200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
Coast Salish Territories
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)

August 28, 2017

West Coast Environmental Law Submissions on the Environmental Assessment Aspects of the Environmental and Regulatory Reviews Discussion Paper

Dear Sirs/Mesdames,

Please accept the following submissions on the Environmental and Regulatory Reviews Discussion Paper (Discussion Paper) released June 2017. We have submitted separate comments on *Fisheries Act* reform and modernizing the National Energy Board, and have written you our recommendations on restoring lost protections under and modernizing the *Navigation Protection Act*.

West Coast Environmental Law is dedicated to safeguarding the environment through law. Since 1974 our staff lawyers have successfully worked with communities, non-governmental organizations, the private sector and all levels of governments, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment. We have represented clients in relation to such environmental assessments as the proposed Site C Clean Energy project, proposed Enbridge Northern Gateway pipelines and tankers project, and proposed Kinder Morgan Trans Mountain pipelines and tankers project (Trans Mountain). For many years we had a seat at the Regulatory Advisory Committee on environmental assessment and currently have a seat at the Multi-Interest Advisory Committee appointed to assist the Expert Panel in this review. We also co-chair the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, a cross-Canada caucus of EA experts and grassroots groups that has been researching and advising governments and communities on EA for decades. Finally, West Coast organized the Federal Environmental Assessment Reform Summit in May 2016 (EA Summit I),[1] and Federal Environmental Assessment Reform Summit II in June 2017, the outcomes of which are submitted along with this submission.

INTRODUCTION

The immense controversy over the outcomes from environmental assessment and regulatory review of a number of high profile projects in recent years is one symptom that our legislative framework for these reviews is fundamentally broken. An overhaul of our current legislation is required to get things on course. Tinkering with the current law as proposed by the Discussion Paper will not suffice. Robust new impact assessment legislation that includes provisions that address the issues set out in this submission is required if we are to fully support a new law.

[1] Anna Johnston, Federal Environmental Assessment Reform Summit: Proceedings (West Coast Environmental Law: August 2016): http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf [EA Summit Proceedings].

The government has committed to introducing new, fair environmental assessment processes through its 2015 election platform as well as Cabinet mandate letters. The Expert Panel heard from thousands of Canadians, including representatives of hundreds of Indigenous and civil society groups. The Panel incorporated what it heard in its visionary report to the Minister of Environment and Climate Change. Despite the Panel's recommendations, the Discussion Paper merely proposes amendments to the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*) that fall far short of the government's commitments, and fails to reflect the bulk of the Panel's recommendations or the detailed and thoughtful submissions and presentations of the members of the public and Indigenous peoples who provided input into the Panel's review.

The Discussion Paper contains promising elements, but falls far short of the mark of what is required to regain public trust, robust oversight and thorough environmental assessments that are based on science, facts and evidence, and serve the public's interest. See our "Making the Grade: A Report Card on Canada's Proposal for Strengthening Environmental Laws and Processes" for our evaluation of the Discussion Paper (uploaded separately).

At the outset, there are two important things to recognize. First, environmental assessment legislation should set out both processes and substantive goals. The current test in *CEAA 2012* fails to do this; rather it simply encourages the avoidance or justification of significant adverse effects. Instead, EA legislation should set out substantive socio-ecological goals, and a framework for achieving them. Second, EA is complex and comprised of multiple interrelated and interdependent factors. In EA Summit I we identified twelve "pillars" of next generation EA, which all must be present in order for EA to function optimally and achieve its procedural and substantive goals. They are:

1. Sustainability as a core objective
2. Integrated, tiered assessments starting at the strategic and regional levels
3. Cumulative effects assessments done regionally
4. Collaboration and harmonization
5. Co-governance with Indigenous Nations
6. Climate assessments to achieve Canada's climate goals
7. Credibility, transparency and accountability throughout
8. Participation for the people
9. Transparent and accessible information flows
10. Ensuring sustainability after the assessment
11. Consideration of the best option from among a range of alternatives
12. Emphasis on learning

This submission builds on the outcomes of both EA Summits, our recommendations to the Expert Panel[2] appointed to review Canada's EA processes (the EA Expert Panel) and reflects discussions with government pursuant to its release of the Discussion Paper. It is not intended to be comprehensive; rather, it outlines priority elements of the reforms required to satisfy the government's commitment to introduce new, fair environmental assessment processes that were absent from or undermined by the Discussion Paper.

[2] Anna Johnston, "West Coast Environmental Law Submissions on next generation environmental assessment" (West Coast Environmental Law Association, December 2016): https://www.wcel.org/sites/default/files/publications/wcel-submissions-to-ea-panel-final-16-12-23.pdf [EA Submissions].

To regain public trust, fulfil its commitment and enact an environmental assessment law that has a strong evidentiary basis, works for the public and the environment, and advances reconciliation and the implementation of UNDRIP, the following outstanding issues will need to be addressed:

1. Statutory framework for sustainability-based assessment
2. Governance, transparency and accountable decision-making
3. Legislated regional and strategic assessments
4. Triggering, streaming and registration
5. A legislated climate test and a strategic assessment of climate
6. Co-governance with Indigenous peoples

RECOMMENDATIONS

1. Statutory framework for sustainability-based assessment

The current significance and justification test in *CEAA, 2012* impedes achieving public trust in processes and decisions in two fundamental ways. First, it fails to set (and therefore to achieve) substantive goals respecting ecological integrity and human well-being. Second, the current legal framework permits opaque justifications of significant harm, inherently politicizing decisions. Similarly, a Cabinet-determined "public interest test" presents an unacceptable risk that political concerns may trump environmental and human well-being goals.

Ensuring sustainability through EA goes beyond *considering* social, cultural and health effects along with environmental ones, as proposed by the Discussion Paper. It means ensuring that federal decisions will *substantively* maintain ecological integrity, meet our climate commitments and uphold UNDRIP, while contributing to high levels of human well-being. As Gibson notes and as was formally recognized by the World Commission on Environment and Development in the 1987 Brundtland report, socio-economic factors and the biophysical environment are interdependent, and the well-being of both are required for sustainability to be achieved.[3] The original *Canadian Environmental Assessment Act* (CEAA) recognized this interdependence by defining "environmental effects" as including: "any effect of any change [that the project may cause in the environment] on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes by aboriginal persons, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance...[4]

The EA Expert Panel has appropriately referred to the interrelationship and importance of environmental, social, economic, health and cultural sustainability. However, it is critical to stress that sustainability is not a process of political balancing between these "pillars." As the EA

[3] G.H. Brundtland (chair), World Commission on Environment and Development, *Our Common Future* (New York: United Nations, 1987): https://en.wikisource.org/wiki/Brundtland_Report; Robert B. Gibson, "Foundations: Sustainability and the requirements for getting there," in *Sustainability Assessment: Applications and opportunities*, Robert B. Gibson (ed), (New York: Routledge, 2017) at 4-13 [Gibson, *Sustainability Assessment*].

[4] SC 1992, c 37, s 2(1).

Expert Panel notes: "Sustainability means the conditions under which ecosystem function, socio-cultural and economic well-being are maintained and risk to ecological integrity is low, thus providing the ecological foundation for the long-term socio-cultural and economic well-being."[5]

In our submission, a project will not meet sustainability goals if low-risk management thresholds for ecological values are exceeded, while there may be multiple creative ways of meeting human economic needs within these ecological limits. Regional assessment and planning at a scale appropriate to valued components has a critical role to play in establishing low risk thresholds for these ecological and Indigenous cultural values. In general, assignment of risk and identification of ecological limits should be based on best available information regarding likely outcomes and relative ecological risk associated with current and future conditions**.**

Thus, legislation needs to:

- **Establish sustainability as its core objective**: A main purpose of the Act should be to ensure that federal decisions promote the greatest number and most equitably distributed lasting net gains for the environment and human well-being.

- **Set out sustainability principles**: Principles that include respect for the interests of future generations are needed to provide clarity and direction to responsible authorities, decision-makers, industry, Indigenous groups and other jurisdictions, and the public.

- **Include broad factors and environmental effects to be considered:** To enable the consideration of net environmental, social and long-term economic benefits, the scope of environmental effects and factors to be considered in assessments should be broad and include all impacts, benefits, risks and uncertainties on all environmental effects (not just those within federal jurisdiction) as well as human health and long and short-term socio-economic well-being.

  Other amendments to the "factors to be considered" in what is currently section 19(1) will also be required, including to broaden the definition of cumulative effects to: "Cumulative effects means the effects resulting from the combination and interaction of the effects of the proposed undertaking including the environmental effects of malfunctions or accidents that may occur in connection with the undertaking, and the effects of past, present and reasonably anticipated future human actions," and the definition of alternatives to be considered (see below).

- **Require consideration of alternatives**: Consideration of alternatives is not new: the original CEAA required that every environmental assessment consider "any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting

[5] Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Minister of Environment and Climate Change, 2017) [EA Expert Panel Report] at 20, citing Tara Marsden, Gitanyow Hereditary Chiefs: https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf.

with the responsible authority, may require to be considered."[6] "Alternatives" means both "alternatives to the project" and "alternative means of carrying out the project." To help ensure that EA can result in the delivery of the most desired outcomes, legislation should enable consideration of reasonable alternatives to the project, and require identification and consideration of alternative scenarios at the regional and regional-strategic levels. The alternatives should be based on societal needs, purposes and rationales, rather than be proponent-based. The legislation must also require consideration of alternative means.

- **Establish a sustainability test:** The pursuit of sustainability should seek net, mutually reinforcing benefits in all aspects of sustainability rather than merely the avoidance of harms. Those benefits, along with any impacts, risks and uncertainties, should be equitably distributed among geographies (communities) and generations. Decisions should protect, restore and enhance both ecological integrity and human well-being. Community and social well-being includes culture, learning and civility. Rather than short-term economic benefits that accrue to a few, assessments should seek to maximize equitably-distributed livelihood sufficiency and opportunities.

  The test, which should also be the principal determination of "public interest" for projects subject to regulatory review (e.g., under the *National Energy Board Act*), may be described, in short, as: "*Which option from among reasonable alternatives is the most likely to maximize lasting, equitably distributed, mutually-reinforcing environmental, social and long-term economic benefits, without exceeding ecological limits or allowing ecological integrity to be undermined*." Progress toward sustainability also means that the ecological basis required for the meaningful exercise of Indigenous rights is protected and restored, and that Indigenous jurisdiction and law are upheld in impact assessment process and outcomes. For greater detail see proposed legislative language below in Appendix A.

- **Set out generic sustainability-based criteria and trade-off rules to guide EA approval**: To help ensure that EA processes and decisions are credible, based on sound information, and respect ecological limits, the significance and justification determinations should be replaced by sustainability-based criteria and trade-off rules, and enable the Minister to enact further criteria and rules in regulations. Such criteria and trade-off rules have been applied in environmental assessments in Canada before and have resulted in both project approvals and rejections.[7] They could appear in the legislation either as decision-making criteria (i.e., as criteria and rules the decision-maker must apply when making his or her decision) or as project approval criteria and rules (i.e., preconditions the undertaking must meet in order to be approved).

- **Enable the development of case-specific criteria and trade-off rules:** To provide flexibility and recognize the different values, risk and impacts of different proposals and regions, assessment authorities should be enabled to develop case-specific criteria and rules, with meaningful participation and in collaboration with other jurisdictions where appropriate.

[6] SC 1992, c 37, s 16(1)(e).

[7] See Appendix A for a list of sustainability assessments in Canada.

See Appendix A for suggested legislative language for a sustainability assessment framework.

2. Governance, transparency and accountable decision-making

Maintaining a Cabinet decision-making process would significantly undermine the ability to achieve government's goal of gaining public trust and getting resources to market. A Cabinet justification determination can undermine entire EA processes through Cabinet's unfettered ability to override sound information and Indigenous and public concerns for any reason, including political considerations. Moreover, regulators and offshore boards do not have the public's trust and a return to joint reviews – like the Enbridge Northern Gateway assessment – would be a step backward. At a minimum:

- **The legislation should require the authority and decision-maker to show, in public reasons for decision, how sustainability-based decision-making criteria and rules were applied, and justification for the decision:** Ensuring decisions aim for maximum net benefits in all aspects of sustainability requires transparency in the application of sustainability criteria and trade-off rules. The legislation should require the reviewing body and decision-maker to provide written reasons for decision that demonstrate how the sustainability criteria and trade-off rules have been applied and the option selected.

- **The Minister of Environment and Climate Change should be the highest level of Crown decision-making:** Decisions must be transparent and accountable in order to meet the mandate to make EA decisions and processes credible and based on scientific data, evidence and Indigenous knowledge. While we recognize the desire to enable other ministers to formally contribute to EA decisions of national significance, matters like Cabinet confidence seriously undermine achieving transparency, credibility, and decisions based on evidence, knowledge and sustainability. To achieve the dual goals of transparent cross-Cabinet dialogue and transparent, credible decisions, we recommend the legislation set out a similar decision-making process to that found in the Australian legislation; namely, that the Minister of Environment and Climate Change makes the decision, but must provide her Cabinet colleagues who have administrative responsibilities relating to the undertaking with an invitation to make public, written comments on her proposed decision within a prescribed period of time. See section 131 of *Environment Protection and Biodiversity Conservation Act 1999* for an example of this approach in EA legislation:[8]

> **131 Inviting comments from other Ministers before decision**
>
> (1) Before the Minister (the ***Environment Minister***) decides whether or not to approve, for the purposes of a controlling provision, the taking of an action, and what conditions (if any) to attach to an approval, he or she must:
>
> (a) inform any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action of the decision the Environment Minister proposes to make; and

[8] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 131: https://www.legislation.gov.au/Details/C2016C00777.

(b) invite the other Minister to give the Environment Minister comments on the proposed decision within 10 business days.

(2) A Minister invited to comment may make comments that:

(a) relate to economic and social matters relating to the action; and

(b) may be considered by the Environment Minister consistently with the principles of ecologically sustainable development.[9]

This does not limit the comments such a Minister may give.

- **The legislation should provide a right of appeal for process and substantive decisions and establish an independent tribunal to hear such appeals:** Key to ensuring fairness, credibility and accountability in assessments is the public and Indigenous peoples' ability to hold decision-makers to account, by being able to challenge interim and final decisions before an impartial arbitrator. The right to appeal interim (process) and final decisions, and when a party is able to file such an appeal, should be clearly set out in the legislation to avoid ambiguity, enable access and ensure timely resolution. The legislation should establish an impartial adjudicatory body to hear appeals.[10] It should also make obtaining injunctions on any activities (including exploratory) related to undertakings being appealed easily accessible, without onerous requirements for security or proof of irreparable harm.

- **The Agency should be sole responsible authority:** The Discussion Paper proposes joint assessments between the Agency and lifecycle regulators for projects regulated by the National Energy Board, Canadian Nuclear Safety Commission, and the Offshore Energy Boards. In our view, this approach would amount to no more than a return to the kinds of joint review panels appointed under *CEAA* 1992 for energy transmission projects, such as the one that assessed the troubled Northern Gateway assessment, which so lacked credibility that the controversy surrounding that assessment contributed to the government's promise to reform EA.

  Returning to joint Agency-regulator assessments would fail to restore public trust in or the credibility of federal EAs. As we note in our submissions to the EA Expert Panel:

  > [T]he vesting of authority for some EA reviews in the National Energy Board (NEB) and Canadian Nuclear Safety Commission (CNSC) has proven problematic in fundamental ways that in our view cannot be fixed by improving those institutions. For one, there are great inconsistencies in the processes used by the three responsible authorities. Perhaps more importantly, the NEB and CNSC are regulators without the relevant mandate or impartiality to undertake the sort of fair, public, planning-based process that good EA requires.[11]

---

[9] In a sustainability-based next-generation Canadian EA law, this provision should read, "... consistently with the principles and goals of this Act, the criteria and rules listed in [sections containing the decision-making criteria and trade-off rules], and any criteria and rules identified in the assessment."

[10] Johnston, EA Summit Proceedings, *supra* note 1 at 9.

[11] Johnston, EA Submissions, *supra* note 2 at 27; See also, Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012), 24 *JELP* 1, at 9, and Richard D. Lindgren, "Going Back to the Future: How to Reset Federal Environmental Assessment Law – Preliminary Submissions from the Canadian Environmental Law Association to the Expert Panel regarding the Canadian Environmental Assessment Act, 2012 at 14-16: http://www.cela.ca/sites/cela.ca/files/1083-CELA%20Preliminary%20Submissions%20to%20the%20Expert%20Panel%20(Nov%207,%202016).pdf.

Regulators should be involved in EA processes as experts and advisors, but not as responsible authorities or decision-makers. They may be appointed to government committees or retained to advise the Agency and review panels on such things as studies, methodology, follow-up and panel members, but that role should be purely advisory in nature. To streamline processes, regulatory processes may occur concurrent with EA ones, and information shared between the two. Finally, our "sole responsibility authority" recommendation would apply to assessments currently conducted by the port authorities such as the Vancouver Fraser Port Authority.

- **Substitution should not be an option:** Rather, the goal should be collaborative assessment among all jurisdictions (federal, provincial, Indigenous). As we state in our submissions to the EA Expert Panel:

> First, regardless of how detailed an agreement to substitute a provincial EA for a federal one may be, some important details will not be captured. Institutional culture is one obvious example: if the provincial entity does not have the same respect for public participants, Indigenous governments or intervenors as its federal counterpart, for example, there will almost certainly be a difference in the conduct of engagement processes and the incorporation of engagement outcomes into interim and final decisions between federal and provincial processes. In other words, no memorandum of understanding can mitigate a poor institutional culture. Second, federal perspectives and expertise in areas under federal jurisdiction are important for ensuring the due consideration and protection of those areas (such as fisheries, navigation and reconciliation with Indigenous peoples), and federal departments and agencies with relevant expertise are likely to be more deeply engaged when the federal government is a responsible authority for the assessment. Third, a nation-to-nation relationship with Indigenous peoples with regards to environmental assessment is impeded by delegation of process or final results to the provinces.[12]

3. Legislated regional and strategic assessments

While the Discussion Paper mentions regional and strategic assessments, it contains important gaps. It merely proposes conducting SEAs to explain the application of national environmental frameworks. While it does propose REAs to guide planning and management of cumulative effects, identify potential impacts on Indigenous peoples' rights and interests, and inform project assessments, absent from the Discussion Paper is mention of: 1) regional-strategic assessments of industry sectors within a region; 2) strategic assessments of policy gaps, including issues raised in project assessments; 3) an off-ramp for dealing with policy issues identified in a project assessment at the strategic level; and 4) a legislative framework for REA and SEA, including embedding in the legislation a framework for strategic assessments of plans, policies and programs currently governed by the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.

For the purposes of this submission, we apply the following definitions of regional and strategic EA:

[12] Johnston, EA Submissions, *supra* note 2 at 6-7.

- **REA**: An assessment of past, present and foreseeable future impacts on values and rights in a given region, that is not, in theory, limited in what it considers. A "region" means an area that is ecologically meaningful, such as a watershed or ecoregion.[13]
- **SEA**: An assessment at the policy or regional scale that has a particular strategic focus. SEA falls into two broad categories:
    - **Cabinet Directive SEA**: SEAs of proposed federal plans, policies and programs (currently governed by the Cabinet Directive); and
    - **Regional-Strategic EA (R-SEA):** SEAs directed a resolving higher level planning or policy questions affecting one or more regions of the country. These take different forms and purposes, including of:
        - A class of development (e.g., the pursuit of oil to tidewater, or the pace and scale of mining development in a particular region such as the Ring of Fire);
        - Policy gaps identified at the project assessment level (e.g., how to assess and make project-level decisions on the basis of climate implications); and
        - Proactive development of sustainability-related policy (e.g., an SEA of the Pan Canadian Framework on Clean Growth and Climate Change).

In order to ensure that regional (REA) and strategic (SEA) assessments occur when they ought to, have appropriate resourcing, and are effective and collaborative, they need to be rooted in a legislative framework for their triggering, conduct and application. Below we present the essential legislative elements for accomplishing timely REAs and SEAs to better address cumulative effects and broader policy issues, fill policy gaps, reduce burdens at the project level, and achieve desired visions of the future that respect ecological limits and ensure human well-being.

The essential legislative framework for REA and SEA includes the following:

- **Expert Advisory Committee:** Legislation should establish an expert advisory committee (in addition to a multi-interest advisory committee) to meet periodically to consider issues such as identification of regions to prioritize for REA and provide evidence-based recommendations to the Minister of Environment and Climate Change (the Minister), e.g., on which regions to add to a schedule. It should require a timely, public response to such recommendations. This concept is successfully modelled by COSEWIC under SARA and would be of similar assistance in EA.
- **Require SEAs of plans, policies and programs currently under the Cabinet Directive:** Legislation should also require SEAs of plans, policies and programs currently governed by the Cabinet Directive, as well as other legal, policy and budgetary matters as set out below. As demonstrated by the Auditor General's office, the vast majority of SEAs triggered by the Cabinet Directive are not being done, and where done,

[13] P.N. Duinker and L.A. Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments, and Ideas for Redeployment" 2006 *Environ. Manag.* 37 (2), 153–161.

are often not done well.[14] A policy requirement is not enough; these SEAs should be governed by legislation, subject to the same requirements of transparency, accountability and oversight by a central agency. By way of comparison, the US *National Environmental Policy Act* requires assessment of all "major Federal actions significantly affecting the quality of the human environment,"[15] including "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals."[16]

Similarly, federal EA legislation should require SEAs of:

a) federal policies, plans and programs,
b) new or revised federal legislation, rules, regulations or guidance, and
c) federal budgets

that require Ministerial or Cabinet approval, and that may result in important positive or negative environmental effects.

It should also set out different process streams, ranging from notice and publication of findings for policies, plans and programs with more minor environmental effects, to processes.

- **Include triggers for REAs and R-SEAs:** We recommend a combined legislated approach:
  i. Triggers, for example:
     a) regions facing significant development pressures,
     b) where a proposed undertaking is growth-inducing in a relatively undisturbed region,
     c) where assessing and managing cumulative effects on an area of federal legislative authority would better addressed a scale beyond that of a particular project (i.e., as an off ramp from project assessment), or
     d) where recommended by an independent science advisory committee.
  ii. A mechanism to allow any person, government, review body or panel to request an REA or R-SEA by submitting an application that meets prescribed criteria, coupled with a requirement for the Minister to respond within a prescribed time and detailed reasons.
- **Establish a framework for conducting and applying REA and R-SEA:** EA legislation should set out a framework to ensure that, like project EAs, REAs and R-SEAs are thorough, achieve desired objectives,[17] and are tiered with project EAs and regulatory processes. To this end, legislation should:

[14] See, e.g., Office of the Auditor General of Canada, Report 3 – Departmental Progress in Implementing Sustainable Development Strategies in Fall 2015 Reports of the Commissioner of the Environment and Sustainable Development (Fall 2015): http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_201512_03_e.pdf.

[15] The National Environmental Policy Act of 1969, 42 USC § 4332 (1970) [NEPA].

[16] CEQ Regulations for Implementing NEPA, 40 CFR § 1508.18(a) [CEQ Regulations].

[17] Including a sustainability test and criteria.

i. Establish that a purpose of REAs and R-SEAs is to identify ecological limits based on best available science, and Indigenous law and knowledge, and management objectives for desired states of lasting ecological and human well-being;
ii. Require the assessment of alternative development scenarios, selection of preferred scenarios, and determination of pathways for achieving the preferred scenario consistent with (i);
iii. Require the application of fundamental principles, processes and purposes, e.g., meaningful public participation, jurisdictional cooperation, transparency and accountability, and a sustainability framework and objectives; and
iv. Tier R-SEAs, REAs, project EAs and regulatory decision-making by requiring:
    a. project EAs and regulatory decision-making be consistent with the outcomes of REAs and R-SEAs; and
    b. periodic (e.g., every five years) updates to REAs and R-SEAs, including by taking into account information from project EAs and regulatory approvals.

- **Enable co-governance mechanisms:** Legislation should enable the establishment of standing and ad-hoc regional co-governance bodies comprised of federal, provincial/territorial, and Indigenous jurisdictions[18] and other mechanisms to recognize and give effect to Indigenous jurisdiction in the context of impact assessment.[19] In contrast to ad-hoc, project-by-project assessment, regional co-governed assessments represent a proactive approach to assessment and planning that can build a stronger foundation for collaboration between the Crown and Indigenous nations. Conduct of assessment agreements aimed at collaboratively determining factors such as the scope of assessment, the geographic boundaries of the region for assessment, the values and rights to focus on etc. will be particularly important in the context of regional assessment.

- **Establish a fund:** EA legislation should establish a fund for conducting REAs and R-SEAs, to help ensure there is appropriate resourcing.

- **Require the conduct of periodic REAs:** The legislation should include a general requirement for the Minister to complete periodic REAs to identify historic ecological baselines and current condition of valued components and to evaluate the impacts of different scenarios for future pace and scale of development in different regions of the country. This would ideally be done collaboratively with provinces. For example, British Columbia's policy-based Cumulative Effects Framework Interim Policy establishes a CE Technical Team to, among other things, "complet[e] periodic assessments of current and potential future condition.[20] Note that the BC example is embedded in policy, whereas for a stronger basis, the requirement should be in legislation and connected to on-the-

[18] For a detailed review and discussion of regional co-governance models, see J. Clogg *et al*, *Paddling Together: Co-Governance Models for Regional Cumulative Effects Management* (2017: West Coast Environmental Law) at: https://www.wcel.org/publication/paddling-together-co-governance-models-regional-cumulative-effects-management.

[19] For specific proposals see J. Clogg, *Reflections on Indigenous Jurisdiction and Impact Assessment* at https://www.wcel.org/blog/reflections-indigenous-jurisdiction-and-impact-assessment.

[20] British Columbia, "Cumulative Effects Framework Interim Policy for the Natural Resource Sector" (October 2016), s 3.4.1 at http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/cef-interimpolicy-oct_14_-2_2016_signed.pdf.

ground decision-making. However, even where provinces do not conduct periodic REAs the federal government should still proceed in order to ensure that thresholds for environmental components within federal legislative jurisdiction are established and respected and that the federal Crown's obligations to Indigenous peoples are met.

- **Establish a Schedule of priority regions and policy issues:** The legislation should establish a list of priority regions and policy issues that should be prioritized for undergoing REAs and R-SEAs, and timelines for commencing those assessments. This list may be established in the Act and updated periodically by order-in-council,[21] or established in regulation.

4. Triggering, streaming and registration

A project list that only sets out classes of major projects (e.g., a metal mine above a certain threshold) will fail to cover too many projects that contribute direct and cumulative effects. Legislation must:

- **Require registration of all undertakings:** All projects and activities within federal jurisdiction should be registered in a central EA database in order to enable the tracking of potential direct and cumulative impacts.
- **Include legislated triggers for when an EA is required**: E.g., when requested by an Indigenous group, the government is a proponent, the government funds a project, or a project requires federal decision (e.g., issuance of a s 35 authorization under the *Fisheries Act*).
- **Enable the Minister to enact regulations establishing further triggers:** If government is unwilling at this time to legislate triggers, legislation must at a minimum allow the enactment of regulations setting out triggers, so that government in the future can require EAs of undertakings of a type not contemplated by the project list.
- **Provide for different assessment streams**: To make assessing smaller projects manageable, the legislation should allow for lesser assessment streams. These streams must continue to meet the core minimum standards and requirements of EA, but may have less onerous processes.

5. A legislated climate test and a strategic assessment of climate

All project and strategic assessments must include a test ensuring that anticipated lifetime emissions and other effects would be consistent with timely Canadian progress towards meeting its climate change commitments. While outstanding questions remain on how to effectively assess climate, legislation should set out minimum requirements. They are:

- **To assess the upstream, direct, downstream and lifespan emissions and effects of a project:** Downstream effects may be more difficult to assess for some types of project; legislation may provide for consideration of downstream where feasible.

[21] See, e.g., *Species at Risk Act*, Schedule I, s 27(1).

- **That a climate test asks whether a project will help or hinder progress towards domestic and international immediate and long-term climate obligations** applying the above information.

6. Co-governance with Indigenous peoples

The Discussion Paper falls short of requiring decision-makers to obtain the consent of Indigenous jurisdictions. To uphold UNDRIP and maximize progress towards reconciliation, legislation must:

- **Recognize Indigenous nations as jurisdictions**: A new assessment Act should explicitly state that a purpose of the legislation is to facilitate the participation of Indigenous nations as jurisdictions exercising decision-making functions in assessments carried out under the Act, in affirmation of Indigenous peoples' inherent rights as recognized in the *United Nations Declaration on the Rights of Indigenous Peoples* and Canada's constitution. The Act should also clearly define Indigenous nations as jurisdictions in the definitions section of the Act, and recognize their authority to conduct assessments in accordance with substantive and procedural requirements of their own legal traditions. As the Expert Panel notes: "Recognition of and support for Indigenous laws and inherent jurisdiction should be built into IA governance and processes."[22]

- **Legislatively enable mechanisms to give effect to Indigenous jurisdiction:** Options for doing so, which may not be mutually exclusive, include:

    - Legislatively confirming that projects may not proceed in the absence of approvals or permits required by Indigenous jurisdictions as a matter of their laws and jurisdiction.

    - Legislatively enabling (or continuing) co-governance bodies with at least equal Indigenous and Crown participation with the responsibility to jointly make procedural and substantive decisions about proposed projects in particular regions.

    - Legislatively providing that assessments and projects may not proceed in the absence of nation-to-nation agreements with all impacted Indigenous nations at three key stages of an assessment: (1) a "conduct of assessment" agreement before an assessment begins; (2) before making a final assessment decision, in order to jointly determine the outcomes of the assessment including conditions for approval if applicable; and (3) an implementation agreement, concurrently with or following the assessment decision, in order to collaboratively implement the outcomes of the assessment (e.g., where implementation of regional assessment requires further planning or regulatory steps).

    - Alternatively, provide for the option of parallel assessments by Indigenous and other jurisdictions, with provision for negotiation and dispute resolution to reconcile the outcomes from these processes. Legislatively provide that projects may not proceed in the absence of nation-to-nation agreements with all impacted

[22] EA Expert Panel Report, *supra* note 5 at 29.

Indigenous nations regarding whether approval, or conditional approval where applicable, should be given.

A new Act should include flexible provisions enabling such co-governance mechanisms to be collaboratively developed between the Crown and Indigenous nations consistent with their own legal traditions, while ensuring that default requirements uphold inherent, Aboriginal and treaty rights. Taking an approach which recognizes Indigenous jurisdiction and law will mean acknowledging that authoritative decision-makers within each Indigenous legal tradition may vary, that there may be more than one level or type of Indigenous approval required, and ensuring that there is transparency with respect to agreements reached.

Provide for dispute resolution mechanisms: A new Act should include provisions enabling an Indigenous nation (or the Crown) to trigger dispute resolution to address issues that arise during negotiation or implementation of nation-to-nation agreements for assessment, or if certain of the criteria, processes or principles set out in the Act have not been respected. West Coast has recommended that a new independent tribunal – empowered to ensure both Indigenous and Canadian legal requirements are upheld – perform this function. However at minimum (and in any event), the Act should include provisions enabling alternative dispute resolution focused on achieving outcomes that incorporates and reflects the laws of the Indigenous nation involved in addition to Canadian law. Such alternative dispute resolution can assist in avoiding costly litigation, while potentially fostering better understanding between the parties and addressing disputes in a manner more appropriate to the legal tradition of the Indigenous nation.

Ensure adequate funding for Indigenous nations performing governance functions in assessment: A new Act cannot merely enable nation-to-nation agreements and co-governed assessments on paper; it must ensure that Indigenous nations have access to sufficient resources to actually perform the roles contemplated in the Act. For this reason, a new Act should establish a funding program to provide adequate resourcing to Indigenous nations carrying out governance roles and negotiations in connection with an assessment under the Act. This program would be distinct from a participant funding program, which assists the public in intervening in the Crown's assessment process. Rather, the goal of this funding program would be to resource Indigenous nations that are directly negotiating or undertaking assessment processes and responsibilities, in collaboration with the federal government (and potentially other jurisdictions).

Ensure that impact assessment is directed at achieving substantive goals, including compliance with *UNDRIP*, not just checking off procedural boxes. As noted above, a new Act should legislatively provide for sustainability as a core objective of assessment, and that this can be achieved in part by establishing a set of principles or criteria that a Crown decision-maker must consider and apply in relation to an assessment outcome. Also as noted, sustainability includes requiring that the ecological basis for the ongoing meaningful exercise of the inherent, Aboriginal and treaty rights of Indigenous peoples is maintained (e.g., by requiring that the outcomes of assessment maintain ecological integrity and uphold Canada's climate commitments) but also that Crown conduct and decision in the assessment is consistent with the *United*

Nations Declaration on the Rights of Indigenous Peoples, and upholds Aboriginal and treaty rights protected by the Canadian constitution.

CONCLUSION

The review of federal EA processes marks a moment in Canadian EA history. Through this review, we have a once-in-a-generation opportunity to apply the learning gained over decades of EA in Canada and build an EA law that works for the environment, communities and the long-term economy, and which helps Canada down the path of reconciliation. But such changes will require more than just a few amendments to *CEAA 2012*. That law has passed its best-before date, and should be replaced with a new, next generation EA act. These submissions recommend just some of the critical elements of what is required in that law in order to achieve Minister McKenna's mandate. As noted in the introduction, the pillars of next generation EA are interrelated and interdependent, and must all be present in order for EA to function optimally. With the threat of climate change and other widespread cumulative effects that threaten species, human health and well-being, it is time for assessments to be able to obtain the substantive goal of progress towards sustainability. We look forward to continue to work with the Minister of Environment and Climate Change, her Cabinet colleagues contributing to this process, and the officials in their Ministries, on building next generation environmental laws that work for the environment, communities and the economy.

APPENDIX A

SUGGESTED LEGISLATIVE PROVISIONS

Proposed impact assessment legislative language for a sustainability test and trade-off rules[23][24]

Sustainability Test

1. Taking into consideration the factors set out in section (x)[25] the decision-maker must, in all regional, strategic and project assessments:
   (a) decide which option from among the reasonable alternatives[26] makes the greatest positive contribution to sustainability by protecting, restoring or enhancing each of the following:
      i. ecological integrity,[27] including the ecological basis for the meaningful exercise of Aboriginal and treaty rights and community health,
      ii. Canada's ability to meet international climate commitments,
      iii. the community and social well-being of potentially affected people,
      iv. the health of potentially affected people, especially vulnerable populations,
      v. livelihood sufficiency and opportunity over the short and long-term,
      vi. intra-generational equity,[28]
      vii. inter-generational equity,[29] and

---

[23] Adapted from Gibson, *Sustainability Assessment*, *supra* note 22 at 11-12; and Meinhard Doelle, "The Lower Churchill Panel Review: Sustainability Assessment under Legislative Constraints" (August 2014) at 13-15, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480368. An updated version of this paper appears in Robert B. Gibson, *Sustainability Assessment: Applications and opportunities* (Routledge, New York: 2017).

[24] Additional related changes will also be needed to the current decision-making provisions under *CEAA, 2012*, such as section 52.

[25] As noted above, the factors to be considered, currently set out in CEAA, 2012, section 19(1) will need to be revised to, among other things, include consideration of impacts, benefits, risks and uncertainties, and reasonable alternatives and an expanded definition of cumulative effects. The legislation should define cumulative effects as: "Cumulative effects means the effects resulting from the combination and interaction of the effects of the proposed undertaking, including the environmental effects of malfunctions or accidents that may occur in connection with the undertaking, and the effects of past, present and reasonably anticipated future human actions, with appropriate consideration to the synergistic and interactive outcomes of multiple land-use practices, industrial developments, and climate change that aggregate over time and space."

[26] Alternatives should be defined in the legislation as: a) for project assessment as including reasonable alternatives to the project, alternative means of carrying out the project, and the null option; b) for regional assessment as alternative scenarios for the nature, pace and scale of development, preservation and restoration in a region; and c) for strategic assessments as reasonable alternative policies, programs or plans or their components.

[27] Legislation should define ecological integrity as "the biological richness and the ecosystem services provided by natural terrestrial and marine processes, sustained at all scales through time (e.g., species richness, vegetation diversity, soil productivity, water quality, predator–prey interactions, nutrient cycling, hydrology, disturbance regimes, succession, carbon storage), including the structure, function, and composition of natural ecosystems." We recommend that measurable ecological limits be defined through REA or regional-strategic EAs (R-SEA) scenario analysis and that these be based on benchmarks of low relative ecological risk for key values and rights. In general, assignment of risk and identification of ecological limits should be based on best available information regarding likely outcomes and relative ecological risk associated with current and future conditions.

[28] The legislation should define contributions to intra-generational equity as, "Enhancement of fairness in the distribution of benefits, effects, risks and uncertainties, as well as choice availability, among potentially affected individuals, communities, regions and other interests."

viii. resource maintenance and efficiency;[30] and

(b) uphold Indigenous jurisdiction, law and rights in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

2. The sustainability criteria set out in 1(a) are to be applied together using the precautionary principle, recognizing interactive effects, and seeking mutually reinforcing, cumulative and lasting sustainability gains.
3. Decisions on project assessments under section 1 must be consistent with the outcomes of any regional or strategic assessment conducted under section (y).[31]
4. The proponent bears the burden of proof in demonstrating that there are probable grounds, based on clear and convincing evidence, to conclude that the criteria set out in 1(a) and section 3 have been met, or if trade-offs are anticipated, that the circumstances set out in section 5 are present.

Trade-off rules

5(1) Selection of an option that does not meet all of the criteria listed in 1 may only be justified if:

(a) no available option, including the option of not proceeding with a undertaking, meets all of the criteria listed in 1,

(b) the option selected:

i. will maximize net gains to overall sustainability based on the criteria identified in paragraph 1(a), even if not every criterion is met,

ii. will not infringe Aboriginal or treaty rights without the consent of the affected Aboriginal rights-holders,

iii. will not result in significant adverse direct or cumulative environmental effects, unless the alternative is the acceptance of a more significant adverse environmental effect for present or future generations,

iv. cannot reasonably be anticipated to result in exceeding an ecological limit,

v. will not contravene or hinder Canada's ability to achieve any domestic or international environmental or human rights obligations, including climate change obligations,

vi. will ensure that no current or future generation, geographic region or community bears a disproportionate share of the adverse effects, risks or costs, and

vii. will not, on a balance of probabilities and taking into account the precautionary principle, pose a risk of effects listed in paragraphs 5(1)(b)(ii-vi); and

---

[29] The legislation should define inter-generational equity as, "The equal preservation or enhancement of the ability of current and future generations to benefit from environmental, social, cultural, health and economic well-being in potentially affected areas."

[30] The legislation should define resource maintenance and efficiency to include "reducing extractive damage, avoiding waste and minimizing overall material and energy use."

[31] This section assumes and depends on a robust and participatory sustainability-based legislative framework for REA and SEA as recommended in this submission.

(c) the decision is based on the best available information in accordance with the precautionary principle,[32]

(2) A decision to approve an option under section 5 must be accompanied by explicit, clear and cogent reasons setting out why selection of the option is justifiable in the circumstances, including:

a. how the option best contributes to overall sustainability compared to other alternatives, applying the criteria listed in section 1 above,

b. how compromises and trade-offs have been addressed and justified through open processes that meaningfully engage all jurisdictions, rights-holders and stakeholders as set out in section (z), and

c. disclosure of the evidence upon which justifications are based.

(3) In determining whether an environmental effect is significant for the purposes of paragraph 5(1)(b)(iii), the decision-maker cannot accept incomplete mitigation of significant adverse effects if stronger mitigation efforts are feasible.

Regulations – Minister

6.The Minister may make regulations:

(a) respecting additional decision criteria and trade-off rules to be applied when making a decision under section 1(a).

[32] The legislation should define a strong precautionary principle.

APPENDIX B

SUSTINABILITY ASSESSMENTS IN CANADA

Canadian Environmental Assessment Agency, Ministry of Environment. *Joint Review Panel Report: Foundation for a Sustainable Northern Future*. (Government of Canada, Dec. 2009).

Canadian Environmental Assessment Agency. Ministry of Environment. *Joint Review Panel Report: Kemess North Copper-Gold Mine Project*. (Government of Canada, Sept. 2007).

Canadian Environmental Assessment Agency. Ministry of Environment. *Voisey's Bay Mine and Mill Environmental Assessment Panel Report*. (Government of Canada, Jan. 1997).

Canadian Environmental Assessment Agency. Ministry of Environment. *Lower Churchill Hydroelectric Generation Project: Report of the Joint Review Panel*. (Government of Canada, Aug. 2011).

Canadian Environmental Assessment Agency. Ministry of Environment. *Joint Review Panel Report: Environmental Assessment of the Whites Point Quarry and Marine Terminal Project*. (Government of Canada, Oct. 2007).