



July 20, 2016

Review of Environmental Assessment Processes  
Canadian Environmental Assessment Agency  
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**Subject: Review of environmental assessment processes: Expert Panel Draft Terms of Reference**

The Mining Association of Canada (MAC) is the national organization for the Canadian mining industry. Its members account for most of Canada's production of base and precious metals, uranium, diamonds, metallurgical coal and mined oil sands, and are actively engaged in mineral exploration, mining, smelting, refining and semi-fabrication.

The mining industry is the sector with the most continuous and extensive experience with the *Canadian Environmental Assessment Act*. Nearly all new mines and major expansions have been subject to the Act since it came into force, continuing to date with CEAA 2012. The fundamental changes brought by CEAA 2012 have resulted in mining projects now constituting the majority of projects undergoing CEAA assessments. The mining sector also has experience with other federal approval processes and with the assessment and regulatory processes of nearly every province, as well as the processes established in the territories.

MAC appreciates the opportunity to comment on the draft Terms of Reference for the Expert Panel, published on June 20, 2016. The draft Terms of Reference outline a positive direction in the evolution of Canada's framework for achieving sustainable development. We are supportive of a process that ensures robust oversight and enhances regulatory certainty. MAC welcomes the review and looks forward to participating in it.

We offer the following recommendations to improve the clarity of the draft Terms of Reference and the likelihood of a constructive outcome of the review.

### **Purpose of Review**

The draft Terms of Reference for the Expert Panel are not clear on the purpose of the review. On one hand, they appear to be high level and broad. On the other hand, they imply that the basic elements of the current *Canadian Environmental Assessment Act* (CEAA 2012), such as the Act's application primarily to major resource projects, are to form the starting assumptions of the review. They also appear to imply that only experience with assessments since CEAA 2012 came into force will be considered. Yet consideration of previous versions of the Act would be helpful. For example, the removal of federal decisions as triggers for CEAA assessments largely narrowed the Act's ability to "inform government decision-making".

Based on our sector's broad and deep experience with environmental assessment processes, MAC believes that a review restricted to the assumptions of CEAA 2012 is less likely to lead to environmental assessment that informs government decision-making, supports sustainable development, fosters robust oversight or public trust, resolves jurisdictional incoherence, and advances reconciliation with Canada's Indigenous Peoples.

MAC supports a review process that leads to recommendations based on sound science, facts and evidence gathered during engagement and consultation, along with input from the Multi-Interest Advisory Committee. However, MAC is concerned that some of the phrases in the draft Terms of Reference appear to predetermine the outcome of the review. For example, the current wording in the first bullet under Scope of Review, "...restore robust oversight...", implies that robust oversight existed under the previous Act. This wording also ignores the fact that federal oversight of mining projects was not reduced by CEAA 2012. Neutral wording that communicates the intent, such as "ensure robust oversight" or "foster robust oversight" would, therefore, be more appropriate.

Further, environmental assessment forms just part of the federal and overall regulatory approvals process for mining, and as such, needs to be considered within the broader context of government decision making.

**MAC Recommends:**

1. Revise the wording in the draft Terms of Reference to more clearly convey the purpose of the review intended by the government, and adjust any language that unintentionally implies restrictions on the review or presumes its outcome.
2. Include direction to the Expert Panel to consider in its review that environmental assessment forms just one part of a broader regulatory framework, and is followed by permitting, licensing or authorization processes.

## **Holistic Framework**

There are unavoidable overlaps between federal and provincial assessment processes, decision making and regulatory requirements. Avoiding duplication, as called for in the first question under Scope of Review, "How to restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with the provinces and territories to avoid duplication?", is not easy and, in MAC's opinion, insufficient. The ideal objective should be a fully integrated review and approval process that seamlessly coordinates the various jurisdictional needs and post-assessment permitting.

Seamless coordination is essential for robust and meaningful consultation. Piecemeal, fragmented consultations from different levels of government and various departments in addition to proponent communications can be demanding for Indigenous groups and communities of interest. Clarity, transparency, and coordination are very important qualities for meaningful engagement and participation.

Assessing what are "areas under federal jurisdiction" in the question above and examining the roles of federal expert departments referred to in the second paragraph under Complementary Mandates will be challenging, and must look beyond the *Fisheries Act* and the *Navigation Protection Act*. In particular, the relationship between assessments and the *Species at Risk Act* must be taken into consideration.

In addition to federal expert departments supporting the Canadian Environmental Assessment Agency (second paragraph under Complementary Mandates), the review must take into consideration that environmental assessment is not the last stage in regulatory oversight for projects in Canada. How the outcome of federal assessments contributes to the subsequent federal permitting, licensing or authorization processes must be considered.

For mining industry projects, provinces are the primary life-of-project regulators. While assessments must consider the potential impacts of the full life cycle of a project, they do so at an early point in that life cycle. For provincially-regulated sectors such as mining, any federal assessment must take into account that future regulatory decisions taken by a province will be based on information that is not available at the time of the assessment. For example, decisions by a province on how a closed mine site should be reclaimed will be made decades after the federal assessment.

**MAC Recommends:**

3. Include in the draft Terms of Reference a requirement that the Panel consider how the federal assessment process interacts with, complements, duplicates or differs from the provincial processes, and how seamless coordination can be accomplished.
4. Include reference in the section on Complementary Mandates to the *Species at Risk Act*.
5. The Panel should consider how the outcome of a federal assessment contributes to the permitting, licensing or authorization processes that follow.
6. Examine the relationship of federal assessment processes to the life-of-project regulator whether provincial or federal.

## Role of Provinces

Provinces are the primary jurisdiction for natural resources, commercial activities, infrastructure within a province, and provincial lands. They have obligations towards Indigenous Peoples as the Crown in their own right for their decisions. South of 60, any project or regional environmental assessment is likely to involve the relevant province. Provincial governments are, therefore, more than a stakeholder.

Achieving the objectives of the review identified in the Terms of Reference will require awareness of the nuances and variability of provincial processes, and should include engagement with provincial governments. The Terms of Reference should explicitly consider the need for engagement with provinces through participation on the Panel or the Multi-Interest Advisory Committee or through a stand-alone engagement process.

**MAC Recommends:**

7. Explicitly acknowledge the need to engage with provincial governments in the last paragraph of the Context section, “*The Panel will engage and consult with Canadians, Indigenous peoples, provinces and key stakeholders and develop recommendations on ways to improve federal environmental assessment processes.*”
8. Add a new section on Provincial Engagement in the section on Conduct of the Review.

## Indigenous Engagement

Engagement with Indigenous Peoples will be a critical aspect of the review. MAC sees value in explicitly identifying which Indigenous engagement components should be contemplated within the scope of this review process and which components are best contemplated under the government's broader Indigenous consultation initiative.

The Terms of Reference direct the Panel to meet with National Indigenous Organizations. However, while they refer to consultations with communities, they do not explicitly acknowledge the need for the Panel to seek the views of Indigenous rights holders. As well, in light of the evolution of jurisprudence on the subject of the Crown's duty to consult, it would be helpful for the Terms of Reference to encourage the Panel to inform itself on recent court decisions relevant to its mandate. Practices and procedures associated with the conduct of environmental assessments must continue to be compatible with Canada's Constitutional and legal framework.

The draft Terms of Reference appear to make the assumption that one solution may fit all situations, which is unlikely to be reflective of the diversity of needs, aspirations, views and capacities of Indigenous Peoples.

The draft Terms of Reference should also acknowledge the respective roles of the project proponent and the Crown to fulfill the duty to consult, and distinguish between the role of the environmental assessment process to fulfill that duty, and the Crown's broader obligations.

### MAC Recommends:

9. Encourage the Panel to consider recent court decisions with respect to Indigenous rights and the Crown's duty to consult so that federal processes are reflective of the evolving Constitutional and legal framework.
10. Identify which Indigenous engagement components should be contemplated within the scope of this review process and which components will be contemplated under the government's broader Indigenous consultation initiative.
11. Consider the Indigenous rights holders in the Indigenous Engagement Plan (in addition to National Indigenous Organizations).
12. Avoid implying in the Terms of Reference that the Expert Panel is expected to recommend a single approach in all circumstances.
13. Distinguish the respective roles of the project proponent and the Crown in fulfilling the duty to consult, and the role that environmental assessments play in this area.

## Effects of Legislation, Policy and Capacity

As noted, the application and scope of federal environmental assessments was maintained for mining projects in the transition from CEAA 2010 to CEAA 2012. Similarly, the industry did not experience a reduction in the number of *Fisheries Act* authorizations required under the amended Act, and the scope of each authorization appears to have increased.

Our sector's experience with the regulatory reform of 2012 leads us to believe that changes in government capacity and policies have affected implementation of current federal legislation.

**MAC Recommends:**

14. Acknowledge the need for the Expert Panel to consider the extent to which implementation of the 2012 amendments, through policies and reduced government capacity, contributed to the actual and perceived changes.

### **Supporting Sustainable Development**

As noted in the Federal Sustainable Development Strategy, and in the House of Commons Standing Committee on Environment and Sustainable Development report, *Federal Sustainability for Future Generations*, sustainability requires attention to more than the bio-physical environment. Without presuming what the Panel will conclude, its Terms of Reference could ask it to examine whether federal assessments should include considerations of impacts on more than just the bio-physical environment. In other words, the Panel needs to consider what should be the scope of assessment under CEAA.

As noted in the 2015 Progress Report of the Federal Sustainable Development Strategy and numerous other reports and studies, as well as in many of the cumulative effects assessments during CEAA assessments, the primary causes of degradation of Canada's environment and of erosion of Indigenous traditional uses are the cumulative effects of many small projects and activities. Environmental assessments focused exclusively on "major resource projects" will, therefore, be insufficient to respond to the Federal Sustainable Development Strategy. Moreover, the assessment of cumulative effects in the course of assessment of major resource projects creates an impossible situation for the project proponent, and affected communities and Indigenous Peoples – the cumulative effects are identified, but any decision is confined to the one project. MAC, therefore, recommends that references to "major resource projects" (fifth question and the last paragraph under Scope of Review) be removed so as not to pre-determine the outcome of the review.

MAC also recommends that the Panel consider whether non-project-centred assessments, such as regional assessments, could augment project-specific assessments. Regional assessments have the potential to address the practicality of assessing small projects and activities, the concerns of Indigenous Peoples and communities, and the need for integration of overlapping federal and provincial jurisdictions. Recognizing that regional assessments take time, require inter-jurisdictional cooperation, and may not be feasible in all parts of Canada, the Panel will have to carefully consider how to prevent them becoming a barrier to ongoing economic activity and project development in the short and medium term.

The Panel's recommendations for federal assessment processes will have to take into consideration the potential impacts on Canada's investment climate, ensuring that the processes recommended will be clear to all participants, practical, scalable to suit the size of projects or undertakings assessed, timely, seamlessly integrated within the overall federal regulatory framework, and flexible to coordinate with provincial processes. MAC recommends that the draft Terms of Reference include direction to the Panel to take these factors into consideration in its analysis and recommendations.

**MAC Recommends:**

15. The Panel could be asked to examine whether federal assessments should include considerations of impacts on more than just the bio-physical environment. In this case, a question should be added under Scope of Review to the effect of: “Should federal assessment processes include consideration of socio-economic and cultural impacts, and what changes to those processes and decision-making framework would be necessary to do so?”
16. Given that the primary causes of degradation of Canada’s environment and of erosion of Indigenous traditional uses are the cumulative effects of many small projects and activities, references to “major resource projects” (fifth question and the last paragraph under Scope of Review) should be removed.
17. Consider whether regional assessments or other non-project-centred assessments should be part of the federal environmental assessment framework to augment project-specific assessments.
18. Consider the potential impacts of any recommended changes to federal assessment processes on Canada’s investment climate.

**“Best Available Technologies”**

The fourth bullet under Context, “Require project advocates to choose the best technologies available to reduce environmental impacts”, and the similarly worded fourth question under Scope of Review may divert the review into unproductive discussion and detract from its goals. What is “best” is very dependent on the type of project and its local circumstances. For example, a technology suited to a hot desert landscape may be ineffective or even damaging on permafrost. Similarly, impacts on the environment as well as socio-economic impacts are determined by much more than choice of technology, including location of major components and infrastructure in the landscape, operating practices, hiring and training, community engagement, etc. Additionally, the sufficiency or adequacy of an existing technology, standard, etc. should not be debated within the context of a single proponent’s project. If technologies or standards are thought to be inadequate, the appropriate oversight body should engage in a separate process to debate and address any issues. As well, the wording of the phrase pre-supposes that the review will conclude that federal assessments should continue to focus exclusively on the bio-physical environment.

**MAC Recommends:**

19. Rephrase the fourth question under Scope of Review to: “How to ensure that project advocates consider alternatives that are best from an overall sustainability perspective?”

**Other Issues**

The second question under Scope of Review, “How to ensure decisions are based on science, facts and evidence and serve the public’s interest?”, may benefit from rewording. It should clarify that science, facts and evidence *are* in the public’s interest, and the public’s interest should be framed by clearly defining the goals of CEAA. It would also be helpful to clarify that traditional knowledge is included in these terms.

MAC heartily welcomes the inclusion of a Multi-Interest Advisory Committee described under Conduct of the Review. MAC would recommend that, in addition to providing advice at the request of the Panel, the Multi-Interest Advisory Committee be empowered to initiate discussion on key topics. This would build on the productive work of the Regulatory Advisory Committee on CEAA, which provided advice during the implementation of the Act and its previous reviews.

**MAC Recommends:**

20. Adjust the second question under Scope of Review to include traditional knowledge and to make the intent clearer.
21. Enable the Multi-Interest Advisory Committee to initiate discussion on key topics in addition to providing advice at the Panel's request.

**Timeline**

Noting the complexity of the issues that will have to be reviewed by the Panel, the extent of necessary consultations with the public, Indigenous Peoples, key stakeholders and, as recommended by MAC, provincial governments, as well as the interplay between environmental assessments and other federal approval processes, the timeline proposed by the Terms of Reference is extremely ambitious.

Respecting that timeline, MAC is not recommending additional process steps that would improve the robustness of the review. However, MAC believes that the process of arriving at the final environmental assessment framework will need to be iterative. It would be reassuring for the government to outline, within the Terms of Reference or in a companion document, subsequent opportunities for comment on the Expert Panel Report and on how the government would propose to proceed, taking into account the review of environmental assessments in combination with the outcome of the reviews of other legislation.

**MAC Recommends:**

22. Highlight within the Terms of Reference or in a companion document that there will be additional opportunities for comment on the Expert Panel's Report and on how the government plans to proceed.

Yours sincerely,



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