the art assessment law could look like and how it can be implemented in Canada. Making that determination requires consideration of alternative approaches and models, including a sustainability-based assessment.

## Broad Review

The specific matters raised in the mandate letters to the Minister and the Minister of Indigenous and Northern Affairs should be considered the bare minimum that the Panel should explore as part of its review. It should by no means be viewed as an exhaustive list of issues to be considered, as it represents only a small fraction of the matters that should be included within the scope of the review. This is addressed in our proposed amendment (7).

## Traditional Ecological Knowledge

There is no mention of Traditional Ecological Knowledge (“TEK”) in the draft TOR. A requirement to consider the role of TEK in EAs should be included in the TOR. The TEK is an important consideration to include in decision-making within the new EA framework. Our proposed amendment (9) seeks to make TEK an essential consideration in the panel’s review.

## Public Engagement

It is our view that public commentary is an important part of the review process. While the TOR require a Public Engagement Plan, they do not indicate that the public will be given an opportunity to provide feedback on the Public Engagement Plan. Given that this is a crucial aspect of the ability to participate in the EA review process, there should be an opportunity for the public to provide feedback on the plan. This will include how the panel interprets important, but ambiguous, terms, such as “open to the public.” Our proposed amendment (13) would provide for that public comment period.

Similarly, the draft TOR do not provide for comments on future changes to the TOR, while specifically outlining a process for future changes. Our proposed amendment (12) would ensure that future amendments to the TOR are subject to the same public scrutiny as these draft TOR.

Finally, on public engagement, we are of the view that a final public comment period on the panel’s report is warranted. This is what our proposed amendments (4) and (16) attempt to achieve. This would be similar in process to the CEAA 2012 model of project EA reports. Certainly an overhaul of the EA system deserves no less scrutiny.

## Multi-Interest Advisory Committee

We are concerned that the TOR require consensus positions for the Multi-Interest Advisory Committee. While consensus positions would be ideal, our proposed amendment (12) seeks to set out a process for when consensus cannot be achieved. We trust that an expert panel will be able to appreciate and assess multiple opinions for the Multi-Interest Advisory Committee.

## Independence of Experts

We are pleased that the panel will have the ability to retain outside expert reports and that those reports will be posted for examination by the public. However, it is important that the experts retained are independent. Public notice of when an expert has been retained, and who has been retained, will provide accountability for those choices before the report is finalized. This will ensure that the panel is careful in selecting primarily consensus experts. Our proposed amendment (15) would ensure that accountability.

## Northern Review

We see no reason to explicitly exclude a consideration of northern issues from the panel’s mandate. While in some cases the Federal government has agreements with First Nations and Inuit to restrict the application of prior or existing Federal EA legislative regimes in parts of the north, this has never been explicit in federal EA legislation and has never been the subject of a broader public discussion about effective environmental regulation across Canada. Further, in

some cases, such as in Nunavut, land claims amendments restricting the application of federal EA law were not ratified by communities.

Not all areas of Canada's north are subject to land claims agreements that restrict the application of existing EA laws and some agreements contemplate at least a partial application of federal EA laws or related legislation. A more effective national EA regime may be something that northern communities could benefit from, and therefore they ought not to be excluded from the discussion. If there is a broader review of EA regimes in the north this ought to be looked at alongside federal EA reform. A broad consideration of how EA ought to operate at the federal level must include a consideration of the best regulatory framework in the north. Our proposed amendment (6) would remove the current limitation on the application of EA in northern communities.

### Provincial EA

We acknowledge that federal environmental assessments must consider the role of similar processes in the provinces. However, the panel should not be limited in considering the interaction of existing federal and provincial processes. These processes vary considerably between provinces in both scope and effectiveness. The draft TOR limits the consideration to duplication, and our proposed amendment (8) would remove that limitation.

In our submission the issue of duplication should not be the focus when scoping the fundamentals of a reformed federal EA regime, rather coordination where practicable should be facilitated. A robust federal EA regime should have the objective of being a stand-alone regime that can adapt to provincial inaction or ineffectiveness on EA. This is consistent with a broad review looking for the best possible federal EA regime and with Supreme Court of Canada jurisprudence.

### Text Amendments

For the reasons set out above, we proposed that the text of the draft TOR, released on June 20, 2016, be amended as follows:

- (1) On page 1, under the heading "Context", delete:  
"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) On page 1, under the heading "Context", replace:  
"assessment processes associated with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012)."  
with:

“assessment processes, which are currently set out in the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).”

- (3) On page 1, under the heading “Mandate”, replace:  
“assessment processes associated with CEAA 2012,”  
with  
“assessment processes, as currently set out in CEAA 2012,”
- (4) On page 1, under the heading “Mandate”, replace:  
“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.”  
with:  
“The Panel shall submit the report to the Minister, who shall provide for a reasonable public comment period on the Panel’s report. The Minister may request that the Panel clarify any of the conclusions and recommendations set out in its report.”
- (5) On page 2, under the heading “Complementary Mandates”, delete:  
“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.”
- (6) On page 2, under the heading “Complementary Mandates”, delete:  
“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.”
- (7) On page 2, under “Scope of Review”, add  
“, among other issues”  
after:  
“(Question 5)”
- (8) On page 2, in the first point under “Scope of Review”, delete:  
“to avoid duplication”.
- (9) On page 2, under the second point under “Scope of Review”, add:  
“,including traditional ecological knowledge,”  
after:  
“facts and evidence”

- (10) On page 2, in the fifth point under “Scope of Review”, delete:  
“to ensure that environmental assessment legislation is amended to”
- (11) On page 2, under “Scope of Review”, delete  
“by the three responsible authorities under CEAA 2012, namely the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission or the National Energy Board.”
- (12) On page 3, under the heading “The Panel”, delete:  
“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.”  
and replace that with the following paragraph at the end of the section entitled “The Panel”:  
“The Minister shall provide for a reasonable public comment period on any proposed changes to these Terms of Reference prior to making any changes. 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.”
- (13) On page 3, under the heading “Public Engagement”, replace  
“This plan shall be posted on the Panel’s website.”  
with  
“A draft version of this plan shall be posted on the Panel’s website and an invitation issued for public comments, including the provision of a reasonable comment period. Once comments on the plan have been reviewed, the Panel may modify the plan and the final version of the plan shall be posted on the Panel’s website.”
- (14) On page 5, under the heading “Multi-Interest Advisory Committee” delete:  
“to the extent possible,”  
and replace it with:  
“when possible, and majority and minority opinions when consensus is not possible,”
- (15) On page 5, under the heading “Expert Advice”, add:  
“The public shall be notified when an expert is retained, including notice of who has been retained and on which topic, and”  
before:  
“Any advice provided to the Panel will be posted on the Panel’s website.”
- (16) On page 5, under the heading “EA Review Report”, add:  
“and allow for a reasonable public comment period on the report.”  
after:

“the Minister will make the report available to the public.”

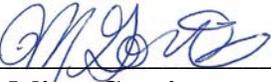
We appreciate the opportunity to comment on the draft TOR. Please do not hesitate to contact us if you have any question regarding our submission.

Sincerely,



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**Karen Campbell**  
Staff Lawyer



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**Melissa Gorrie**  
Staff Lawyer



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**Laura Bowman**  
Staff Lawyer

cc: Hon. Catherine McKenna, Minister of Environment and Climate Change,  
[Catherine.McKenna@parl.gc.ca](mailto:Catherine.McKenna@parl.gc.ca)

Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs,  
[Carolyn.bennett@parl.gc.ca](mailto:Carolyn.bennett@parl.gc.ca)

Hon. Jim Carr, Minister of Natural Resources,  
[Jim.Carr@parl.gc.ca](mailto:Jim.Carr@parl.gc.ca)

Hon. Dominic LeBlanc, Minister of Fisheries, Oceans and the Canadian Coast Guard,  
[Dominic.leblanc@parl.gc.ca](mailto:Dominic.leblanc@parl.gc.ca)

Jonathan Wilkinson,  
[Jonathan.Wilkinson@parl.gc.ca](mailto:Jonathan.Wilkinson@parl.gc.ca)

Marlo Reynolds,  
[Marlo.reynolds@canada.ca](mailto:Marlo.reynolds@canada.ca)

Jesse McCormick,  
[Jesse.mccormick@canada.ca](mailto:Jesse.mccormick@canada.ca)