

Submission to the Impact Assessment Agency of Canada from the Environmental Planning and Assessment Caucus of the Canadian Environmental Network Regarding the Draft Policy Framework for Regional Assessment under the *Impact Assessment Act*

February 28, 2023

The Environmental Planning and Assessment Caucus (“the Caucus”) of the Réseau Canadian Environmental Network submits these recommendations on the draft Policy Framework for Regional Assessment (the “draft policy”) under the *Impact Assessment Act* (the “IAA” or the “Act”).¹ The Caucus is a network of over 100 national, provincial, regional and local conservation, environmental and community groups, academics and impact assessment (IA) experts from across Canada. As a caucus and as individuals, its members have a long history of work on, and involvement with, IA in Canada – many dating back to the first federal guidelines order that introduced environmental assessment into the federal regulatory framework.

The Caucus’ purpose is to present a strong public interest analysis of all facets of environmental planning and assessment. Therefore, we provide these recommendations on the draft policy to identify key areas of concern that need to be addressed before the Agency moves forward its policy. This submission is not meant to be an exhaustive analysis of the draft policy. Instead, it presents an overview of key areas of concern with accompanying recommendations and rationale for changes. Our recommendations are organized by the topic area in which they are found in the draft policy.

The Caucus also supports the letter submitted to the Minister of Environment and Climate Change and President of the Impact Assessment Agency of Canada (IAAC) on February 24, 2023 by a number of IA experts, which included a recommendation that the draft policy undergo a full revision in light of a lack of meaningful attention to cumulative effects and sustainability.²

¹ IAAC, “[DRAFT - Policy Framework for Regional Assessment under the Impact Assessment Act](#),” 12 Dec 2022 [Draft Policy]

² See: Letter to Ministers Guilbeault and Wilkinson, IAAC President Hubbard, “[Re: Withdraw and Reconsider the Draft Policy Framework for Regional Assessments](#)” (24 Feb 2023)

1. Objectives and outcomes of regional assessment

Overview

The Caucus is of the view that the successful conduct of RAs is integral to the objectives and function of the *Impact Assessment Act*.³ Done properly, RAs can lead to better understandings of project impacts, reduce conflict amongst stakeholders and rightsholders, and ensure more efficient project-level assessments processes. However, done poorly, RAs jeopardize the ability of project-specific impact assessments to work effectively to address project impacts in a sustainable and contextualized way. Specifically, if the policy does not mandate cumulative effects assessment as part of RAs, there is a significant risk that RAs will fail to uphold core purposes of the Act, including protecting the environment and fostering sustainability.

Recommendation 1: Make cumulative effect assessments mandatory for regional assessments

One of the purposes of the *IAA* is to encourage “the assessment of the cumulative effects of physical activities in a region”.⁴ Because this objective is not specifically referenced in the Act’s provisions on RAs, it merits particular emphasis in the RA policy framework to ensure that cumulative effects assessment is a central aspect of all RAs and that they are addressed in a manner consistent with the Act’s purposes, its mandated obligations and the principles set out in section 6.

The draft policy currently dictates a discretionary approach to regional assessments that risks overlooking cumulative effects. For example, it only states that an RA “may” include “measures to address cumulative effects”.⁵ In our opinion, cumulative effects assessment should be at the core of regional assessment, and thus at the core of the policy. Its inclusion should not be limited to passing references.

The term “cumulative effects” is not defined in the *IAA*, and the process for conducting a cumulative effects assessment is not set out in any way. Therefore, the policy framework is an opportunity to set out the parameters and expectations for cumulative effects assessment in all regional assessments, including the fundamental expectations that they:

³ *Impact Assessment Act*, SC 2019, c 28, [IAA]

⁴ *IAA*, s.6(1)(m)

⁵ Draft Policy, s 4, para 3

- assess synergetic, compensatory, and additive effects, across spatial and temporal boundaries (e.g., at the ecosystem and watershed level), of all relevant past, present, and reasonably foreseeable future anthropogenic activities and natural processes;
- determine their implications for project assessments; and,
- recommend steps to manage cumulative effects through decision making on project level impact assessments and other measures.

The value of cumulative effects assessment during an RA stems from the fact that project-specific assessments analyze impacts on a smaller scale and with a more limited mandate. As assessment experts have long-recognized, going beyond the project level and considering cumulative effects at the regional level provides a superior scope for assessing the environmental and sustainability-related impacts of projects.⁶

A regional assessment must inform and improve future project level assessments by establishing a framework to identify, evaluate and address cumulative impacts, with attention to the way that individual project impact assessments can address cumulative effects. If regional assessments fail to provide this foundational cumulative effects assessment framework, they will not provide necessary and relevant insights to help shape and guide project level impact assessments or monitoring of the effects of projects and other activities on a region's environmental, health, social and economic values and Indigenous rights and interests, as required by the Act.

The Caucus recommends revising the draft policy framework to locate cumulative effects assessment at the centre of regional assessment, its conception and application. This can be done by requiring that every regional assessment undertake a cumulative effects assessment that identifies and assesses regional cumulative effects, along with other relevant factors.

Lessons Learned: Newfoundland and Labrador Regional Assessment of Offshore Exploratory Oil and Gas Drilling

Although best practices for regional assessment and cumulative effects assessment are still being refined, the experience of the Newfoundland and Labrador Regional Assessment of Offshore Exploratory Oil and Gas Drilling ("NFLD RA") may prove informative. In its final report, the Committee appointed to conduct the NFLD RA noted that it faced "key challenges" when attempting to comprehensively evaluate cumulative effects, including the "uncertainty around the nature, intensity and spatial and temporal distribution of future activities and their effects".

⁶ See, for example, Peter N., Duinker and Lorne A. Greig, "The impotence of cumulative effects assessment in Canada: Ailments and ideas for redeployment," *Environmental Management* 37:2 (2006), pp. 153-161.

The Committee recommended that “a more proactive and holistic approach through associated policy and planning decisions by the federal and provincial governments” be adopted.⁷ It concluded that a planning approach, rather than predictive modeling, was the best avenue to address cumulative effects, and it deferred to future land tenure processes as the “optimal point” at which cumulative effects would be addressed.⁸

We recognize that cumulative effects assessment is challenging, but it is necessary nevertheless, and committees tasked with carrying out regional assessments must be equipped with the expertise, resources, and time required to conduct such cumulative effects assessments.⁹ We believe the NFLD RA Committee ultimately failed to conduct a cumulative effects assessment because it had not been equipped to do so.

The NFLD RA Committee’s treatment of cumulative effects assessment fell below expectations for several key reasons: process issues and a short timeline hampered the comprehensiveness of the assessment; many relevant effects and environmental conditions were not considered, and none were assessed; and, no framework to address or assess cumulative effects through a land-tenure system was produced.¹⁰ Exacerbating these shortcomings was the subsequent failure to establish or conduct a cumulative effects assessment through the NFLD RA Follow-up Program.

Shortcomings within the NFLD RA highlight the need for mandatory attention to cumulative effects and for a basic framework that provides clear guidance to the agency or committees about how to assess past, current and reasonably anticipated cumulative effects, determine their implications for decision making in project impact assessments and other government decision-making processes, and prepare recommendations on how anticipated cumulative effects may best be managed.

Recommendation 2: Provide stronger guidance on outcomes of regional assessment

The policy framework should be aligned with the sustainability-based scope and purposes of the Act’s requirements for the impact assessment of designated projects. This is necessary to

⁷ Garth Bangay, Wes Foote, Gerald Anderson, Maureen Rustad & Keith Storey, *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador: Final Report* (February 2020) at page 121 [“NFLD RA Final Report”].

Ibid at page 150.

⁸ *Ibid* at page x.

⁹ We would note, however, that cumulative effects assessments are notoriously more difficult to do at the project level. See for example Duinker and Greig (full citation at footnote 3) at pages 156 -158.

¹⁰ NFLD RA Final Report (full citation at footnote 5) at pages 121-156.

ensure that regional assessment findings and recommendations are appropriate for informing and guiding project assessments. It is also important for regional assessment consistency and predictability; for facilitating realistic attention to the interactions among environmental, social, economic and health considerations; and for protecting the interests of future generations.

As with making cumulative effects assessment central and mandatory in regional assessments, providing clearer guidance on expectations for regional assessments should not restrict flexibility in the design and application of regional assessments consistent with the purposes of the Act and the long-recognized roles for regional assessment. The policy framework approach recommended here would continue to allow flexibility to place non-exclusive cumulative assessment emphasis on aspects of particular concern or opportunity.

Recommendation 3: Contributions to sustainability must be a required objective for regional assessments

The policy must incorporate core requirements for sustainability-based decision making, recognizing that ecological, social and economic objectives are interdependent and not accommodated through trade-offs, a balancing of considerations, or compromise. This means a core purpose of the policy must be centred on a commitment to sustainability-based objectives for regional assessments that ensures that the range of interactions among effects are explicitly considered.

Sustainability-based RA's must not simply 'inform or influence' future project-level assessments or be used to identify standard mitigation measures. Instead, they must identify and compare future development scenarios for the region, and identify ways to enhance the prospects for positive contributions to sustainability.

Recommendation 4: Remove the restriction limiting regional assessments to existing information

The draft policy appears to preclude gathering new information in any regional assessment. It states, "[r]egional assessments can be used to gather existing and available scientific, technical, cultural and Indigenous information and knowledge" (emphasis added).¹¹

While the gathering of existing and available information will be useful and necessary, the policy should require knowledge gaps to be identified and addressed. This is especially

¹¹ Draft Policy, s 4 para 2

important where existing information and knowledge is insufficient to delineate relevant cumulative effects or inform guidance on how best to respond. Given the general weakness of cumulative effects understanding in much of Canada, the exclusion of new information gathering and identification of knowledge gaps would virtually eliminate prospects for credible regional assessment.

Regional Assessment Process – Meaningful Public Participation & Engagement

Overview

Caucus members have repeatedly raised concerns about the inadequacy of efforts to ensure effective public engagement under the Act and the need to facilitate real engagement, not simply information sharing. In our collective years of experience and participation in Agency-hosted open houses, for instance, the established approach has aimed for information sharing rather than meaningful public engagement and Indigenous involvement. To be meaningful, members of the public and other stakeholders must have an ability to contribute in ways that have consequences on the processes and their outcomes.

As we discuss below, opportunities for public participation should be varied and abundant, and the processes should be driven by the needs of participants. The lack of clarity on the criteria for and approaches to conducting a regional assessment, and shortcomings in the participation process, must be addressed to ensure that the assessment process considers all relevant considerations. Without solid and clear criteria for determining what meaningful public participation should look like in regional assessments and an equitable participation scheme, the RA process falls short of upholding the public participation purpose of the Act.¹²

Recommendation 5. A clear definition of meaningful public participation must be set out

As the Caucus has previously recommended,¹³ a clear definition of meaningful public participation ought to be set out in any policy and guidance material. We endorse the following definition for working purposes and recommend its inclusion in the policy:

Meaningful public participation establishes the needs, values, and concerns of the public, provides a genuine opportunity to influence decisions, and uses multiple and

¹² IAA, s 6(1)(h)

¹³ See for instance: [Submission](#) to the Canadian Environmental Assessment Agency from the Environmental Planning and Assessment Caucus of the Canadian Environmental Network Regarding Key Regulation and Guidance Requirements under the proposed *Impact Assessment Act* (30 April 2019), p 8.

customized methods of engagement that promote and sustain fair and open two-way dialogue.

If the public is going to be meaningfully engaged in RA, opportunities for participation ought to be encouraged throughout. This means the policy ought to require:

- Timely and effective provision of participant funding
- Meaningful opportunities for the public to review and provide comment on drafts of terms of reference and RA reports
- Opportunities for Indigenous nations to co-lead or jointly conduct RAs
- Specification and application of principles for design and implementation of means to facilitate meaningful public participation
- Public reporting on how the substance of public submissions was considered and incorporated
- Public response by the Minister to all regional assessment reports
- Timely updating of the IAAC Registry, in near / real time to ensure the transparent sharing of information among all interested individuals

Recommendation 6: Create flexible timeframes for participating in regional assessments

The participation process should also be improved by introducing flexible timelines for engagement and comment. Currently, the draft policy mentions timelines are “determined on a case-by-case basis,” noting an RA’s terms of reference may also set out the timeframe within which the assessment must be completed.¹⁴

The Caucus recommends that for activities which fall outside legislated timelines, the policy require a flexible approach, allowing the Agency and regional assessment committees to ensure that those most affected and interested can meaningfully engage. While providing funding to public participants, including Indigenous groups is a mechanism to facilitate participation, lacking adequate time to review, comment and participate, can undermine opportunities for public input, and frustrate the Act’s purpose of ensuring Indigenous knowledge and community knowledge are accounted for in the assessment process.¹⁵

¹⁴ Draft Policy, s 5, item 5

¹⁵ IAA, s 6(1)(j)

Lessons Learned: Regional Assessment in the Ring of Fire Area

Based on lessons learned, early planning must occur to ensure any decision regarding timelines is done in full consultation with affected communities, including Indigenous communities and authorities, their customs and inherent laws. The Regional Assessment in the Ring of Fire Area (“Ring of Fire RA”), which imposed inflexible timelines and was non-responsive to communities’ concerns about their constrained ability to participate,¹⁶ illustrates the critical need for early planning discussions to be undertaken in tandem with affected communities.

Following nearly a year of silence from the Agency regarding the terms of reference development, without notice a 60-day public comment window for the draft Terms of Reference for the Ring of Fire RA commenced. As many commenters including Indigenous organizations and First Nations called out,¹⁷ the 60-day deadline was both unrealistic and unfair, as it not only spanned holiday closures, but the new Omicron variant which renewed lockdowns in First Nation communities, preventing discussion or engagement among community members and leadership.

Requests by First Nations and Indigenous organizations to suspend the consultation and restart when circumstances allowed for meaningful participation were dismissed by the Agency, which stated, “the current engagement and comment period of 60 days was planned with consideration of the holiday period, and the challenges associated with the on-going Covid-19 pandemic.”¹⁸ While the Minister of Environment and Climate Change is yet to determine next steps for Ring of Fire RA, the process to date should not be used as a precedent for early engagement and Indigenous participation for RAs pursuant to the IAA.

Recommendation 7. Allow for early engagement in the planning stage by stakeholders and Indigenous groups in the RA process

To encourage public participation and enable more meaningful engagement, the policy ought to establish early engagement as the standard expectation, rather than being discretionary and determined on a case-by-case basis. If there are circumstances when early engagement may not be appropriate, the policy framework should set out criteria for permitting exceptions to the standard practice.

¹⁶ IAAC, [“Regional Assessment in the Ring of Fire Area”](#)

¹⁷ Letter from the Friends of the Attawapiskat River, [“Request to Extend Deadline](#) for Comments on the draft Agreement for the Ring of Fire Regional Assessment due to Omicron Variant” (21 Dec 2021), Appendix 3;

¹⁸ Correspondence, Email from Dave Bell to Kerrie Blaise, “RE: Time sensitive - Request to extend Ring of Fire RA deadline” (5 Jan 2022)

The early planning process is an important opportunity for the public and affected communities to help set the stage for the RA and set out their preferred ways of how participation ought to unfold during the process. It is not effective or in keeping with meaningful participation to solicit comment on proposals that are already so far along in the process that the public cannot influence decisions about an RA's goals and objectives, scope, purpose and methodology.

Participation in early planning enables the public and communities to influence the design of RAs and provides an opportunity to provide input prior to a draft agreement being made. The Caucus does not see the addition of early engagement as at odds with efficiency – among the stated objectives for RA set out in the draft policy¹⁹ – as an RA process which is developed in cooperation with the public and affected communities, and not limited to proponents or other Crown jurisdictions, will lead to more publicly accepted visions of regional futures.

Key Elements and Guiding Principles – Cooperation

Overview

The IAA introduced important changes to federal IA law respecting Indigenous rights protection, including new commitments to recognize the rights of Indigenous peoples and provide effective means for including Indigenous knowledge in decision making.

Recommendation 8. The policy ought to promote reconciliation, including the upholding of principles in the *United Nations Declaration on the Rights of Indigenous Peoples*

Currently the draft policy sets out that RAs provide for “opportunities for cooperation with other jurisdictions (including Indigenous jurisdictions).”²⁰ It further reads that RAs offer “opportunities to engage, collaborate or establish partnerships with First Nations, Inuit and Métis peoples” and the Agency is committed to “participation by” Indigenous communities.²¹ It is unclear whether collaboration or participation may enable co-led or Indigenous-led RAs.

To ensure respect with Indigenous law and authorities, the Caucus submits Indigenous nations must be among the jurisdictions that may lead or co-develop an RA process. The policy ought to expressly recognize and respect the inherent authority and jurisdiction of Indigenous peoples;

¹⁹ Draft Policy, s 4, para 1

²⁰ Draft Policy, s 6, para 2

²¹ Draft Policy, s 6, paras 3-6

this would enable compliance with the *United Nations Declaration on the Rights of Indigenous Peoples*, including Article 32(2) which requires Canada to obtain free, prior and informed consent for any project affecting Indigenous lands and resources, and Article 26(2) which provides that Indigenous peoples have the right to own, use and control their lands and territories.²²

²² United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.