



F O U N D A T I O N
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July 20, 2016

RE: Terms of Reference for the Expert Panels Appointed as part of the Review of CEAA, 2012 and the National Energy Board

Dear Sirs / Mesdames:

Thank you for this opportunity to comment on the Terms of Reference for the Expert Panels tasked with reviewing the Canadian Environmental Assessment Act (CEAA), 2012, and the National Energy Board (NEB). These reviews are much needed, and we hope they will result in improved environmental protection to the benefit of all Canadians.

Please accept these recommendations regarding the Terms of Reference for the CEAA, 2012 and National Energy Board Modernization Expert Panels.

Review of CEAA, 2012

1. TOR should include a review of the over-arching goals of environmental assessment, with a view to modernizing its definition, objectives and procedures.

The TOR defines environmental assessment as:

“Environmental assessment informs government decision-making and supports sustainable development by 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.”

EA processes are not intended to be “red tape” or a “hoop” to jump through; rather they should be real opportunities for decision-making and part of a framework that guide us toward sustainability.

We recommend that the Terms of Reference of the Panel be expanded to include a redefinition of environmental assessment, with a view to encapsulating the concept of “sustainability assessment”, as described in R.B. Gibson, M. Doelle and J. Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2016), 29 JELP 251. This re-definition would ensure we are shifting from evaluating how to make projects less damaging to creating a process that evaluate projects to determine if they will contribute to a sustainable future.

The above definition of environmental assessment limits the definition to EA to single project assessments. We support the recommendations of our colleagues at West Coast Environmental Law, Canadian Environmental Law, and others, who recommend inclusion of the following in the mandate of the panel:

- strategic environmental assessments;
- assessment of cumulative effects of multiple projects; and
- regional environmental assessments.

2. Role of Offshore Petroleum Boards

We recommend that the review include consideration of the role of the Canada – Nova Scotia and Canada - Newfoundland and Labrador Offshore Petroleum Boards in conducting environmental assessments.

We feel these Boards are not the appropriate venue for engaging in environmental assessment because:

- their role in promoting development in the offshore places them in a conflict of interest position when evaluating potential environmental damage, and diminishes public trust;
- lack of expertise within the Boards to assess environmental information;
- Boards are not the appropriate venue for consultations required to respect indigenous rights;
- province-based Boards are not the right venue for assessing trans-boundary issues (i.e. oil and gas development in the Gulf of St. Lawrence could impact four other provinces);
- while Board members are appointed by our political leaders, they are not accountable directly to the public; and
- Offshore boards lack the expertise and capacity to properly conduct environmental assessments and the public consultation they require.

3. Role of environmental assessment outcomes in the context of free trade agreements

The proponent for the Whites Point Quarry and Marine Terminal, Bilcon, has appealed to a NAFTA Tribunal to determine the legitimacy of the joint review panel process that resulted in the rejection of their project. The proponent is requesting \$101 million USD in compensation. Last year, the Tribunal found in favour of the proponent. Canada is currently asking this determination to be set aside by our Federal Court. However, the risk that the result of environmental assessment processes being questioned via investor-state provisions in free trade agreements, and at great expense to taxpayers, will create a chill for public servants and potential public participants and experts.

We recommend that the Expert Panel explicitly look to free trade agreements and the risk they present to our ability to have robust environmental assessment processes, and receive expert advice on how to “trade-proof” CEAA.

4. Role of Proponents in Preparing Environmental Impact Reports

The stated objective of the review of CEAA is

“to regain public trust and help get resources to market and introduce new, fair processes that will:

- Restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication;
- Ensure decisions are based on science, facts and evidence and serve the public's interest;
- Provide ways for Canadians to express their views and opportunities for experts to meaningfully participate, and
- Require project advocates to choose the best technologies available to reduce environmental impacts.”

Currently, project proponents hire consultants directly to write environmental impact statement reports and engage in other activities associated with assessment processes. This relationship creates an incentive to minimize or overlook impacts to create a greater likelihood that projects will be approved. It also decreases public trust in the process (because there is a sense, rightly or wrongly, that information is skewed in favour of the proponent) and reduces the likelihood that the best available information is made available to inform decision-makers. It can also result in the most affordable - not the “best” - technologies are used to mitigate impacts of a project.

The Terms of Reference of this review should include a procedural review of how environmental impacts of projects are assessed that will ensure arms-length research is conducted to inform decision-making.

Review of the National Energy Board

We recommend that the TOR for the Panel reviewing the role of the National Energy Board explicitly require the Panel to ensure we meet ghg emission targets and targets for renewable energy and energy efficiency. This should be clearly stated in the Scope of the review.

Thank you for this opportunity to comment on the Draft TOR for the Expert Panels reviewing CEAA, 2012 and the NEB. We look forward to participating further in these reviews.

Sincerely,

A handwritten signature in cursive script that reads "Gretchen Fitzgerald". The signature is written in black ink and is positioned above the printed name.

Gretchen Fitzgerald

Director, Atlantic Canada Chapter