



The Honourable Catherine McKenna
Minister of Environment and Climate Change
c/o Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON
K1A 0H3

Via e-mail: CEAA.EARReview-ExamenEE.ACEE@ceaa-acee.gc.ca

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**Re: Comments on Draft Terms of Reference of Expert Panel
for Review of Federal Environmental Assessment Processes**

Thank you for providing the opportunity to comment on the draft terms of reference of the Expert Panel (“Panel”) and the planned review of environmental assessment processes.

The BC First Nations Energy and Mining Council (“FNEMC”) was established by First Nations leaders for the benefit of all BC First Nations. FNEMC’s board of directors is composed of representatives of the BC Assembly of First Nations, the First Nations Summit and the Union of British Columbia Indian Chiefs. The mission of FNEMC is to support and facilitate BC First Nations efforts to manage and develop energy and mineral resources in ways that protect and sustain the environment while enhancing First Nations’ social, cultural, economic and political well-being.

FNEMC assists in the development of BC First Nations’ capacity to participate in mining (including participation in mineral exploration and development and in production) and energy project opportunities in BC, and for First Nations communities to achieve self-sufficiency through sustainable development. FNEMC seeks to develop consensus on policies and programs, in partnership with BC’s 203 First Nations, to advance their constitutional, statutory and common law rights and interests in the exploitation of mineral and energy resources.

Introduction

As your ministry has declined to provide capacity funding to facilitate the preparation of a submission from FNEMC and British Columbia’s 203 First Nations, I submit an abbreviated commentary on the draft terms of reference.

In February FNEMC submitted an initial funding proposal to the Canadian Environmental Assessment Agency to coordinate and carry-out research to create a First Nations engagement plan whereby engagement results would be a touchstone for dialogue with government agencies and industry representatives on environmental assessment processes. The proposal was submitted on the understanding that a comprehensive environmental assessment review process would take place over an approximately two-year period. FNEMC reached out to your ministry on a number of occasions between February and July seeking a reply to it’s proposal. The response from your ministry was denial of funding and that FNEMC should consider submitting, after the terms of reference are finalized and the Panel appointed, a new proposal that aligns with a pending funding program.

FNEMC wishes to state on the record that when funding criteria are announced, it will in a new proposal identify costs incurred in preparing this submission.

Context

1. The opening sentence of the draft terms of reference states that environmental assessment informs government decision-making and supports sustainable development by, *inter alia*, ensuring that mitigation measures are applied when a project is “constructed, operated and decommissioned”.
 - a. Comment: This phrase “constructed, operated and decommissioned” must be amended to “constructed, operated, decommissioned, closed and abandoned”. With the increasing number of closed and abandoned mines requiring water treatment facilities to be maintained and operated in perpetuity, explicit recognition of closure and abandonment in the draft terms of reference, as stages in the environmental assessment process, is required.

The terms of reference should direct the Panel to ensure true “walk-away scenarios” for mine closure is a fundamental principle in environmental assessment. That is, the objective for mine owners and operators to achieve upon mine closure is of no monitoring or further reclamation.

- b. Comment: The terms of reference must include reference to ensure federal environmental processes are (1) aligned with provincial Crown environmental assessment processes, and (2) aligned with the increasing number of First Nations-led environmental assessment processes and broader project review processes such as those of the Coast Salish Squamish Nation and the Shuswap Stk’emlupsemc te Secwepemc Nation.
2. The draft terms of reference reproduces four priorities from the 2015 mandate letter of Prime Minister Trudeau to you, as Minister of Environment and Climate Change.
 - a. Comment: The Prime Minister’s mandate letter states, “No relationship is more important to me and to Canada than the one with Indigenous Peoples.” Unfortunately, the speed and condensed nature of this environmental process review combined with the complexities of reviewing multiple enactments involving multiple ministries, foreshadows a review that is more of process than of substance.

No Crown regulatory activity is more integral, and impactful, to the culture and livelihood of First Nations than that of environmental assessment. On matters of proposed legislation that has the potential to adversely affect First Nations constitutional rights, the Crown has a fiduciary duty grounded in the honour of the Crown to substantively engage First Nations as per the commitments outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

Complementary Mandates

3. The scope of the Panel’s environmental assessment review also includes those relevant matters that “intersect” environmental assessment and the mandates of other ministers of the Crown: the Minister of Fisheries, Oceans and the Canadian Coast Guard (review changes to and restore lost protections of the Fisheries Act), Minister of Natural Resources (modernize the National Energy Board such that Board member composition has sufficient expertise in “indigenous

traditional knowledge”), and Minister of Transport (review changes to and restore lost protections of the Navigation Protection Act replacement of the Navigable Waters Protection Act).

- a. Comment: The core of the Panel’s environmental assessment review process is to review and propose repeal, amendment or enactment of environmental assessment legislation. The Panel must review, in detail, not only the two pieces of 2012 omnibus legislation known informally as Bill C-38 and Bill C-45, but also 2010 omnibus legislation known as Bill C-9. All three omnibus bills were enacted by the previous Conservative government. In addition, the forgoing bills’ antecedent environmental assessment legislation that was repealed or amended requires a considered review by the Panel (such as the Navigable Waters Protection Act, the Canadian Environmental Assessment Act and the Fisheries Act). The same, considered review by the Panel is essential for intersecting environmental assessment legislation and legislation that is significantly, consequentially amended or repealed (such as Canada Oil and Gas Operations Act, Nuclear Safety and Control Act, Canadian Environmental Protection Act, 1999, Species at Risk Act, Kyoto Protocol Implementation Act, and Canada National Marine Conservation Areas Act).
4. The draft terms of reference states “northern” environmental assessment regimes are not within the Panel’s mandate.
 - a. Comment: Clarity is required that the Panel will review environmental assessment processes applicable to projects in northern Quebec and Labrador. If northern Quebec and Labrador are included in the review I suggest replacing “northern” with “territorial”.
 5. The draft terms of reference state that the Panel shall focus on environmental assessment matters and the roles of “expert” departments supporting the Canadian Environmental Assessment Agency, such as compliance and enforcement activities.
 - a. Comment: The collective experience of British Columbia First Nations on matters of compliance and enforcement after issuance of Crown environmental assessment certificates and decision statements has been uniformly negative. The litany of non-compliant activity by project proponents and the utter lack of enforcement in energy and mining projects is one of the most significant structural deficiencies of Crown environmental assessment and related regulatory processes. Compliance and enforcement is a priority issue that must be considered and addressed in the Panel’s Indigenous Engagement Plan.

Scope of Review

6. This part of the draft terms of reference recasts, in an inappropriately structured question format, the Prime Minister’s four mandated priorities to you as Minister.

Further, an additional fifth priority matter (from the Prime Minister’s mandate letter to the Minister of Indigenous and Northern Affairs) is included in the scope of review and directs the Panel to consider dealing with enhancing the “consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects”. The Minister of Indigenous and Northern Affairs’ mandate letter from the Prime

Minister also includes the statement, “No relationship is more important to me and to Canada than the one with Indigenous Peoples.”

- a. Comment: This fifth priority matter is vitally important to First Nations and, as presently worded, exceptionally broad and wide-ranging. The current capacity of First Nations to be fully informed prior to government decision-making in reviewing major resource development projects is non-existent. Similarly, First Nations have no active role monitoring the development and operation of major resource projects much less the subsequent decommissioning, closing and abandonment of such projects.
7. The draft terms of reference provides for a perfunctory incorporation of the United Nations Declaration on the Rights of Indigenous Peoples (“UN Declaration”).
 - a. Comment: The draft terms of reference wording reveals a watered down political commitment by the federal government on implementing principles of the UN Declaration by directing the Panel “to consider” the relationship of environmental assessment processes and Aboriginal and treaty rights “to reflect” UN Declaration principles. The principle of free, prior and informed consent, a core principle for all Indigenous peoples potentially impacted by mining and energy projects, should be explicitly set out in the terms of reference.

Addressing the Annual General Assembly of the Assembly of First Nations on July 12, 2016, Minister of Justice, the Honourable Jody Wilson-Raybould stated, “... our government has adopted, without qualifications, the United Nations Declaration on the Rights of Indigenous Peoples.” The statement of the Minister of Justice appears to be much more expansive than the decidedly narrow statement in the draft terms of reference on the principle of free, prior and informed consent. We suggest a very strong reference be made in the terms of reference to the full implementation on United Nations Declaration as it relates to environmental assessment processes. The Minister of Justice and Minister of Indigenous and Northern Affairs provided Canada’s full support to the UN Declaration “without qualification” at the United Nations Permanent Forum on Indigenous Issues in New York on May 2016.

The Review Process

8. Panel member appointments.
 - a. Comment: At a minimum, a First Nations person must be appointed to the Panel. As one-third of First Nations governments are located in British Columbia and some 50% of federal environmental assessments deal with projects located in British Columbia, a British Columbia First Nations panel member is required.
 - b. Comment: Mandatory and desirable qualifications for Panel members must be set out in the terms of reference.
9. The Panel has the ability to request the Minister to amend the terms of reference keeping in mind compliance with the terms of reference timelines.
 - a. Comment: Any proposed amendment to the terms of reference must provide recognition of the principle of First Nations free, prior and informed consent.

Conduct of the Review

10. The Panel must complete its review and submit a report to you with recommendations by January 31, 2017.

- a. Comment: As it is highly unlikely the Panel will commence any significant research and activities until September, it appears there is only a four month window for the Panel to engage, consult and review the environmental assessment processes of Canada and one further month of report preparation, a portion of which will be over the holiday season. This schedule necessarily results in an abbreviated review of the federal EA process. In our view this restricted review process will not result in a robust, world-class environmental assessment framework.

The time required to finalize the terms of reference, identify and confirm Panel members, prepare the Public Engagement Plan and also prepare the Indigenous Engagement Plan in of itself is a months' long process. We fully expect that a UN Declaration commitment to engagement with British Columbia First Nations is carried out before the Indigenous Engagement Plan is finalized and the environmental assessment review process commenced.

11. Substitution-equivalency of environmental assessment processes with the Province of British Columbia.

- a. Comment: BC First Nations were not consulted when the substitution-equivalency agreement was signed between Canada and British Columbia. On June 23, 2016 federal officials confirmed during a national "common stakeholder" teleconference with First Nations that the substitution-equivalency provisions are included in the scope of the review. First Nations must be involved in all discussions between federal and provincial officials on this matter. Furthermore, any future federal-provincial harmonization or substitution agreements must be fully supported by First Nations in BC.

Indigenous Engagement and Commitments to Free, Prior and Informed Consent

12. The draft terms of reference states the Panel will prepare an Indigenous Engagement Plan outlining how and when the Panel will conduct indigenous in-person engagement activities. The Panel will meet leadership of National Indigenous Organizations in the Panel's preparation of the plan. Further, the Panel shall also work with regional indigenous organizations to plan and host in-person engagement activities.

- a. Comment: With one-third of Canada's First Nations located in British Columbia, it would only be sensible for FNEMC to have a lead role with the Panel's BC First Nations engagement activities.

Multi-Interest Advisory Committee

13. The Panel may seek advice from a multi-interest advisory committee (composed of Indigenous Peoples, environmental groups and industry associations) and experts on certain matters. The committee is to be convened by the Canadian Environmental Assessment Agency.

- a. Comment: The broad scope of the Panel's review coupled with its restricted timeline means potentially heavy reliance on the advisory committee. Given the unique fiduciary nature of the relationship between the federal Crown and Indigenous peoples, and in light of the number of recent court decisions that have further defined this relationship and as 50% of federal environmental assessments are carried out on projects located in

British Columbia, I strongly urge you to create a separate Indigenous Advisory Committee which must include representation from BC First Nations.

EA Review Report and Follow Up toward Legislative, Regulatory and Policy Amendments

14. The report is structured such that each Panel member shall “reflect” his or her views.
 - a. Comment: We are encouraged the terms of reference provide for autonomy of Panel members. The importance of a First Nations person being appointed to the Panel is further underscored.
 - b. Comment: First Nations must have an opportunity to respond to a draft of the Panel’s review report, prior to submission of the finalized report to you, as Minister.

First Nations must be fully resourced on all aspects of these amendments including future regulatory and policy considerations, House of Commons and Senate reviews and any other parliamentary processes that require our input. Legislation arising from your review has deep implications on projects on First Nations territories. The courts have directed governments to ensure when any laws, regulations or policies are introduced that potentially, adversely impact Aboriginal rights and interests must be preceded by Crown consultation, and if required, accommodation. And where necessary First Nations consent must be obtained.

15. We acknowledge that you are making publically available the Panel report and other parts of the environmental assessment review process including advice received from the multi-interest advisory committee and experts.
 - a. Comment: It is imperative that information is made available to First Nations as soon as technology allows, and certainly no later than 24 hours once received or prepared by the Panel. The constrained timeline of the review process is such that delays of days, or weeks, for information to be made publically available defeats the very purpose of a your environmental assessment process review.
 - b. Comment: Many First Nations communities are located in remote and rural locations and lack basic Internet access and bandwidth or have unreliable information systems. It is imperative that the Panel’s communications plan bridge these systemic deficiencies. The litmus test is simply will First Nations receive information in a timely manner from the review process and, where necessary, have the necessary resources and time to respond to such information.

Participant Funding

16. Funding will be offered by the Canadian Environmental Assessment Agency to indigenous organizations, groups, communities and individuals to support participation in the review.
 - a. Comment: Capacity is a central issue for First Nations who desire to be involved in a meaningful, informed manner in your environmental assessment review process. Save for the Indian Act, environmental assessment legislation, and attendant policy, have arguably the greatest impact on First Nations rights and interests. First Nations require adequate resources to fully participate in formulation, establishment and carrying-out of public processes such as your environmental assessment process review.

- b. Strikingly absent from the draft terms of reference is an acknowledgement of the government-to-government basis on which this review process must be undertaken. In her capacity as the Regional Chief for BC of the Assembly of First Nations, the Minister of Justice stated, regarding the June 26, 2014 Supreme Court of Canada reasons for judgment in *Tsilhqot'in Nation v. BC*, "... our country can and will move forward from its colonial past towards a new spirit of cooperation based on respect and understanding and where First Nations become full partners in confederation". Full partners means just that – full partners. Nowhere more so is the relationship of full partners required than on matters of the environment and environmental assessment. The proposal and budget that we submitted to you and the Canadian Environmental Assessment Agency on February 17, 2016 should be fully considered.

Concluding Remarks

The thread that runs through FNEMC's submission is that environmental assessment is of critical importance to BC First Nations. The inclusion of First Nations as "full partners" is simply unattainable in light of the present funding and timeline constraints of the review process. We respectfully ask that your decision regarding the Panel's terms of reference reflect the need for adequate First Nations funding and a less constrained timeline.

Respectfully, I remind you of the June 23, 2016 Federal Court of Appeal judgment quashing an Order in Council and two Certificates of Public Necessity and Convenience. I do so as if you do not get this process right then the current climate of litigation will continue.

I trust the forgoing will inform you in the finalization of the Panel's terms of reference for review of environmental assessment processes.

Thank you, Minister, for the opportunity to provide this submission.

Sincerely,



Dave Porter,
CEO, BC First Nations Energy and Mining Council