Eabametoong First Nation

Written Submission to CEAA 2012 Expert Review Panel

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1. Introduction

Eabametoong First Nation is a remote fly-in community located in northern Ontario, approximately 350km north of Thunder Bay. We possess the dual responsibility and authority as the inherent stewards of this land. In addition to our inherent rights and jurisdiction, we have Aboriginal and Treaty rights, which are recognized in s.35 of the *Constitution Act, 1982*. Our membership has a right to participate in any adjustment to Federal legislation or policy on the practice of Environmental Assessment in Canada. We have interests in the good practice and stewardship of the environment across Canada, and hold well-informed views on how this may be accomplished, especially in regards to our experience with mineral and infrastructure proposals for the so-called 'Ring of Fire' region in Ontario.

2. EA Triggers

One of the significant changes to federal environmental assessment brought about by CEAA, 2012 was the narrowing in the scope of the application of the Act – from applying to all projects for which there was a federal trigger to only a limited list. This can result in projects that infringe Aboriginal and treaty rights escaping assessment, and is particularly concerning with respect to new kinds of projects not anticipated by the *Regulations Designating Physical Activities.*[1] To address these issues we recommend the following changes.

First, the federal triggers for environmental assessment under section 5(1) of *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 should be reinstated. Additional triggers should be developed in consultation with Indigenous communities, to ensure projects that may infringe on Aboriginal or treaty rights are federally assessed. These additional triggers should include but not be limited to:

(a) Any project that may have an adverse impact on Federal Lands and lands of international significance including National Parks, Indian reserve lands, waters designated under the Navigation Protection Act, and World Heritage Sites.

(b) Any project that may have an adverse impact on treaty settlement lands under a modern treaty or land claim agreement.

(c) Any project that may impede the federal government's carbon emission target, other climate change commitments or other national environmental objectives. This could be a general trigger or be broken down into more precise triggers such as "any project that has the potential to contribute X amount of Greenhouse Gases".

[1] SOR/2012-147.

(d) Any project that would impact more than 2% of the known range of a species designated under the *Species at Risk Act*[2] as a species at risk (endangered, threatened or of special concern).

(e) Any project that may discharge a substance listed under the *Canadian Environmental Protection Act, 1999*[3] or the *Canada Water Act*.[4]

(f) Any project that may affect migratory birds protected under the *Migratory Birds Convention Act, 1994*.[5]

(g) Any projects prescribed by regulation.

In addition to federal triggers, the *Regulations Designating Physical Activities* should remain in place to provide greater certainty about specific kinds of projects that require assessment. Where regional or strategic assessments suggest other triggers or other kinds of projects that should be subject to assessment, these should be added to the regulations.

If a project is subject to one or more of the triggers the Proponent should submit a Project Description to the Agency. The Agency should then examine the Project Description and solicit public comment. An exclusion list should also be reinstated with triggers for exclusion of minor projects from assessment *after* the submission of a Project Description and initial consultation with Indigenous peoples, if it is determined to have minimal environmental effects, according to appropriate exclusion triggers. The exclusion triggers should be developed in consultation with Indigenous communities, exclusions should be limited, and they should not allow any project to be excluded if there is a reasonable possibility that the project or activity may adversely impact Aboriginal or treaty rights. The previous exclusion list under the *Exclusion List Regulations*[6] could be used as a starting point for discussion of appropriate exclusions, but we are not suggesting it simply be reenacted. Instead, a consultation process with Indigenous peoples on appropriate exclusions should be conducted.

Under this framework, where projects are more minor, but not excluded, the content of the EIS Guidelines could be tailored to reflect the level of complexity of the project.

3. Timelines

Improving opportunities for Indigenous participation in the environmental assessment process will require that the timelines for environmental assessment set out in sections 27(2) – 365 days

[2] S.C. 2002, c. 29.
[3] S.C. 1999, c. 33.
[4] R.S.C. 1985, c. C-11.
[5] S.C. 1994, c. 22.
[6] SOR/2007-108.

for an assessment by a responsible authority and the Minister's decision – and 38(3) – 24 months for an assessment by a review panel and the Minister's decision – be applied more flexibly and be more responsive to the needs of Indigenous peoples. Power is given under sections 27(3) and 38(4) to extend these time limits (but in the case of assessment by a responsible authority only by up to three months). Within these timelines there are no specific timelines for comment periods or consultation, with the exception of a 20 day limit for public comments on the project description.[7]

The timelines that Indigenous communities are subject to when participating in environmental assessment are highly discretionary, unpredictable and subject to external pressures beyond their control that impact the ability of Indigenous peoples to fully participate in the EA. As a result these timelines are often inadequate. For example, studies to collect Indigenous Knowledge to inform the environmental assessment process or community surveys to assist with assessment of impacts on Aboriginal and treaty rights require significant time to complete.

We have several recommendations for how this might be addressed:

1. Set minimum time periods in the legislation for comment on draft Environmental Impact Statement Guidelines, comments on Environmental Impact Statements and any revisions to the EIS, comments on panel Terms of Reference and comments on the draft environmental assessment report.

2. These minimum time periods should "stop the clock" like requests to Proponents for further information, and not be counted towards the overall time.

3. Provide triggers for extending these minimum timelines and the overall timelines for the environmental assessment process including those relevant to engagement with Indigenous peoples such as:

    a) An automatic extension of timelines if participant funding is delayed; and

    b) Request by an Indigenous community participant, provided they give reasonable justification for their request.

4. Funding

Funding levels currently provided under the Agency's Participant Funding Program are too limited. These processes are complex and given the importance of the environmental assessment in informing the duty to consult, the consequences are significant. Indigenous peoples will often need to retain consultants with legal, technical or scientific expertise to support their

[7] Section 9(c).

participation. This is especially true given the reluctance of non-Indigenous society to accept Indigenous knowledge or laws at face value. The current reality Indigenous peoples face in the EA process is that the information provided by Indigenous knowledge holders needs to be "legitimized" by the involvement of experts (anthropological, sociological, technical, scientific or legal) when it is in conflict with other legal, scientific or technical information provided by a proponent. This comes at a significant cost.

Often, funding provided by the Agency will cover no more than a technical review of the EIS, let alone technical or legal review and drafting of responses to any other documents such as panel terms of reference, project updates and information responses; hearing participation; consultation meetings; community briefing and consultation with members; and environmental baseline studies or Indigenous knowledge studies.

One way to address the shortfall in funding provided to Indigenous communities for participation would be to increase the funding available and broaden the cost recovery provisions under s. 59 of the Act and the *Cost Recovery Regulations* to provide the Agency with power to recover costs related to funding Indigenous participation in an EA from proponents in order to cover the difference.

5. Role of Agency/Crown in Environmental Assessments

The Role of the Canadian Environmental Assessment Agency must be reimagined. The Canadian Environmental Assessment Agency has been one of the main hurdles we have encountered in EAs because, despite a veneer of inclusiveness, the Agency contributes to our indigenous knowledge being treated as less valid, is routinely non-responsive to our questions, prevents us from engaging with other departments and is a primary cause of the lack of clarity regarding how rights will be assessed and consultation undertaken.

Our suggestion is that the Agency be reestablished as an independent agency, funded by government and proponents seeking regulatory approval, that will have the responsibility to prepare independent environmental assessment materials and conduct engagement with all stakeholders, including First Nations.

Reestablishing the Agency in this way will assist in rebuilding confidence in the environmental assessment process by offering independent review to all stakeholders in an environmental assessment. Such an agency would also assist in bringing First Nations' concerns into the environmental assessment process. Proponents are often unable or unwilling to engage in particularized analysis of issues that seem to go beyond the footprint of their proposed projects. An independent agency, empowered to conduct its own assessment studies where required, could greatly increase the understanding of the potential direct and cumulative effects of a proposed project. This would result in higher quality information being made available to First Nations and the Crown.

The Agency should also be expressly tasked with facilitating consultation and accommodation with First Nations by directly engaging with First Nations and connecting federal departments with subject matter expertise to the consultation. Roles need to be clearly defined and contacts for First Nations have the authority to make the necessary decisions within those roles.

6. First Nation Led Assessments

In addition to participation in EAs under CEAA 2012, Indigenous groups across the country are increasingly conducting EAs of their own. This may be done as an exercise of indigenous law, under a land code or other framework. New federal legislation should consider how meaningful recognition of these other assessment bodies uphold principles in UNDRIP, including article 18 which recognizes that

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

Additionally, EA processes where Indigenous groups are decision-makers are another way of fulfilling the principle in UNDRIP article 32(1) where Indigenous groups have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. In light of the Truth and Reconciliation Report (TRC) calling on all levels of government and sectors of Canadian society to adopt UNDRIP as a framework for reconciliation, mechanisms in federal legislation should be considered to meaningfully integrate Indigenous environmental assessments into environmental management and decision making.

There are a range of examples in Canada where First Nations are working with provincial and territorial governments to develop collaborative models for environmental assessment that advances recognition of First Nations' inherent jurisdiction as stewards of their lands. In the Northwest Territories, the Mackenzie Valley Environmental Impact Review Board is a co-management board responsible for the environmental impact assessment process in the Mackenzie Valley. Aboriginal land claim organizations nominate half of the board members and the federal and territorial governments nominate the other half of the board members. In Ontario, the provincial government is negotiating with a group of First Nations in northern Ontario to develop a terms of reference for a joint review panel that includes a First Nation appointee, and that accommodates First Nation decision making in respect of panel recommendations. Where Indigenous groups chose to conduct their own, stand alone assessments, federal legislation can provide for assessment agreements that seek to harmonize timelines and information collection between federal, provincial, and Indigenous assessments processes.

7. Integration of Consultation into Environmental Assessment

Crown Consultation and the federal environmental assessment regime

The stakes are high when it comes to Crown-aboriginal engagement in EAs. EAs are often the first and most fulsome forum in which First Nations can engage with the Crown regarding projects that can have serious consequences for their ways of life. Second, because the Crown often chooses to rely on EAs to discharge consultation, reconciliation and Canada's commitment to the United Nations Declaration on the Rights of Indigenous Peoples are also at stake.

Unfortunately, our experience has been that the Crown integrates the duty to consult into EAs in a manner that undermines the fairness and effectiveness of both processes to the detriment of aboriginal interests. We highlight a few examples:

> *Creating uncertainty*: The Crown is routinely unclear on whether and when key aspects of consultation and environmental assessments will be coordinated, such as the assessment of impacts to section 35 rights.
>
> *Non-responsiveness*: federal departments take the position in EAs that the Act precludes them from sharing feedback and doing anything with information provided by First Nations until, possibly, after the EA process.
>
> *Passive participation*: We routinely request that the Crown help us collect baseline information relevant to assessing impacts to the environment and Section 35 rights. We have never encountered a situation where the Crown has assisted in collecting information.
>
> *Closed mind*: While the Crown asks us to submit comments on certain guiding documents in EAs, our comments relating to issues such as incorporation of indigenous knowledge, information gathering, and factors for assessing impacts to rights are universally met with the response that the clarity we requested would be contrary to the Act.
>
> *Late consultation*: Instead of working with us at the outset of an EA to shape a more inclusive and effective process and identify information necessary for an EA, the Crown tells us to wait until after the EA process is complete to talk about what may be missed. This is too late for effective engagement and, in any event, the Crown fully relies on the EA report (deficiencies and all) when we get to that later stage.
>
> *Obscuring roles and decisions*: In response to most questions and requests we pose during consultation in EAs, the Agency responds with some form of "we will take a whole of government approach to that issue, as and when appropriate". This limits any engagement with federal departments and decision makers.

Creating appropriate federal engagement with aboriginal peoples in EAs is necessary from the perspectives of good EA practice, implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and, should the Crown continue to rely on EA processes for consultation, the duty to consult. Improved Crown engagement in EAs would have the following elements:

- Explicitly requiring the identification of effects resulting from proposed projects directly on Aboriginal and treaty rights would be a first step in increasing Aboriginal nations' confidence in both the environmental assessment and the Crown consultation processes

- Clearer requirements for Crown engagement with aboriginal groups at key steps in an EA

- Statutory minimum standards for the factors and indicators of interest to First Nations that must be included in all terms of reference for EAs

- Requirements for First Nation involvement in the design and carrying out of studies pertaining to, at a minimum, rights and culture. Early engagement and inclusion of Aboriginal peoples whose territories may be affected by a proposed development will ensure that environmental assessments are properly scoped to provide useful information during Crown Consultation

- Clearer authority for federal departments to gather information requested by First Nations and to provide feedback to First Nations, when so requested, in EA and factors to guide the exercise of that authority

- Where the Crown intends to rely on an EA process for consultation, a requirement for the EA to assess the adequacy of consultation

- Improved funding for First Nation participation in EAs

8. Require Consideration of Effects on Aboriginal and Treaty Rights

The concept of free, prior and informed consent, requires that Indigenous peoples and the Crown be informed about the potential effects of proposed development on the ability of Indigenous peoples to continue to exercise constitutionally protected aboriginal and treaty rights. For First Nations to have confidence in environmental assessment processes, these processes must assess the potential adverse effects of development on aboriginal and treaty rights. The present statutory and regulatory scheme does not require that effects to aboriginal or treaty rights be assessed in the context of federal environmental assessments.

Instead, section 5 of the *Canadian Environmental Assessment Act, 2012* ("*CEAA, 2012*") limits the consideration of effects on the environment that may impact aboriginal peoples to the four aspects covered in 5(1)(c) (health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance).

This narrow definition unduly constrains environmental assessments and deprives First Nations and the Crown of the knowledge necessary to understand whether a proposed land use will diminish the ability of First Nations to exercise aboriginal and treaty rights. This definition imposes an undue constraint as impacts to the continued ability of First Nation to exercise rights on lands and waters cannot be assessed by evaluating the likely impacts of a development on the current use of lands by First Nations or on physical and cultural heritage. Effects on aboriginal and treaty rights must instead be informed by understanding the nature of the asserted or proven rights, including the conditions necessary for First Nations to exercise those rights.

Collecting this information and conducting a direct assessment on potential effects to aboriginal and treaty rights is a necessary component of reconciliation. Unless this information is collected, First Nations cannot provide informed consent to resource development that may impact upon their rights, and the Crown cannot fulfill its constitutional obligations to not infringe upon those rights. A renewed environmental assessment process can replace guess work with evidence based analysis on the potential impacts of proposed land uses.

Because of this narrow definition, the Crown, as a matter of consultation, often commits to conducting an assessment of the effects of a proposed development on aboriginal and treaty rights *outside* of the environmental assessment. This is an exercise that has repeatedly failed First Nations and has undermined confidence in the environmental assessment process. Such ad hoc assessments are deprived of the information necessary to actually understand the potential effect of a proposed development.

The Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the *Canadian Environmental Assessment Act, 2012* recognizes that information gathered under 5(1)(c) may when it sets out that:

> The information gathered under paragraph 5(1)(c) **may** also assist other kinds of assessments needed to meet other kinds of obligations that may arise in the course of implementing CEAA 2012. For example, the information collected may overlap with the information needed to assess potential adverse impacts on Aboriginal or Treaty rights which in turn may inform any consultation or treaty implementation requirements that may arise. However, <u>this Guidance document is not directed at</u>

> informing these other kinds of assessments or obligations that may arise in relation to the implementation of CEAA 2012.[8]

The constitutionally mandated 'other kinds of assessments' (i.e. those on Aboriginal rights) must take place as part of the Crown consultation process, but are currently being conducted separately from those carried out under CEAA 2012, **if at all**. For example, with respect to the Northern Gateway project, the majority of the Federal Court of Appeal wrote that:

> The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.[9]

Environmental assessment methodology is appropriate and flexible enough to identify the effects of proposed projects on section 35 rights. When Aboriginal nations are included in the scoping of environmental assessments they can inform the selection of biophysical and human components studied in the assessment process. There are many examples of environmental assessments that have been conducted to determine effects on Aboriginal interests including section 35 rights. By updating the factors that must be considered in section 5 of CEAA to include the Aboriginal and treaty rights recognized and affirmed in section 35 of the Constitution Act, 1982, it will be made clear that environmental assessments must include an assessment of project effects directly on the rights of Aboriginal peoples.

Requiring as a minimum the identification of indicators that can credibly represent each Nation's rights, the collection of information regarding those indicators, and an assessment of that information in the environmental assessment process will allow the environmental assessment process to meaningfully inform the Crown consultation process. Project proponents are expected to assess all other aspects of the effects of their projects; the potential effects on the rights of Aboriginal peoples should be treated no differently. The cost of assessing effects on Aboriginal peoples and their rights should be borne by proponents and not by Aboriginal nations. While project proponents are in a position to mitigate some of the direct effects of their operations on Aboriginal and treaty rights, some effects of development are more properly addressed by governments. Requiring proponents to identify such effects will provide the Crown with information it can use in its accommodation process.

To ensure that environmental assessments evaluate potential effects to aboriginal and treaty rights, we request that CEAA, 2012 be amended to expressly require that aboriginal and treaty

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[8] Stantec, Technical Memorandum "Reference: Effects of Changes to the Environment on Physical and Cultural Heritage" at 2. (emphasis added)

[9] *Gitxaala Nation v Canada*, 2016 FCA 187.

rights protected under s.35 of the *Constitution Act, 1982* be defined either as a "component of the environment" under s.5(1)(a) or as an aspect of the effects that are required to be assessed under s.5(1)(c). We also request that the "Purposes" section of CEAA, 2012 be amended to include, as a purpose of the act, "to protect aboriginal and treaty rights guaranteed under s.35 of the *Constitution Act, 1982"*.

9. Regional/Strategic Environmental Assessment

As discussed above under the Cumulative Effects Assessment section, project based assessment without a structured approach to cumulative effects assessment is ineffective and can miss or underestimate the long term effects of a development, many of which are disproportionately felt by Indigenous communities who continue to reside and rely on their lands after non-renewable resources are depleted and project proponents have departed.

New federal environmental assessment legislation should provide for government led, regional studies which focus on land use planning at a larger scale, because it is not possible or reasonable for individual project proponents to have the correct information or conduct an assessment at this scope. The legislation should provide criteria for when a regional assessment must occur, or at least provide it as a clear option. Triggers could include situations such as:

- the proposed project is in a region or ecosystem that has a unique value, including significant cultural value to one or more Indigenous groups;
- the region or ecosystem has already been subject to heavy development, or significant development is anticipated; and
- cumulative effects are expected and are of particular concern.

Project level assessment can be more easily and legitimately undertaken by proponents under a tiered structure of regional assessment, whereby the project level assessment determines conformity with a larger scale plan that considers the overall development framework for a region. In a "contribution to sustainability" model, alternative development scenarios in a region should be considered as a component of the assessment so that project or regional development proposals can be compared with a range of potential outcomes that include long term, fairly distributed benefits and minimization of 'trades offs' (economics v. environment).

10. Meaningful Cumulative Effects Assessment Methodology

The CEAA 2012 model of determining significant impacts and potential mitigations for project by project approvals misses the long term adverse impacts of development. This is the particularly the case in green field scenarios where the approval of one project may cause a domino effect of further development and infrastructure approvals. It is also the case where significant development has already occurred and a further project approval can be 'the straw

that broke the camel's back' with respect to the ability of Indigenous peoples to continue to practice their Aboriginal and Treaty rights.

The case law provides guidance on the proper approach to meaningful assessment of the cumulative effects a proposed project may have on Aboriginal and Treaty rights. The Honourable Chief Justice Finch of the British Columbia Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, endorsed an approach that takes historical erosion of Treaty rights into consideration when assessing the affects of a new industrial activity:

> [117] I do not understand Rio Tinto to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.
>
> [118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.
>
> [119] To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

Chief Justice Finch's reasons in *West Moberly* also mandated a broad forward looking approach to cumulative effects assessment in considering impacts on Aboriginal and Treaty rights:

> [122] It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.
>
> [123] On my reading of the chambers judge's reasons, it does not appear that he gave much, if any, weight to the potential impact of a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt

> Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.

An approach to cumulative effects assessment that can provide meaningful insight into the real impact of a proposed development on Aboriginal and Treaty rights could be secured by amendments to CEAA 2012 that require proponents to provide information, and assessors to consider, information such as the following:

1) a description of existing and potential cumulative impacts or changes to the environment caused by all past, present and reasonably foreseeable future projects and human activities, including the potential social, cultural, health, economic and environmental impacts on Aboriginal and Treaty rights, and which shall include:

    a) amount (quantity and percentage) of potential industrial development within the traditional territory of each Indigenous group;

    b) amount (quantity and percentage) of lands within the traditional territory of each Indigenous group that is currently leased for exploration and industrial development;

    c) percentage of tenures developed within the traditional territory of each Indigenous group in past 10 years;

    d) amount of land within each Indigenous group's traditional territory taken up for other developments (i.e., converted from natural vegetation);

    e) amount of each Indigenous group's traditional territory no longer available for exercise of Aboriginal rights because of direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable development;

    f) identification of all linear corridors (pipelines, transmission lines, roads, seismic lines) within each Indigenous group's traditional territory and in the vicinity of the project;

    g) estimated size of area of direct and indirect disturbance to wildlife within each Indigenous group's traditional territory and in the vicinity of the project, and description of methodology for gathering such information;

h) identification of all other tenure holders within the vicinity of the project, including exploratory leases or tenures, and the size of area held by other tenure holders within the vicinity of the project;

2) a description of the pre-disturbance baseline from which to assess the project's cumulative impacts, in order to fully understand the potential adverse impacts of existing and planned development in the project area upon section 35 rights, including changes in the patterns of resource use and the exercise of rights by the Indigenous groups and the reasons for such changes;

3) all relevant and previous baseline information and studies, submissions, reports and applications related to the project;

4) quality baseline data, benchmarks and modeling that identifies the pre-development situation with respect to vegetation, fish and wildlife populations and habitat, access and pre-development uses, and the exercise of Aboriginal and Treaty rights; and

5) the assessment of the current situation of vegetation, fish and wildlife populations and habitat, access, permanent structures and the exercise of Aboriginal and Treaty rights.

A related methodology concern of assessing cumulative effects under the CEAA 2012 regime is the practice of only assessing cumulative effects with other anticipated projects for the valued components for which a significance effect has been determined. This should be prohibited by the legislation, as it misses many cumulative effects that will occur when multiple minor effects can combine to have serious implications for ecological and socio-economic well being.

11. Sustainability Framework

Assessments under CEAA 2012 are generally oriented towards ecological components. The incorporation of human well-being and regional sustainability as a requirement of project approval is a fundamental and necessary change to the legislation. The framework for project assessment must go beyond an impoverished and short sighted "mitigation of significant adverse effects" to incorporate a more positive and comprehensive objective of "contribution to sustainability". This approach mandates comparative evaluations of the best options for development for making positive contributions to lasting human wellbeing. An example of this overarching concept is the Ontario *Environmental Assessment Act*, which contemplates 'the betterment of the people of Ontario' as its purpose. The revision of CEAA 2012 provides the federal government with an opportunity to meaningfully integrate such a purpose into the federal assessment process.

Non-renewable resource developments, such as mining developments, provide time-limited benefits and leave a legacy of long term adverse effects. An appropriate environmental and

human impact assessment must consider what contributions the proposed project will make to a more sustainable future, including the protection of water and other lasting renewable resources. Accordingly, the legislation should require a proponent of a project to demonstrate how the project can contribute to the longer term economic diversification of a region, create multiple, lasting livelihood options and other positive legacies such as multi-purpose infrastructure development and programs for community health and capacity building.

Amendments to CEAA 2012 should incorporate a dual focus, or two-stage purpose statement prescribing the positive contribution to sustainability (with general and site-specific factors to be identified), along with the mitigation of adverse effects. Such an approach would enable decision-making in a paradigm that is far less conflict-ridden than the current scheme which pits economics against the environment, and far too often against Indigenous peoples. A sustainability assessment framework would significantly increase the likelihood of Indigenous groups supporting and collaborating with development and in turn uphold the core principles of the United Nations Declaration on the Rights of Indigenous Peoples.

12. Require consideration of Indigenous Knowledge

Indigenous knowledge (also known as "Traditional Knowledge (TK)" or "Aboriginal Traditional Knowledge (ATK)"), Indigenous perspectives and Indigenous laws are not adequately incorporated into the current Environmental Assessment process. "Indigenous knowledge" includes ecological knowledge, social rules, spirituality and Indigenous philosophy. "Indigenous perspectives" include the views, opinions, perceptions and interpretations of circumstances or events shaped by the world view of an Indigenous people. "Indigenous laws" means the laws of an Indigenous community, including traditional teachings, protocols, rules of conduct and laws of more recent origin.

The lack of respect for Indigenous knowledge, perspectives and laws which is often shown in the EA process undermines the ability of Indigenous peoples to fully participate and is inconsistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples and the concept of reconciliation. In panel reviews, elders and other knowledge holders are commonly subject to irrelevant cross-examination. It is neither appropriate nor relevant, for example, for elders or Indigenous knowledge holders to be subject to cross-examination focusing on their lack of "formal" (non-Indigenous academic, scientific or technical) education or training. Formal education in non-Indigenous institutions is not the source of the value, legitimacy or reliability of Indigenous knowledge, rather it is based in culture, experience and oral tradition. To encourage more respectful engagement with Indigenous knowledge, perspectives and laws the "Purposes" of CEAA, 2012 should be amended to include:

> 4(1)(j) to respectfully engage with and consider Aboriginal knowledge, Aboriginal perspectives and the laws of Aboriginal people in environmental assessments;

This purpose should inform and be reflected in Agency and Panel procedures at all stages of the process.

First, the Act currently states that environmental assessment "*may* take into account community knowledge and Aboriginal traditional knowledge" (emphasis added).[10] This should be made mandatory and the Act should be amended to instead read:

> …must take into account community knowledge and Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people, where this information is provided to the review panel or responsible authority.[11]

Indigenous knowledge and Indigenous perspectives must inform every stage of environmental assessment. It is important that Indigenous peoples' views are incorporated in the early stages of review, such as the Terms of Reference in a Panel EA or the EIS Guidelines and EIS in an Agency EA. If Indigenous perspectives are not incorporated at this stage, the assessment can be framed in a way that devalues Indigenous knowledge. Terms of Reference and EIS Guidelines should explicitly require that the Indigenous perspective inform the development of Valued Components, rather than being left up to the discretion of the proponent.

This is important if impacts to Aboriginal and treaty rights are to be properly characterized and assessed. For example, in considering the impact to a hunting right, the Indigenous perspective requires consideration of much more than the number of animals available to hunt, such as:

- what conditions are required for the exercise of rights;
- what cultural connections does the Indigenous people have to the area and resources in that area;
- what is the timing of harvest;
- what is the availability of the resource;
- what is the quality of the resource;
- is there potential for avoidance reactions (e.g. might the exercise of the right be impacted by safety concerns or concerns over contamination of wildlife);
- what cultural transmission activities occur in the area;
- what is the habitat availability and quality in other accessible areas; and
- where and when do members of the Indigenous community prefer to exercise their rights.

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[10] Section 19(3).

[11] We have used the word "Aboriginal" rather than "Indigenous" in our suggested changes to the Act because of its recognized meaning in Canadian law and use in section 35 of the *Constitution Act, 1982.*

The development of Valued Components and the assessment of impacts should also consider whether the Project may directly or indirectly violate or disrupt any Indigenous laws. For example, there may be a law that harvest of a particular resource should occur only at certain sites which the Project will render unusable, forcing community members to hunt elsewhere in violation of their own Indigenous laws.

Second, more flexibility should be accorded in agency environmental assessments and panel reviews to accommodate culturally appropriate ways to receive and consider Indigenous knowledge. In addition to changes to the panel process such as restrictions on irrelevant cross-examination, this might also include mechanisms to protect Indigenous knowledge information that is considered confidential by the community from release to the public.

Third, for panel reviews where infringement on Aboriginal and treaty rights by the project is reasonably likely, the panel should include Indigenous member(s). Section 42(1) of CEAA, 2012 should be amended to include the language underlined below:

> 42(1) Subject to subsection ~~(2)~~ (3), if the environmental assessment of a designated project is referred to a review panel, the Minister must establish the panel's terms of reference and appoint as a member one or more persons who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects.
>
> <u>(2) Where the project has the potential, prior to consideration of any effect of mitigation measures, to have adverse impacts on Aboriginal or treaty rights, at least one of the panel members appointed under subsection 1 must be an Aboriginal person or have knowledge or experience relevant to the consideration of Aboriginal knowledge, perspectives and laws.</u>

Finally, EA Reports should include an explanation of how Indigenous knowledge, Indigenous perspectives and Indigenous laws were considered and incorporated into the Environmental Assessment. In this regard, the *Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the* Canadian Environmental Assessment Act, 2012[12] provides good guidance that is not consistently put into practice. It recognizes that western and traditional knowledge will often provide complementary insights in the EA, however, where they cannot be reconciled, the EA should demonstrate how each type of knowledge was considered in the EA. To ensure consistency, this should be a legislated requirement for EA Reports. This could be done by revising sections 22 and 43 of the Act as follows:

[12]Canada, Minister of Environment. Ottawa: Public Works and Government Services Canada, 2014, p. 6

Responsible authority's obligations

22 The responsible authority with respect to a designated project must ensure that

(a) an environmental assessment of the designated project is conducted; ~~and~~

(b) a report is prepared with respect to that environmental assessment; and

(c) the report demonstrates how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

Review panel's duties

43 (1) A review panel must, in accordance with its terms of reference,

(d) prepare a report with respect to the environmental assessment that sets out

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, ~~and~~

(ii) a summary of any comments received from the public, including interested parties, and

(iii) how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

13. Impact Benefit Agreements and other Agreements between proponents and First Nations

Crown consultation coordinators have been known to request information about capacity funding arrangements between proponents and First Nations that allow Nations to undertake studies and review EA materials. When this has occurred, funding to support First Nation participation in an EA is then characterized as a mitigation and accommodation measure. This is a reprehensible practice. We request that the Panel make a clear statement that funding provided to First Nations that assists their participation in an EA should never be considered a project mitigation measure.

In some First Nation presentations to the Panel, the Panel has asked whether the EA process should take into account Impact Benefit Agreements and whether these agreements should be reviewed in the EA process. This is a complex question. When we have encountered this question in previous EAs, it has come from federal representatives who query whether they or the EA process should bother to undertake impact assessments relating to First Nation concerns because, in the words of representatives from CEAA, First Nations will just enter into an IBA anyway.

Our agreements with industry are the result of difficult choices. We are well aware that projects undergoing federal EAs are almost universally approved, typically with little if any regard for First Nations' concerns. Our Nation has little confidence that the terms of approval for projects will rigorously address the issues that matter most to us or result in significant protections for Aboriginal and Treaty Rights: from this perspective, agreements are less about mitigating impacts and more about not being left behind when our rights are trampled. Even where we do enter into agreements with industry, they do not address all of the concerns we raise in the EA process and we continue to rely on federal environmental assessments and permitting requirements for the protection of our section 35(1) rights.

The Panel must strongly discourage the practice of delaying or avoiding assessments where IBAs may occur because it undermines the EA process and, in fact, it pushes First Nations into agreements with Proponents because it makes First Nations feel that the EA process will not take their concerns seriously. Whether a First Nation may enter into an agreement is irrelevant to the EA process. We also request that the Panel not make recommendations about disclosure of IBAs and leave that to the discretion of the First Nations and proponents negotiating agreements.

14. Require transparent decision making

CEAA, 2012 removed the responsibility for determining whether a project would have significant adverse effects from responsible departments and granted those powers to the Minister of the Environment. This change provided the Minister or the federal Cabinet with inappropriate amount of decision making discretion. One aspect of this discretion is the power of Cabinet to authorize developments that are likely to cause significant adverse effects if, in the judgment of Cabinet, such "effects are justified in the circumstances" (s.52(2)).

Allocating discretion to justify significant adverse effects solely to Cabinet undermines confidence in the environmental assessment process as Cabinet deliberations are protected by privilege and Cabinet is not required to demonstrate how it has determined that such effects are justified. In practice, Cabinet has exercised this discretion to justify without providing reasons; instead baldly asserting that significant environmental effects are justified in the circumstances. Attempts to require Cabinet to disclose reasons justifying such environmental effects have been rejected.[13]

In the context of environmental assessments which indicate that proposed developments may have significant adverse environmental effects on First Nation's, this is particularly troubling as significant effects that limit the exercise of aboriginal or treaty rights may be authorized without the Crown demonstrating either that it understands the nature of those aboriginal or treaty rights or that there are circumstances which justify the potential infringement of those rights.

[13] Adam v Canada (Environment), [2014] FC 1185 at paras 79-81

Our view is that decision making under CEAA, 2012 should be made transparent and that decision makers be required to identify the matters that have been considered in determining that any significant adverse effects are justified. Without such requirement, confidence in a revived environmental assessment process may be undermined by decisions that purport to justify environmental effects without actually indicating why such environmental effects are justified.

Our request is that CEAA, 2012 be amended to clarify the discretion to justify adverse environmental effects by requiring the Minister or Cabinet to demonstrate with evidence based criteria upon which adverse effects will be justified and provide transparent written reasons justifying significant environmental effects.

15. EA Follow-Up and Enforcement

There are two aspects of post-EA follow-up that are not working: verification of proponent predictions in the EA process and government responses.

Verification of EA predictions: The EA system is based on predictions and, absent a robust system to verify the accuracy of the predictions over time, it will continue to incentivize the underestimation of project effects during the assessment process.

To address this problem, the Act should be revised in three ways: (1) explicitly require that a proponent whose project is approved under the Act must report on all assessed valued components within a period prescribed in a condition or in the Act; (2) require that this information be posted publicly and (3) establish new offences under the Act relating to failures to report and others pertaining to failing to meet predictions.

Recommendations to governments: Often environmental assessments result in recommendations that governments to take a variety of actions, such as undertake cumulative effects studies, develop new environmental benchmarks, develop land use frameworks and develop new monitoring plans. Unfortunately, while the Crown points to these recommendations to rationalize project approvals, they routinely go un-implemented, to the detriment of future environmental assessments.

To address this problem, the Act should, similar to the *Species at Risk Act*, set timelines in which the government must develop an action plan for implementing EA recommendations that are made to the federal government.