



Environmental
Law Centre

July 20, 2016

Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor,
Ottawa ON
K1A 0H3

Via Email:

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Re: Comments on the Expert Panel's Draft Terms of Reference - Review of Environmental Assessment Processes

The Environmental Law Centre (Alberta) (ELC) is pleased to provide its comments on the Expert Panel's Draft Terms of Reference (Draft ToR) for the upcoming review of environmental assessment processes. The ELC is a registered charity that champions for laws and policies that ensure environmental sustainability for future generations.

Environmental assessment (EA), when effectively applied and informed, is a central pillar to sustainable decision making at all levels of government. It is also a central mechanism for direct engagement of interested citizens to assist government in answering the difficult questions of how we choose to develop and protect our nation's resources.

The ELC recommends amending the Draft ToR to so that the Panel can modernize EA into a new reality that enables cumulative effects assessment and planning, and creates an EA governance system that embodies principles of citizen engagement, integrated planning and precautionary development. Below you will find the ELC's specific recommendations to amend the Draft ToR.

a) Context

The current "context" of the Draft ToR should be amended to recognize that EA is more than mere assessment of impacts and mitigation of specific projects. EA must become a foundation of monitoring, planning, assessing and engagement with Canadians. This includes:

- Contextualizing decisions within regional and strategic assessment, and

- Cumulative effects monitoring and assessment in an appropriate cumulative effects management framework.

The scope of the Panel's consideration of mitigation measures must similarly be expanded to include review and evaluation of whether specific mitigation measures are appropriate and effective, and to recommend approaches for compliance with prescribed objectives where mitigation measures fall short. Furthermore, the Panel should not be looking at EA as merely a tool to identify and mitigate negative impacts of a proposed project but rather as a tool to select policies, plans and projects that enhance Canada's sustainability.

The context of federal EA must not be narrowly construed around "thresholds" of impact or unnecessarily narrow interpretations of federal jurisdiction. In other words, scoping federal EA jurisdiction must recognize the realities of resource development and its incremental, cumulative and sometimes incidental effects on the environment. Once federal jurisdiction is involved, the EA process should not be unduly restricted to narrow consideration of federal matters but look to the entirety of the project. Decisions should be based on science, facts and evidence, and be guided specifically by the precautionary principle.

Meaningful participation must apply not only to "experts" but to all Canadians. The Panel should be directed to consider the scope of procedural rights that will ensure citizens are engaged in a meaningful way in EA driven monitoring, evaluation, assessment, and compliance and enforcement.

Assessment of alternatives should become more formalized and should guide the types of activities that should proceed, prior to a determination of best available technologies. That is to note, any presumption about reliance on technologies to mitigate adverse environmental effects must be scientifically confirmed prior to reliance on such technologies.

b) Mandate scope

It is important that the panel not only consider processes associated with CEAA 2012 but expand its scope to consider what EA should and could be with the aim of properly informing and guiding sustainable development. Key to this broader scope are issues related to:

- cumulative effects;
- nested planning and assessment and various scales;
- effective integration of federal and provincial environmental monitoring, assessment and planning policy; and
- effective and meaningful inclusion of the public in informing decisions.

The Panel report should articulate the rationale in adopting and/or rejecting specific input received in relation to the report.

c) Complimentary Mandates

The Draft ToR note that complimentary mandates of the various departments must be addressed in relation to EA. The Panel review of these mandates should be expanded to evaluate the role, scientific and resource capacity and the governance structures of the relative mandates and the CEA Agency. This assessment must address whether mandates can be effectively integrated and whether departments are properly resourced to undertake monitoring, assessment (including strategic and cumulative assessments) and compliance functions.

d) Scope of review

The ELC commentary regarding “context” above applies to the Panel’s scope of review. Specifically, the ELC recommends altering the scope of review to address:

- Federal jurisdiction in the context of cumulative effects assessment and strategic assessment, policy alignment, governance and planning;
- The use of science and the precautionary principle in undertaking the broad scope of consideration of EA in decision making at all levels;
- Legal processes for public participation to inform EA at all levels; and
- The need to properly evaluate mitigation measures and best available technologies prior to project approval, ongoing monitoring of the efficacy of mitigation approaches, and the use of compliance mechanisms to address shortcomings in mitigation measures where outcomes are not met.

A robust review of EA governance is required and should not be limited to the Agency, CNSC and the NEB. This includes revisiting the concept of delegation of EA responsibility to regulatory bodies such as the CNSC and the NEB, and consideration of the creation of an independent body tasked with implementation of the federal EA process. Systems for policy development and integration, scientific capacity, and regulatory governance should be subject to the review (including the role of Cabinet and Treasury Board).

e) Timelines

There is significant concern that the timeline for the Panel’s work is insufficient to deal with the need for significant review and revise federal EA as it stands today.

f) Multi-Interest Advisory Committee (MIAC)

There should be opportunity provided to the MIAC to advise the Panel on gaps, barriers and new approaches which the Panel should consider. MIAC should be able to determine the scope and matters that it determines the Panel should be advised on. If the Panel determines that the MIAC scoping of advice is not relevant to the review, that the Panel should be required to provide its rationale for so doing.

g) Expert Advice

As with the MIAC above, expert advice should not be unduly constrained in scope and content. The Panel should provide its rationale for determining when expert advice is not relevant to the review.

We look forward to future opportunities to engage in the EA and other environmental regulatory reviews the government has undertaken. Please do not hesitate to contact us should you have any questions.

Sincerely



Jason Unger
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Environmental Law Centre



Brenda Heelan Powell
Staff Counsel
Environmental Law Centre

cc: Hon. Catherine McKenna, Minister of Environment and Climate Change
Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs
Hon. Jim Carr, Minister of Natural Resources
Hon. Dominic LeBlanc, Minister of Fisheries, Oceans and the Canadian Coast Guard,