

Wednesday, July 20, 2016

Review of Environmental Assessment Process
Canadian Environmental Assessment Agency
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RE: Review of environmental assessments: Expert panel draft Terms of Reference

To Environment and Climate Change Canada,

Thank you for the opportunity to provide comments on the Expert Panel Draft Terms of Reference (TOR) for the review of environmental assessment (EA) processes.

The Minister of Environment and Climate Change (the Minister) has decided to appoint an independent expert panel to conduct this review, stemming from a top-priority ministerial mandate to “review Canada’s environmental assessment processes 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”¹

Environmental Defence is encouraged that the government is taking steps to address the shortcomings of the *Canadian Environmental Assessment Act, 2012 (CEAA)*. We are also encouraged that the review is being undertaken by an independent panel. And we urge the government to set the TOR such that the purposes of the Act are examined as part of the review, to ensure that Canada’s environmental laws are robust and will yield decisions consistent with this government’s commitments to address climate change and protect the environment.

The Review of EA processes presents an opportunity to develop a world-leading, next-generation EA regime² that ensures industrial, energy and development proposals bring social, environmental and economic benefits to Canadians while meeting Canada’s international climate change obligations. Such a system would ask and answer whether a project should proceed at all, and not just how or to what extent the risks can be mitigated. To accomplish this, the TOR should ensure the independent expert panel has a broad mandate and the authority and resources to:

- re-examine the fundamental definition and purposes and goals of an EA to consider next-generation iterations of EA and the strategic-level effects of projects. EAs should not just assess impacts of projects

¹ Office of the Prime Minister. *Minister of Environment and Climate Change Mandate Letter*. (November 13, 2015). Retrieved from <http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>.

² Robert B. Gibson, Meinhard Doelle, A. John Sinclair. “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment.” (2016). *Journal of Environmental Law & Practice* 29.

on the environment and recommend mitigation options, but should
determine whether projects should proceed at all;

- commission expert discussion papers to provide recommendations to the panel; and
- enhance the transparency, accountability and public review of the panel's decisions.

Purpose and role of EA

In the "Context" section of the TOR, the role of EAs should be broadened to recognize its broad planning and sustainability-based goals. Further, in the "Scope of Review" section, the purpose and goals of EAs should be broadened to provide the expert panel with the authority to make the best possible recommendation to the Minister.

Based on previous iterations of the *CEAA*, there is no single, agreed-upon purpose and role of EAs. The Minister has been mandated to introduce new environmental review processes that, among other things, serve the public interest. The expert panel should therefore be empowered to assess the overarching and fundamental purposes and goals of EAs. We recommend the TOR be amended to explicitly task the expert panel with undertaking this assessment.

Such an assessment might result in a process much closer to the "next-generation" EA regime described by Gibson, Doelle and Sinclair:

The core purpose of next generation environmental assessment is to ensure that deliberations and decision making on new and renewed undertakings at the project and strategic (policies, plans and programmes) levels foster proposal development, approvals and implementation that deliver the strongest feasible positive contributions to lasting wellbeing while avoiding significant adverse effects. More generally, the objective is to protect and enhance the resilience of desirable biophysical, socio-ecological and human systems and to foster and facilitate creative innovation and just transitions to more sustainable practices.³

Currently, the definition of EAs in the draft TOR does not include strategic and regional assessments of projects, the assessment of management of cumulative (and not just project-based) effects, and the current and potential role of Indigenous co-management bodies in EAs.

Broadening the authority of the expert panel to re-examine the purpose and goals of the EA will help ensure Canada develops an EA regime that ensure proposals bring social, environmental and economic benefits to Canadians and Indigenous peoples while protecting the environment and meeting Canada's international climate change obligations.

Further to broadening and reassessing the definition of EA in the "Context" section of the TOR, the "Scope of Review" should be expanded to align with the Minister's mandate by:

- Addressing the issues which undermine "public trust" in current EA processes;
- Ensuring that best practices and leading expert thinking in EAs inform the panel's recommendations; and
- Upholding the federal government's commitments to implement the United Nations Declaration of the Rights of Indigenous Peoples.

³ Ibid.

By amending the TOR to clarify that the expert panel has a mandate to re-examine the fundamental purpose of EAs, explore the strategic, regional and cumulative effects of projects, and broaden the panel's scope, the expert panel will be positioned to bring a next-generation EA to Canada.

Advance Discussion/Options papers

Environmental Defence supports the inclusion in the TOR of enabling the expert panel to retain the services of non-governmental experts to provide advice. However, given the complexity of reviewing environmental regulatory and policy frameworks, we recommend that Environment and Climate Change Canada or the Canadian Environmental Assessment Agency commission expert discussion papers on the substantive goals and principles of next-generation EAs that provide recommendations to the expert panel. Expert discussion papers would resource the panel with the best practices and leading thinking in the fields of environmental assessment and planning, ease the burden on the panel itself, and assist stakeholders and the public in their participation in the review of EA. These discussion papers should be commissioned in advance of or alongside the expert panel's appointment, and include expert analysis and Indigenous laws and knowledge.

Increase transparency and accountability

Environmental Defence supports the requirement in the TOR that the expert panel include a summary of comments received. However, this requirement should be extended to include a summary of engagement with the public, Indigenous peoples and stakeholders, and a demonstration of how that engagement informed the Panel's conclusions and recommendations.

Public Review of Expert Panel Report

Environmental Defence recommends that the TOR be amended to include a public review and comment period of the draft expert panel report to the Minister. Under CEAA 2012, where the CEAA is responsible for project proposals, public comment periods are required for draft EA reports. The TOR should require a similar public review of the draft expert panel report to the Minister.

Finally, the review of the CEAA and related environmental regulatory agencies and processes, including the Canadian Nuclear Safety Commission, the Navigable Waters Protection Act, the Fisheries Act, and the National Energy Board modernization process, should transparently share relevant information with review processes so as to ensure the public interest is being served and all industrial, development and energy project proposals bring social, environmental and economic benefits to Canadians and Indigenous peoples while protecting the environment and meeting Canada's international climate change obligations.

Thank you for considering these recommendations. If you would like to discuss these comments further, please do not hesitate to contact Environmental Defence.

Sincerely,

Patrick DeRochie



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Environmental Defence

