



Ministry of Environment and Climate Change
Expert Panel Review of Environmental Assessment Processes
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To whom it may concern:

Thank you for the opportunity to comment on the Expert Panel Report on the reform of the federal environmental assessment process, *Building Common Ground: A New Vision for Impact Assessment in Canada*, released by Minister McKenna on April 5, 2017. We provide this input in our respective capacities as Wildlife Conservation Society (WCS) Canada scientists familiar with provincial, northern and federal EA processes in policy and practice. We are conservation biologists and wildlife ecologists who are actively engaged in conservation science and related policy in species at risk conservation and conservation planning, including EA, in northern Canada.

We provide these comments from the perspective of those who have reviewed numerous environmental impact statements and associated scientific products, especially baseline studies, as independent outsiders or to support directly-affected First Nations, and delivered joint review panel testimony. We also have considerable experience in the practice of applying scientific and technical information to decision making, having served on a number of government advisory panels. Dr. Ray has been a co-chair of the terrestrial mammals subcommittee of COSEWIC, the Committee on the Status of Endangered Wildlife in Canada since 2009. WCS Canada is also a member of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network (EPA Caucus).

General Remarks

We consider the Expert Panel's report to contain a new vision for federal "impact assessment" (IA) guided by a set of key principles with which we are in solid agreement. The recommendations address a number of our concerns about CEAA 2012 and generally support our contributions during the Panel's public consultation process and through the EPA Caucus on "next generation" federal assessment. The report describes a package of suggested reforms to the current process that provides a welcome focus on sustainability, cooperation and consensus processes, and evidence-based decision making. It also recognizes the value of regional and strategic assessments, enhanced public participation, and addressing the role of Indigenous Peoples in IA. We welcome the recommended inclusion of a planning phase to the process, an enhanced federal IA authority (the "Impact Assessment Commission"), and the principle of "one project, one assessment".

The most significant strength of the report is its distillation of inclusive and extensive outreach undertaken by the Panel -- all the more impressive given the ambitious timeframe and mandate. The report is accessible in terms of language, necessarily aspirational and high level, and well written, and we commend the Panel for working to capture the feedback they received.

In spite of the Panel's claim that it has not proposed "the creation of something entirely new" (p. 12), the recommendations as a whole, if followed, are a significant departure from today's federal environmental assessment law and processes. The report is lacking in detail in many areas as they relate to practical matters of implementation. Ultimately, however, the details around each of the areas we highlight below will determine whether the federal government can capitalize on this opportunity to advance and improve federal assessment.

Our submissions to the Panel in person and in writing expressed particular concerns about the process and outcomes of environmental assessment in the context of planning for major new industrial developments like metal mines and all-weather infrastructure, in remote, intact regions in the north where the majority of the population are Indigenous Peoples with Aboriginal and/or treaty rights under the Canadian Constitution. Planning for new development to generate lasting benefits that outweigh adverse and cumulative social, economic, and environmental impacts cannot be delivered adequately through exclusive focus on project-level EA under CEAA 2012 or under provincial legislation in most jurisdictions (e.g., Ontario's Environmental Assessment Act). This calls for a shift in federal EA away from one solely focused on making projects "less bad" to a more comprehensive approach that includes strategic- and regional-level assessment and adequately-scoped cumulative effects assessments. We also placed specific focus on the role of scientific information and expertise in environmental assessment (EA), in an effort to consider matters raised in the Minister's mandate letter, namely, "how to ensure environmental decisions are based on science, fact and evidence".

The Focus of this Submission

In this submission, we explore the recommendations offered by the Panel on regional/strategic assessment and evidence-based decision making. We follow by additional reflections on the shift to sustainability, indigenous rights and participation, and triggering. To summarize our conclusions with respect to the two main topics:

Regional/Strategic Impact Assessment: We welcome the Panel's acknowledgement of the important role of RSEA and SEA and the potential for these types of assessments to inform, guide and even streamline project-level assessments. We are pleased with the report's clear recommendation that RSEA/SEA be required in the IA legislation, which is much needed in many regions in Canada. However, the Panel's perspective on the circumstances by which either RSEA or SEA would be applied is very narrow and tentative and would need to be significantly broadened for the federal government to play a true leadership role. No rationale is offered for how the crucial participation of provinces/territories would be incentivized and

there is no discussion on the relationship between RSEA/SEA and project-level assessments and how these would be tiered and the linked with regulatory permitting and information-gathering.

Evidence-based Decision Making: The Panel placed a welcome emphasis on “science, facts and evidence” as essential underpinnings of a well-functioning IA process and supported most of our own recommendations on this topic. The report did not, however, adequately acknowledge the reality of scientific uncertainty associated with the development of IA materials and decision making and so it will be important to consider how the reality of scientific uncertainty will be dealt with at various stages of the IA process much more deliberately than the Panel was able to. The Panel placed appropriate emphasis on the steadily diminishing capacity of the Canadian Environmental Assessment Agency -- most notably in the regions, and stressed the need to rebuild this capacity. With respect to governance issues around implementing its vision for evidence-based IA, we would like to see more attention to alternative mechanisms for strengthening information quality in impact assessments to the structure proposed by the Panel.

Regional and Strategic Impact Assessment

The Panel heard that federal IA processes should be integrated and tiered, starting at the strategic and regional levels, which would then inform project level IA. It largely agreed with testimony it heard from across the country that regional IA should be legislated, anticipatory and commonplace. The Panel heard the concerns about the lack of implementation and compliance with the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* that could be used to address the impacts of policy, programs, and plans on issues such as cumulative effects and climate change within Federal ministries and consider how to address principles such as free, prior and informed consent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The core concepts of regional impact assessment (RIA) and strategic impact assessment (SIA) are ably described in the Panel’s report and draw on well-established guidance in Canada, such as the Canadian Council of Ministers of the Environment. We agree with the Panel’s endorsement of a tiered approach in which RIA and SIA are conducted with the goal of improving the efficiency, effectiveness and fairness of project IA and decision-making, especially with respect to cumulative effects assessment as well as comparative assessment of alternative regional scenarios.

Regional Impact Assessment

The Panel stressed that regional IA would provide clarity on thresholds and objectives on matters of federal interest in a region to inform and streamline project IA, given that neither sustainability nor cumulative impacts can be properly assessed or addressed at the project scale. Providing this regional assessment could benefit proponents and communities alike.

The Panel also highlights that the best scenario to achieve sustainability for current and future generations is for RIA to happen prior to many projects in a region. This would allow the RIA process to be proactive rather than reactive.

We consider the strong inclusion of RIA and SIA to be an important advance over CEAA 2012. This understanding is consistent with our communications to the Panel that have highlighted the situation in Ontario's Far North¹ which, like many other regions of the country, would benefit from information gathered in a regional assessment prior to welcoming industrial resource development (mines) and associated infrastructure (Ring of Fire) into this globally-significant ecosystem. While CEAA 2012 provides for the conduct of regional studies on the effects of existing or future physical activities, we are not aware of any studies conducted to date in Canada or in the Ring of Fire region as a result of this discretionary approach. Ontario is simply not ready to consider the regional impacts of industrial-scale development in this region and on marginalized communities of First Nations, despite opportunities to do so during the recent period of relatively low commodity prices.

While recommending RIAs that would be cooperative in nature, the Panel offers no suggestions on how to incentivize such cooperation (e.g., federal funding). Similarly, the Panel fails to clearly establish how to ensure that broadly-scoped regional assessments beyond federal lands and marine areas could ever occur, and to clarify their importance to federal decision making at the project level. Accordingly, the Panel seems to envision limited circumstances by which RIA would take place beyond federal lands/marine waters.

The report is overly cautious with respect to federal jurisdiction to carry out RIAs. As a result, it does not acknowledge that while jurisdiction may place limits on the federal government to make project *decisions*, there are no such limits on gathering information, assessing and publicizing the information, engaging the public, and other related outcomes. These aspects could only support federal assessment of projects. Consequently, the report is disappointing in not emphasizing the important role and opportunity of RIA to improve federal project IA, and acknowledge clear federal role and responsibilities in carrying out such assessments.

We support the last two of the three Panel recommendations on RIA, i.e., that "IA legislation require the IA authority to develop and maintain a schedule of regions that would require a regional IA and to conduct those regional IAs" and that "a regional IA establish thresholds and objectives to be used in project IA and federal decisions". We stress, however, that in order for these to have any chance of being realized in the service of project IA, the triggers for RIA would have to be considerably broadened and strengthened in contrast to the unduly constrained vision of the Panel reflected in its first recommendation. Specifically, the federal government must be able to carry out a RIA outside federal lands (e.g., watersheds, airsheds, and where cumulative impacts affect Indigenous Peoples and their rights). Accordingly, we urge full consideration of the recommendations offered by Canadian Council of Ministers of the

¹ http://wcscanada.org/Portals/96/Documents/RSEA_Report_WCSCanada_Ecojustice_FINAL.pdf

Environment² in their 2009 report on regional strategic environmental assessment, which still resonate today (p. 13). In addition, we recommend that federal IA legislation provide strong incentives to other jurisdictions to carry out cooperative regional assessments, with the federal government fulfilling its responsibility to ensure this information is available for project IA.

The need for the IA legislation to adequately assess cumulative effects (heard by the Panel across the country) provides an important example of inadequacy of the restricted vision by the Panel for the circumstances by which RIA might be triggered. While the report acknowledges the need for cumulative effects to be assessed at the regional scale to better enable assessment at the project level, it does not consider how this might practically take place. In addition to Ontario's Far North, there are many regions of the country south of 60° where a comprehensive regional assessment would be highly beneficial in light of cumulative effects, given multiple land uses and ongoing emphasis at the federal level for new and intensified natural resource development. Yet, RIAs would not be likely to take place if the federal legislation adopts the Panel's recommendation with respect to the narrow set of circumstances by which RIA should be required. Nor does it currently demonstrate appropriate leadership to incentivize provincial, territorial, or Indigenous government cooperation.

Strategic Impact Assessment

The Panel's recommendation that Canada lead a federal strategic IA on the *Pan-Canadian Framework on Clean Growth and Climate Change* in order to provide direction on how to implement this Framework and related initiatives in future federal projects and regional IAs is an excellent example of how SIA can be applied federally. This recommendation clearly illustrates that the Panel can conceive of areas where SIA demands a strong legislated federal role (e.g., climate change) that requires provincial, territorial, and Indigenous government cooperation. We support this recommendation, as it would require addressing specific federal (as well as provincial and territorial) policies between project IA and the federal framework.

In addition, the Panel identifies Indigenous peoples and lands as a federal interest. Indigenous lands are not limited to federal lands, meaning that impacts on Indigenous peoples or their lands from projects within provinces or on provincial Crown lands could serve to trigger federal environmental assessments. This recommendation greatly expands federal involvement in environmental assessments in provinces beyond current levels. While this is mainly considered in the scope of project IA, federal and provincial policies, plans, programs (PPPs), and other strategic undertakings demand broader and earlier opportunities for consultation with Indigenous peoples. This should, in our mind, make SIA more attractive in enabling comprehensive and timely deliberations, proactive consideration of alternatives, opportunities for clarification of concerns and possible responses, and less risk of surprise, conflict and delay at the project IA stage.

² CCME. 2009. Regional Strategic Environmental Assessment in Canada: Principles and Guidance. Canadian Council of Ministers of the Environment, Winnipeg, MB.

The purpose of SIA is to ensure, or at least encourage and facilitate, effective integration of environmental considerations in the conception, planning/design, approval and implementation of PPPs and other strategic undertakings. SIA can enhance the openness and credibility of government decision making. In general, SIA is expected to generate timely attention to strategic issues, to provide clearer and more reliable guidance for project IA, and to improve the efficiency as well as quality of decision making³. However SIA in Canada has not been effective or beneficial to date.

For example, the Panel itself noted the long history of inconsistent and poor implementation of the federal *non-legislated* SEA process (e.g., Federal Directive)⁴. SEA practice outside of the Directive has emerged on an *ad hoc* basis resulting in inconsistent outcomes for the environment and society, due in part to assessment experience, jurisdiction, and differing frameworks^{1,5} as opposed to legal standards of best practice. There have been a number of recommendations (e.g., House of Commons Standing Committee on Environment and Sustainable Development) to legislate SIA.

Rather than address these outcomes, the Panel has recommended in its report that strategic IA would be required where new or existing federal policies, plans and programs (1) are likely to affect many projects subject to federal IA, and (2) lack clear guidance on how they should be applied in a project or regional IA. While useful, this remains incomplete.

We urge recognition of the fact that strategic assessment can also be used to address other issues that can improve project IA, particularly given climate change, including fossil fuel industries (e.g., fracking, offshore oil and gas, liquefied natural gas) and new industries (e.g., turbines, wind energy). For example, in the Ontario's Far North, the development of all-weather roads to the Ring of Fire will have a region-opening (growth-inducing) effect by facilitating access to more exploration and the development of mines. Similarly, project IA remains proponent-led and has failed to address climate change even though federal guidance on how to do so has been available since 2004.

Finally, cumulative effects assessment the project level has been found largely ineffective and because all effects are cumulative in a changing climate, federal attention to cumulative effects assessment through SIA is just as relevant and important as climate change. This suggests among other things, an SIA framework could make government-led climate change mitigation and adaptation goals more explicit in considering federal project assessments. For example, the evolving energy sector would have benefitted from a strategic level assessment to aid decision

³ Benevides, H., D. Kirchoff, R. Gibson, and M. Doelle. 2009. Law and Policy Options for Strategic Environmental Assessment in Canada. Available at SSRN: <https://ssrn.com/abstract=1660403> or <http://dx.doi.org/10.2139/ssrn.1660403>

⁴ Noble, B. F. 2009. Promise and dismay: The state of strategic environmental assessment systems and practices in Canada. *Environmental Impact Assessment Review* **29**:66-75.

⁵ Fidler, C. and B. F. Noble. 2013. Advancing Regional Strategic Environmental Assessment in Canada's Western Arctic: Implementation Opportunities and Challenges. *Journal of Environmental Assessment Policy and Management* **15**:1350007.

makers in their efforts to adjust their planning and regulatory processes accordingly, and to develop some general guidance for project decision makers faced with deciding whether, where, and under what conditions to allow energy activities to proceed. We recommend legislation contemplate the values of SIA to improve decision making and efficiency for project IA and legislate a mechanism for SIA.

Evidence-based Impact Assessment

The Panel placed significant emphasis on “science, facts and evidence” as essential underpinnings of a well-functioning IA process, stressing that “the quality of science contributes to public trust in the process and credible outcomes” (p. 4). We were encouraged by the attention paid by the Panel to how to best ensure IA processes and decisions are strongly based on available evidence. This was in response to repeated calls in submissions from the public for assessment processes to be based on “unbiased, adequate, accessible and complete information about impacts, issues, concerns and processes.” (p. 14).

The set of recommendations offered by the Panel acknowledges the heavy reliance on scientific input and/or expertise in virtually every stage of the IA process. The Panel supported our own recommendation (attribution on p. 42) that expectations for the relative strength and role of science in various stages of the IA process be explicit within the language in the IA legislation (using Canada Species At Risk Act as a model in this regard). The Panel also agreed with our call for the deliberate integration of outside scientific expertise into the review process, the need for transparency in decision making, especially with respect to how available evidence has been considered and weighted, and the imperative of making information (e.g., baseline and monitoring data) from all stages of IAs available in public databases.

Uncertainty

In our view, the report did not adequately acknowledge the reality of scientific uncertainty associated with the development of IA materials and decision making. Most references to uncertainty in the report were related to the EA process and outcomes, rather than scientific uncertainty. In our experience, scientific uncertainty is more the rule than the exception, particularly for new projects in remote, northern regions. Where scientific uncertainty was mentioned in the report, the main means to address it was to invoke the precautionary principle.

It will be important to consider how the reality of scientific uncertainty will be dealt with at various stages of the IA process much more deliberately than the Panel was able to. By the time a project EA reaches the final stage, a decision maker is confronted with compounded uncertainty that stems from various stages of the process, including:

- Incomplete or limited portrayal of baseline conditions in the EIS due, for example, to lack of available information collected and published by others prior to EA and inadequate time and scale of inquiry for proponent studies that serve as input into the EIS;

- Uncertainty in potential impacts and mitigation tools due, for example, to incomplete understanding of baseline conditions and lack of monitoring on similar projects that might enable learning opportunities and transfer of knowledge;
- Insufficient reporting by the proponent of the full breadth of uncertainty of information, analysis, and conclusions that appear in the EIS; lack of disclosure of data gaps, and overconfidence in predictions;
- Loss of full information that does appear in the EIS, including statements of uncertainty, on the way up the ladder to the decision-making point stage.
- Lack of capacity by decision makers to make full use of scientific information that does reach them.

The many sources of uncertainty that arise throughout the EA process will have real and practical consequences for some of the structural and process-oriented recommendations the Panel has devised. Uncertainty can and should be minimized by increasing the accuracy and objectivity of predictions that are presented in EIS and other EA products (see below). However, at least as much focus must be placed on monitoring and follow up and stronger communication regarding uncertainties where they persist, in addition to more transparency in the prediction and decision making processes. Transparency should involve⁶: a) complete and clear recording of expert reasoning, judgements and decisions in the evaluation process; b) a clear indication of unknowns; c) the rationale for methods used to address variability and uncertainty; d) where hypotheses and/or speculations have been adopted; and e) the appraisal of values.

Capacity Limitations

The Panel clearly heard about the steadily diminishing capacity of the Canadian Environmental Assessment Agency -- most notably in the regions, and stressed the need to rebuild this capacity in the context of their recommendations for a new governance structure to implement the vision they brought forward. Accordingly, they call for a “comprehensive review of federal expert research initiatives, standards and guidance to support IA” (p. 43). We would go one step further to stress that without readiness to invest significantly in federal science capacity to enable robust leadership of IA processes, many of the central issues that prevail today surrounding lack of public trust in IA will not be addressed. In this respect, we agree with the Panel’s contention that “The government should view this increased cost as the re-investment needed to restore capacity and deliver a trusted federal IA process. This increased cost should also be weighed against the cost to Canada of doing nothing” (p. 74).

Governance

With respect to governance issues around implementing its vision for evidence-based IA, the report’s recommendations lack sufficient detail to understand precisely what the Panel had in

⁶ Kontic, B. 2000. Why are some experts more credible than others? *Environmental Impact Assessment Review*, 20, 427–434.

mind and what alternatives its members considered. The Panel makes quite clear, however, that the impetus for its recommendation that the IA Authority (as opposed to the proponent) lead the development of the Impact Statement (EIS under CEAA 2012) comes from the repeated concerns it heard that information developed in project IA is commonly perceived to be biased and insufficiently independent from the proponents and special interests.

The Impact Statement is envisioned by the Panel to be the cornerstone product of the assessment process that brings all available evidence and analyses together as a basis for ultimate decisions. At issue is how the most robust products can be produced in a manner that inspires confidence in the process by addressing perceptions of bias, is sufficiently tailored to the individual project circumstances and context, while at the same time maintaining the proponent's responsibility without being unduly burdensome or time consuming. The Panel does not mention or give any indication whether it considered the production of an additional report analogous to the final EA report under CEAA 2012. Delivered by the Responsible Authority, it is informed by the proponent's EIS as well as other inputs from federal agencies, Indigenous groups, and members of the public.

Accordingly, we have considered two main governance options for their potential to address concerns and perceptions about bias and increase public confidence:

- 1) The option put forward by the Expert Panel for the Assessment Authority ("Impact Assessment Commission") to conduct the studies and lead the development of the Impact Statement, with funding by the proponent. This model assumes that an Assessment Authority with a strong and arm's length mandate that takes over direct management of the studies and writes the Impact Statement would minimize bias by removing the proponent from this aspect of the process.
- 2) An alternative option to stick with the current process, whereby the proponent pays for and executes studies and formulates the impact assessment, which in turn informs the final assessment report put together by the Agency as one (but not the only) basis for decision making. The mechanisms to reduce bias in this case would be a considerably strengthened Assessment Authority that sets clear expectations through guidance, provides robust and steady oversight, and leads expert reviews of IA products that test the available evidence. It would allow enhanced participation by the members of the public with the means to engage qualified experts to test the proponent's evidence.

We have certainly reviewed a number of low-quality studies and impact statements that have served as the basis for project EA decisions, so we agree that there are necessary improvements that must be made to address this issue. Following the Panel's recommendation, however, could have some negative trade-offs. These would likely include the requirement for a major cultural shift that would be overly clumsy to implement on top of many other changes to the system. And it may not make much difference. Proponents tend to begin work with their consulting biologists and engineers at early stages of project development, well before the IA process, through the life of project design and post-approval all the way to the closing of the

project. The EA process is one stage of this relationship, and so redirecting consultants to work for the Agency instead of the proponent during one period of time is somewhat artificial. In fact, the close and professional relationship that exists between many clients and consultants often serves to improve the project design. Isolating the proponent could disincentivize its full participation in matter such as information sharing to its fullest extent, investment of appropriate funds, and/or active participation in monitoring, etc. Moreover, the same concerns about bias could emerge with time when the body responsible for preparation of IA materials is the same as the one reviewing these materials, and making decisions, as is proposed by the Panel.

More importantly, instating such a significant change to the IA process and structure may not be necessary. If new legislation allows the continued practice wherein the proponent conducts studies and prepares an EIS, there are other mechanisms that should collectively enable a strengthening of the information supporting assessments, address the issue of perceived bias of IA products and enhance trust in the process. These would include:

- 1) The EIS prepared by the proponent serving as one input to the Assessment Authority, possibly along with other EIS's (e.g., prepared by Indigenous co-proponents); the Authority prepares an Assessment Report from these and other inputs;
- 2) Significantly strengthened Authority with bolstered in-house expertise and sufficient capacity to provide clear and consistent guidance, place greater evidence on cross-checks and validation of evidence, employ outside expertise where required, etc.;
- 3) Enhanced public participation, including sufficient funding for intervenors to engage qualified experts to test evidence;
- 4) Regional and Strategic impact assessments to provide better guidance to project-level EAs;
- 5) Appointment of Joint Review Panels where required;
- 6) Transparency in decision making and open data; and
- 7) Comprehensive monitoring regime at appropriate scales with continuous oversight by the Assessment Authority.

Indigenous Knowledge

The Panel acknowledges that evidence comes in many forms and includes Indigenous knowledge and community knowledge. It recommended that federal environmental assessment legislation require that Indigenous knowledge be *integrated* into all phases of environmental assessment. Indigenous groups would determine for themselves how Indigenous knowledge studies should be conducted, and would enter into agreements on how those studies should be integrated into environmental assessments. The sustainability-based IA framework the Panel proposals seeks to integrate all relevant evidence that supports outcomes within the five pillars and recommends that IA integrate the best evidence from science, Indigenous knowledge and community knowledge through a framework determined in the planning phase collaboration with Indigenous Groups, knowledge holders and scientists.

We support this vision with the caveat that it can be practically achieved and that clear processes are developed with respect how different types of information will be *integrated* into final products and decisions. While the ongoing emphasis on integrating traditional knowledge with western science in the Panel’s report is not unanticipated, outside of community-led monitoring programs and co-management boards in Canada^{7,8}, there are few models or examples of “integration” between different knowledge systems.

In the meantime, we would like to emphasize that engaging with Indigenous and local knowledge systems involves encounters of different world views, identities, practices, and ethics, in a context of asymmetries of power and rights. Nowhere are these asymmetries of power more obvious than in federal assessments involving Indigenous Groups, particularly in regions without modern land claim agreements such as Treaty No. 9 in Ontario’s Far North.

One way to consider working with different knowledge systems in the context of sustainability assessment is through the “Multiple Evidence Base” approach⁹. This approach recognises and acknowledges the incommensurability of diverse knowledge systems and the often asymmetric power issues arising when connecting different branches of science with locally-based knowledge systems. Complementarity, validation of knowledge *within* rather than *across* knowledge systems, and joint assessments of knowledge contributions are key aspects of the approach. Institutions such as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and the Convention on Biological Diversity (CBD) are currently using this approach because they also acknowledge the importance of Indigenous and local knowledge and explicitly support a diversity of knowledge systems in order to inform sustainability (of biodiversity and ecosystem services) and decision-making. Because Canada is a signatory to CBD, we would expect that there is already some practical experience with this approach, but we have no knowledge as to how it is being implemented. We encourage investigation of this avenue, given the institutions and processes being envisioned by the Panel and the ongoing need to consider Indigenous and local knowledge to address sustainability in project IA.

Finally, we agree with the Panels’ recommendations that should also be greater efforts to provide Indigenous peoples access to technical expertise and science. To engage with processes like IA, Indigenous people need to be able to understand, engage with and challenge science, and to do so they need access to appropriate technical expertise.

⁷ Kouril, D., C. Furgal, and T. Whillans. 2016. Trends and key elements in community-based monitoring: a systematic review of the literature with an emphasis on Arctic and Subarctic regions. *Environmental Reviews* **24**:151-163.

⁸ Johnson, N., C. Behe, F. Danielsen, E.-M. Krümmel, S. Nickels, and P. L. Pulsifer. 2015. Community-Based Monitoring and Indigenous Knowledge in a Changing Arctic: A Review for the Sustaining Arctic Observing Networks.

⁹ Tengö, M., R. Hill, P. Malmer, C. M. Raymond, M. Spierenburg, F. Danielsen, T. Elmqvist, and C. Folke. 2017. Weaving knowledge systems in IPBES, CBD and beyond—lessons learned for sustainability. *Current Opinion in Environmental Sustainability* **26-27**:17-25.

A Shift to Sustainability

In the report, the Panel embraces and recommends a sustainability-based approach based on five pillars (environmental, social, economic, health, culture) as opposed to the usual three (environmental, social, economic). The Panel advocates for a sustainability test using an explicit framework for evaluation and decision making. The Panel also proposes a legislated planning phase to be conducted by the IA Authority (not the proponent) during which the “sustainability framework” would be developed. Finally, the Panel recognizes the importance of describing decision-making criteria and providing explanation and justification for any trade-offs.

We support a legislated shift in the focus of project IA to sustainability as an alternative to the process under CEAA 2012, which is to address the symptoms, or outcomes, of individual project impacts and mitigate them until they are deemed acceptable, rather than also grappling with broader regional social and ecological change, cumulative effects, and social license. While the concept of sustainability (or “sustainable development”) has been around for nearly 30 years, we have witnessed a number of project assessments that have failed to deliver on this vision in an equitable and transparent way. Current practise avoids the fact that positive social and economic outcomes of development depend on functioning, but *limited*, ecological systems (*sensu* “thresholds” in the Panel’s report).

The Panel advocates that projects be assessed for their impacts (both negative and positive) on the environment, social systems, economies, health, and culture based on an explicit framework for evaluation and decision-making (“sustainability test”). We would like to see how such an approach might allow movement beyond the typical approach of determining whether a project will have “significant adverse environmental effects”, which under CEAA 2012 are narrowly defined, meaning project approvals are too often based on damaging or destroying the environment for economic gain. The sustainability test means that only proposals that result in a net contribution to environmental, social, cultural, health and economic well-being should go forward for approval.

We do not believe such an approach would work properly without inclusion of Strategic and Regional IAs in addressing sustainability. Regional IA’s, for example, can establish limits to development in various regions, particularly in relation to cumulative impacts. As such, we think regional IA, in a legislated tiered process, should allow for a streamlined project IA to the benefit of proponents and communities.

While there are few details in the report about how sustainability will be legislated, we submit that there is good expertise as well as Canadian examples at the project level on which to base sustainability assessment and consider criteria.

In order for the recommendations made by the Panel on the sustainability focus of IA to have the best chance of working, we recommend new legislation add the following aspects:

- be very clear on combining commitments to positive contribution to sustainability and avoidance of adverse effects;

- include explicit and strong provisions emphasizing attention to interactive effects and delivery of lasting gains in all core areas (e.g., pillars) of sustainability concern;
- provide guidance on the development of case-specific sustainability frameworks that not only cover the identified pillar areas, but also address cross-pillar concerns and opportunities related to the case and context; and
- include basic rules for reviewing and potentially justifying proposed trade-offs in light of comparative evaluation of potentially reasonable alternatives to both the undertaking and the design of undertakings.

Indigenous Rights and Participation

The Panel envisions a role for Indigenous Peoples in federal IA in way that includes a greater level of direct participation in IA as well as decision making (“inherent jurisdiction”, consultation, free, prior and informed consent). The Panel identifies Indigenous Peoples and lands as a federal interest for IA. As mentioned above, the Panel considers Indigenous lands are not limited to federal lands, which potentially expands federal involvement in environmental assessments in provinces and territories. The report notes that while some Indigenous Groups in Canada already have established legal rights to participate in IA processes pursuant to modern land claims agreements, self-government agreements, and federal laws, Indigenous Groups without modern treaties, should (if they wish) establish their own IA processes, and federal IA processes should support these.

We agree with all the Panel recommendations on this topic and recognize that ensuring an appropriate and effective role for Indigenous Peoples in federal IA is a complex task that will require significant investment in capacity and relationships focused on reconciliation. The extensive references to UNDRIP and the principle of free, prior, and informed consent in the Panel’s report is well within public expectations, given the federal government adoption of UNDRIP, and commitment to nation-to-nation relationships and to the recommendations by the Truth and Reconciliation Commission. One of the ways this nation-to-nation relationship can be expressed is through environmental assessment. While the Panel has not included many details on how these recommendations may be translated into new legislation, the high-level recommendations and vision recognizes that federal assessments need to be a more equitable tool for Indigenous Peoples and thereby help realize the “harmonization” between UNDRIP and the Canadian Constitution.

The Trigger for Project IA

Building on the “project list” aspect of CEAA 2012, the Panel recommends that new projects be added if they are “consequential to present and future generations, affect multiple matters of federal interest, are of a duration that will be multi-generational, and/or extend beyond a project site in geographic extent”. The report states that “the term “consequential” is of utmost importance in triggering meaningful federal IA” (p. 56).

We are concerned about the use of the word “consequential”, particularly as it relates to current and future generations. This determination is made in the triggering process and affects what projects get added and what projects, not on the list, get assessed. We suspect this assessment requires an understanding of the cumulative effects of this project given other projects, climate change, etc. that seems unlikely to emerge unless a regional IA, in cooperation with other jurisdictions, is completed first. As we have noted above, currently there are few incentives in the Panel’s report for Regional IA to occur in a cooperative way. In terms of process, we remain unclear how this will be determined in a “legal test without discretion”.

In terms of process, for projects not on the new Project List, one of the other triggering mechanisms depends on statutory criteria being established to require an IA of projects that have the potential to impact present and future generations in a way that is consequential (e.g., the project occurs in a sensitive area). The Panel notes these criteria should be clear so that discretion is not required. We are uncertain how these criteria could be determined and what if any legal test could be applied to avoid discretion.

We appreciate the opportunity to comment on this important report and welcome any further discussion.

Yours sincerely,



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