The Mining Association of Canada | L'association minière du Canada

SUBMISSION OF THE MINING ASSOCIATION OF CANADA

MAC Submission to the Expert Panel Review of Environmental Assessment Processes

THE MINING ASSOCIATION OF CANADA November 8, 2016

Executive Summary

The Mining Association of Canada (MAC) appreciates the opportunity to share with the Expert Panel its experience and views on federal environmental assessment (EA) processes. The mining sector has the most extensive and continuous experience with the *Canadian Environmental Assessment Act* (CEAA 2012).

The outcome of your review and how the government implements your recommendations will be essential to determining whether our industry will continue to generate value for Canadians or slowly erode, because nearly all of our activities are impacted by CEAA 2012. For our industry to thrive in Canada, the process for reaching a decision on whether a mine can be built, and under what conditions, needs to be arrived at through a timely, coordinated and seamless process that continues to be grounded in meaningful consultation. However, the current situation is one of fragmented, overlapping and uncoordinated processes, which continues to worsen.

In short, CEAA 2012, as currently structured and implemented, does not serve the federal government's sustainable development and Indigenous reconciliation goals and is a risk to attracting new investment. This review is a critical opportunity to advance solutions to address the challenges posed by CEAA 2012, as well as to identify areas of improvement, including on ways to:

- Enhance the participation of Indigenous Peoples in the decision-making process, which includes funding for participation and capacity building for impacted communities.
- Strengthen public confidence in the robustness of Canada's regulatory review processes.
- Preserve Canada's reputation as an attractive jurisdiction for mining investment.

Outlined below is a summary of our experiences with the current regulatory review process as well as a summary of our key recommendations for your consideration.

CONTEXT AND SUMMARY OF RECOMMENDATIONS

Addressing CEAA 2012's Scope and Lack of Rationale

CEAA 2012 currently requires assessment for private sector projects that are federally regulated or cross boundaries, or that are of a magnitude to be considered of national interest. CEAA 2012 also requires assessment of nearly all mining projects, even though mining on provincial lands is constitutionally the responsibility of provinces, mines generally do not cross boundaries and, at the thresholds in the *Regulations Designating Physical Activities*, are not of a magnitude to be considered of national interest.

CEAA 2012's application to mining projects results in duplication with provincial processes and federal intrusion into provincial jurisdiction. Meanwhile, there is no articulation of the rationale for such duplication at the same time as gaps remain unaddressed in assessing what is primarily federal jurisdiction. This results in inefficient and costly impacts to project economics. In Canada's multi-jurisdictional reality, the relationship between provincial and federal jurisdictions, and respect for Indigenous rights, are important aspects that must be core considerations in your review.

Further, the absence of an articulated rationale for the current *Regulations Designating Physical Activities* has resulted in a disproportionate application of the Act on the provincially-regulated mining industry. The application of CEAA to mining projects has remained comprehensive under CEAA 2012, as has the breadth, depth and rigour of what is assessed. Meanwhile, the fact that thousands of federal government and other projects are no longer subject to CEAA may be contributing to a perception of reduced oversight.

- **Recommendation:** Within this context, we urge the Panel to examine the purposes of CEAA to ensure that they provide clarity on the intent of the Act to the public, Indigenous Peoples and project proponents; guide the implementation of the Act; and contribute to the achievement of sustainable environmental, economic and social outcomes for Canadians, Indigenous Peoples and proponents. Currently, CEAA 2012's expressed purpose is to assess designated projects, but provides no rationale for how projects are designated.

- **Recommendation:** We recommend that the Panel propose a clear rationale for the application of federal environmental assessment processes. There are various approaches that the Panel could examine, such as to assess projects or activities that are regulated by the federal government, to inform federal decisions (as was the case with predecessor Acts), to assess and manage impacts on federal jurisdiction or to assess projects and activities that impact Indigenous rights.

Enhancing Federal-Provincial Coordination

Timeliness of decisions is a key factor in the attractiveness of a jurisdiction's investment climate and in a company's decision whether to pursue a particular project. However, timeliness is the total of all decision processes that a project must undergo. As such, coordination and integration of these processes is as important as how long any one process, such as CEAA, takes.

Unfortunately, it is our experience that coordination between federal and provincial processes is not improving. There also does not appear to be any progress on coordinating federal environmental assessments with other federal processes that apply to most mines, such as *Fisheries Act* authorizations. This has resulted in delays, confusion and fragmented consultations, imposing burdens on the mining project proponent, Indigenous communities and the public, without any value added towards sustainable development, environmental protection or reconciliation.

- **Recommendation:** We recommend that priority be given to continuously enhancing coordination, substitution and equivalency provisions as well as ensuring there is adequate capacity, resources and skills to manage the interplay between federal and provincial processes and associated federal regulation such as the *Fisheries Act*.

Enhancing the Act's Compliance Mechanisms

Mining and other natural resource activities on provincial lands are constitutionally the responsibility of provinces. CEAA 2012's decision statement conditions can create an untenable situation as inevitably the conditions decided early in a project-planning process will conflict with requirements imposed by the province over the life of the mine in response to evolving science, technology and public expectations. All provinces with a mining industry have in place comprehensive regulatory regimes that address the full life cycle of a mine, including construction, operation and reclamation, as does the

Canadian Nuclear Safety Commission for uranium mines. In contrast, the Canadian Environmental Assessment Agency lacks the legal means, the regulatory framework and the expertise to assess and adjust its conditions through the life of a mine or to reconcile its requirements with those of the province.

- **Recommendation:** We recommend that that the Panel examine the compliance problems inherent with CEAA 2012's approach to decision statements and conditions and seek resolution. Which solutions are the most appropriate will depend on what other changes to the Act the Panel recommends.

Addressing Cumulative Effects

While CEAA 2012 does not apply to the majority of the activities in Canada that impact the environment, the assessment of a mining project includes assessment of cumulative effects of other activities. However, CEAA 2012 is only able to decide whether that mining project can proceed, even where the contribution to adverse effects of the mining project is very small compared to the cumulative effects of other activities not subject to CEAA. CEAA 2012 thus imposes a disproportionate burden on the mining sector without addressing the cumulative effects it has assessed.

- **Recommendation:** We recommend that, if the issue of the disproportionate application of CEAA 2012 to mining cannot be resolved through other mechanisms, CEAA retain assessment of cumulative effects, but make the environmental assessment decision based on the significance of a project's contribution to those cumulative effects, rather than on the significance of the cumulative effects of other activities.

Exploring Opportunities for Enhanced Participation of Indigenous Peoples in Decision Making

Relationships with Indigenous Peoples matter to industry as well as to how decisions are made. Therefore, we support the exploration of processes that enhances Indigenous participation in decision making. However, several questions as to how such participation would be structured to apply to the federal context south of 60 would have to be resolved, including regional circumstances, regulatory jurisdictions, level of capacity and Indigenous community preferences.

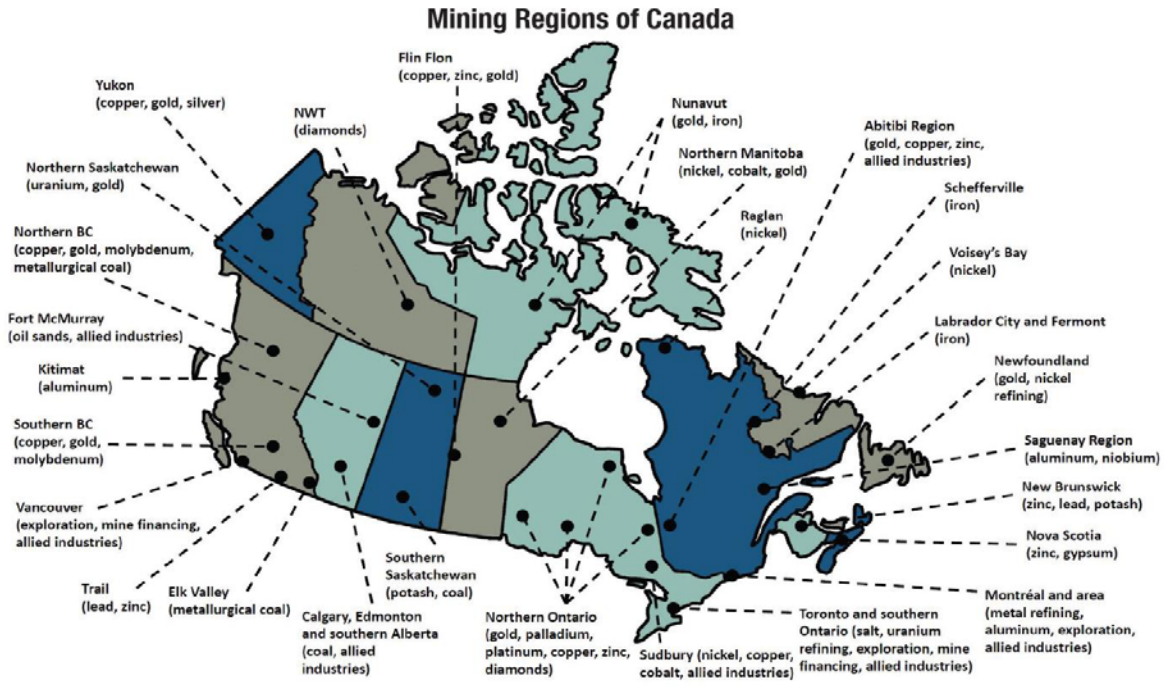
- **Recommendation:** The Expert Panel could explore processes that enhance Indigenous participation in decision making.

Additional detail regarding context and a reiteration of these key priorities are embedded in this submission. As part of the submission, we have followed the Themes outlined by the Expert Panel, and have answered the questions posed based on our sector's extensive experience with environmental assessment. We have not addressed the questions on which our views would be inappropriate or where we lack the relevant expertise. We have endeavoured to suggest possible ways to address the problems we identify, but the topic of federal environmental assessment processes is too big and complex to easily lead to simple solutions.

Introduction

The Mining Association of Canada (MAC) is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Since 1935, MAC has been the national voice of the Canadian mining industry. Our members account for the majority of Canada's production of base and precious metals, uranium, diamonds, metallurgical coal, and mined oil sands.

Canada's mining industry has been a bedrock of the country's economy for decades. Canada produces over 60 minerals and metals from more than 200 mines, providing 375,000 direct jobs and many more indirect jobs. Ours is primarily an export industry, representing some 20% of Canada's total export value. The sector has contributed $71 billion in taxes and royalties to Canadian governments in the past decade. Its contribution to our collective well-being is felt strongly in rural and remote Canada, particularly in Canada's North, where economic opportunities are more limited. However, the Canadian mining "ecosystem" reaches deeply into urban Canada. Toronto is a global centre for mine finance, Vancouver a global hub for mineral exploration, while other cities like Edmonton, Saskatoon and Montreal also boast a significant mining presence. Canada's mining supply and services sector, with over 3,700 companies, is the third largest in the world, serving the global mining industry.



Source: Mining Association of Canada

Other sectors benefit from a healthy mining sector. According to Transport Canada, minerals and metals represent about half of the commodities carried by Canadian rail. In contrast, the grain sector only accounts for one tenth. Mining companies support their local communities through donations and in-kind contributions to health care initiatives, educational institutions, local artists, community sport and recreational activities, and other charitable organizations. Mining projects in a northern or remote

region can provide the stimulus for sustainable infrastructure development, such as the introduction of less carbon intensive energy sources to a region or community.

Towards Sustainable Mining

Canada's mining industry is also renowned for its leading environmental and social practices. MAC's Towards Sustainable Mining (TSM) initiative is unique in the global mining industry, a mandatory program (for Canadian operations) that includes public reporting of independently-assured leading environmental and social indicators.

The goal of TSM is that "*our actions … demonstrate a responsible approach to social, economic and environmental performance that is aligned with the evolving priorities of our communities of interest. Our actions must reflect a broad spectrum of values that we share with our employees and communities of interest, including honesty, transparency and integrity. And they must underscore our ongoing efforts to protect our employees, communities, customers and the natural environment*."

Every member of MAC is obliged to conform to TSM, a set of tools and indicators that drive performance and ensure that key mining risks are managed responsibly at our members' facilities. Members commit to a set of Guiding Principles and report their performance annually in MAC's *TSM Progress Reports* in the following areas:

1. Aboriginal and Community Outreach
2. Energy and GHG Emissions Management
3. Tailings Management
4. Biodiversity Conservation Management
5. Safety and Health
6. Crisis Management

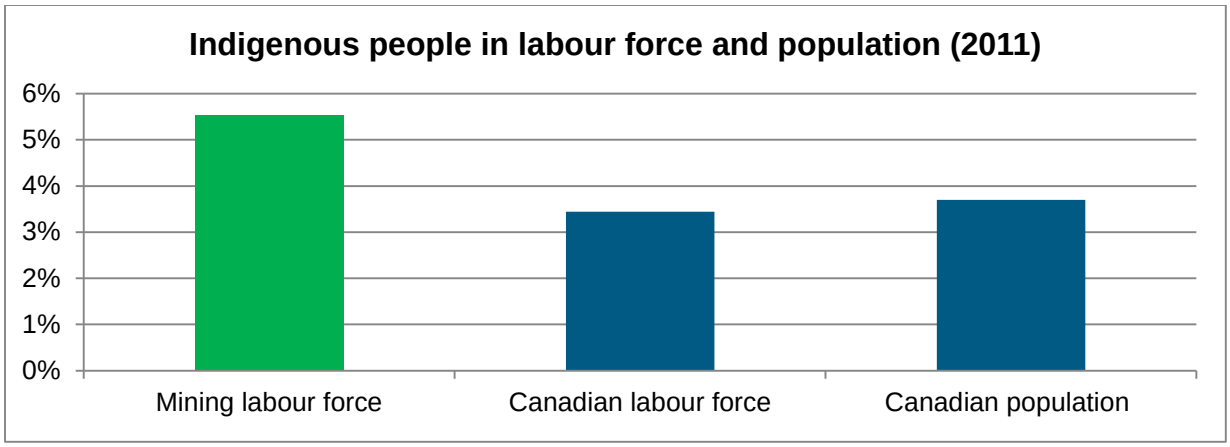
Each facility's results are publicly available, and externally verified every three years. Assessments are conducted at the facility level where the mining activity takes place. This provides local communities with a meaningful view of how a nearby mine is performing. TSM includes ongoing consultation with a national Community of Interest (COI) Advisory Panel. This multi-interest group helps our members and communities of interest foster dialogue, improve the industry's performance and shape the program for continual advancement.

TSM is increasingly recognized around the world. Recently, Finland and Argentina have decided to adopt TSM, while several other countries have expressed a similar interest.

Canada's Mining Sector and Indigenous Peoples

Canada's mining sector has also pioneered relationships with Indigenous Peoples. Through mechanisms such as Impact Benefit Agreements, the sector has for more than two decades worked to involve and share the benefits of mining with Indigenous Canadians. According to Natural Resources Canada, there are currently over 350 Impact Benefit or other agreements active between Indigenous communities and mining companies. Proportionally, the mining industry is the largest private sector employer of Indigenous Peoples, and a major partner of Indigenous businesses. Indigenous participation in the mining sector is also growing at a significant rate. The number of Indigenous Peoples employed in the

mining sector increased by 14 percent between 2007 and 2012. In some cases, such as at Voisey's Bay in Labrador, Indigenous employment exceeds 60 percent, and 90 percent of procurement goes to Indigenous-owned businesses. Through such leading practices, Canada's mining industry is contributing to the Government of Canada's reconciliation goals.



Regulatory Framework for Mining in Canada

Mining and other natural resource activities on provincial lands are constitutionally the responsibility of provinces. Each of Canada's provinces has a distinct approach to how it discharges that responsibility, with a mix of generic and sector-specific legislative requirements, standards, guidelines and site-specific permits, as well as environmental assessment processes for new mines. In addition to requirements for the building and operation of a mine, provinces require mines to develop reclamation plans and provide financial assurance for their implementation.

At the federal level, there are no requirements directed at mining as an activity[1], but there are requirements that apply to particular aspects of activities in the sector. In addition to the requirements of legislation such as the *Explosives Act* or the *Canadian Environmental Protection Act* (for example, reporting to the National Pollutant Release Inventory), of particular relevance to this review are requirements related to the *Canadian Environmental Assessment Act* (CEAA), the *Fisheries Act*, the *Navigation Protection Act* and the *Species at Risk Act* (SARA). The application of the latter three to a particular mine depends on its nature (for example, whether it is a metal mine subject to the *Metal Mining Effluent Regulations*) and location (for example, whether the mine or its infrastructure impacts fisheries, navigable waters or species at risk).

By virtue of the location of most mines, relations with Indigenous Peoples are critically important to our sector. In addition to economic transactions (employees and service provision), a mine may be located on or impact Indigenous traditional territory or rights and, therefore, the evolving situation regarding Indigenous rights and the Crown's obligations also affects a mine's regulatory framework.

[1] Uranium mines are an exception, as would be a mine located on the boundary of two provinces. The federal role in mining in the territories is a separate subject.

Taken together, the regulatory framework for mining in Canada is complex, multi-jurisdictional and changing more quickly than the time it takes for a mining project to move through the assessment and permitting processes. This complexity makes it challenging, and sometimes contentious, to draw definitive conclusions from raw information about aspects such as process timelines.

CEAA 2012, CEAA and the Mining Industry

The ongoing application of CEAA to the mining sector since it came into force in 1995 means that the mining industry is the sector with the most comprehensive and continuous experience with the Act. Nearly all new mines and major expansions are "designated projects" under CEAA 2012. The *Regulations Designating Physical Activities* include almost all types of mining and set thresholds for metal, diamond and coal mines that capture all economical-scale projects. The triggering system under the predecessor Acts had a similar effect in practice, since in most parts of Canada mining projects require at least one federal decision. While there may be a few mining projects that would have triggered the predecessor Act but not CEAA 2012 or vice versa, for the sector as a whole, CEAA 2012 did not change the requirement for most new mines and major expansions to be subject to CEAA, nor the breadth, depth and rigour of what is assessed. However, thousands of federal government and other sector projects, which were subject to the predecessor Act, are not designated projects under CEAA 2012, which may be contributing to a perception of reduced oversight.

It is in this context that MAC submits its views regarding CEAA 2012. The ability of Canada's mining sector to continue to contribute to Canada's long-term economic well-being and the government's goals of reconciliation depends upon its ability to build new mines. For more than two decades, Canada's mining sector has been subject to two levels, federal and provincial, of environmental assessment. For most of this period, coordination of assessments has been challenging, contributing to delays and uncertainty, weakening project economics and harming Canada's attractiveness to new investment. Since the implementation of CEAA 2012, these challenges have increased and, unless addressed and corrected, present a very real risk to the future of Canadian mining.

Panel Questions – A Mining Sector Perspective

Panel Question: What is working well with current federal environmental assessment processes? What is not working well and needs to change with current federal environmental assessment processes?

Mining Industry Experience with CEAA and CEAA 2012

In 2010, CEAA was amended making the Agency responsible for comprehensive studies, and enabling the Agency to initiate assessment if a project was likely to require a federal decision without waiting for confirmation that a federal decision was required. For mining projects, which were nearly all comprehensive studies rather than screening assessments, this amendment dramatically reduced delays in initiating a CEAA assessment and in the assessment process itself. The self-assessment approach required by the Act prior to 2010 was the source of tremendous delays and frustrations. Regulators delayed making a determination that a decision, such as a *Fisheries Act* s35 authorization, was necessary. As well, since most mining projects require more than one decision from more than one federal department, further delays ensued before a lead department was determined. Such delays in some cases could reach 18 months.

Early initiation of CEAA assessments after the 2010 amendments had the additional benefit of allowing the start of the federal assessment to align with the provincial assessment. This, therefore, enabled good coordination of the two processes through harmonization agreements.

In comparison with the benefits of the 2010 amendments for the mining sector, CEAA 2012 provided limited improvements, while at the same time, created new problems.

It is important to note that, given its limited time in force, experience with the full suite of CEAA 2012 provisions is limited. The functioning of most provisions is known, but the full impact of some provisions is still untested. An examination of the CEAA Registry in August 2016 for mining projects showed 34 assessments that began under CEAA 2012 (and 13 assessments still active for which assessments began under the predecessor Act). Of the 34 CEAA 2012 mining project assessments, five have been completed and 29 were still active. Of these 29 active assessments, seven assessments are using substituted process (all in British Columbia). The CEAA 2012 equivalency provisions have not been used for any project. Final decisions for the five CEAA 2012 mining assessments were reached only in 2015-2016. There is, therefore, a limited set of experience with CEAA 2012, and much of that experience preliminary.

Positive Attributes of CEAA 2012

CEAA 2012 has improved the clarity of process. As well, mandated process timelines have encouraged attention to timeliness. However, it is difficult to find evidence that the overall time for CEAA assessments has changed between CEAA 2010 and CEAA 2012.

As noted above, it is not yet known how substitution will affect CEAA 2012 decisions and post-assessment federal decisions.

Challenges post-CEAA 2012

The problems that appear to have been exacerbated by CEAA 2012 are in coordination between federal and provincial processes and within the federal government. We do not know the extent to which the deterioration in coordination reflects the Act itself or rather its implementation or changes in government policy and capacity. The effects of inadequate coordination are unnecessary delays and fragmented consultations.

In addition, further issues are becoming apparent. Since the first mining project Decision Statement with enforceable conditions was published for a mining project in 2015, it has become clear that it is difficult to impose conditions at a single point in time after a planning process for the life of a mine with no legal link or process for reconciliation with the requirements of the provincial regulator over the life of the mine. This is a particular problem for non-uranium mines, which do not have a federal regulator equivalent to the Canadian Nuclear Safety Commission[2] that is involved in the full life of a project.

CEAA 2012 has not materially changed the robustness or scope of assessments applicable to mining projects. Rather, it has narrowed the types of non-mining projects it applies to. CEAA 2012 uses *Regulations Designating Physical Activities* to specify what activities are subject to the Act, without any underpinning rationale for what should be designated and no purpose identified for the application of the Act to guide that decision. This is a fundamental challenge for assessing the effectiveness of CEAA 2012. The lack of objective clarity in the stated purposes of the Act, which outline how environmental assessments under CEAA 2012 are to be carried out, but not when or why they are to be carried out, renders the application of CEAA 2012 to the mining sector – and its lack of application to numerous other activities of equal or even greater impact – arbitrary. The difficulty of this approach has become especially evident with respect to considering impacts on Indigenous Peoples (s5(1)(c) of CEAA 2012) and in relation to s79 of the *Species at Risk Act*. The narrow application of CEAA 2012 also raises questions about the effectiveness of a process and decisions built on cumulative effects when the majority of the activities causing those effects are not subject to CEAA 2012.

[2] In Canada, the nuclear industry is federally regulated by the Canadian Nuclear Safety Commission (CNSC), including Cameco's operations in Saskatchewan and Ontario. The CNSC is a life-cycle regulator that licenses the construction, operation, modification and decommissioning of nuclear facilities. Environmental protection for nuclear facilities and activities is in accordance with the *Nuclear Safety and Control Act* (NSCA) and associated regulations.

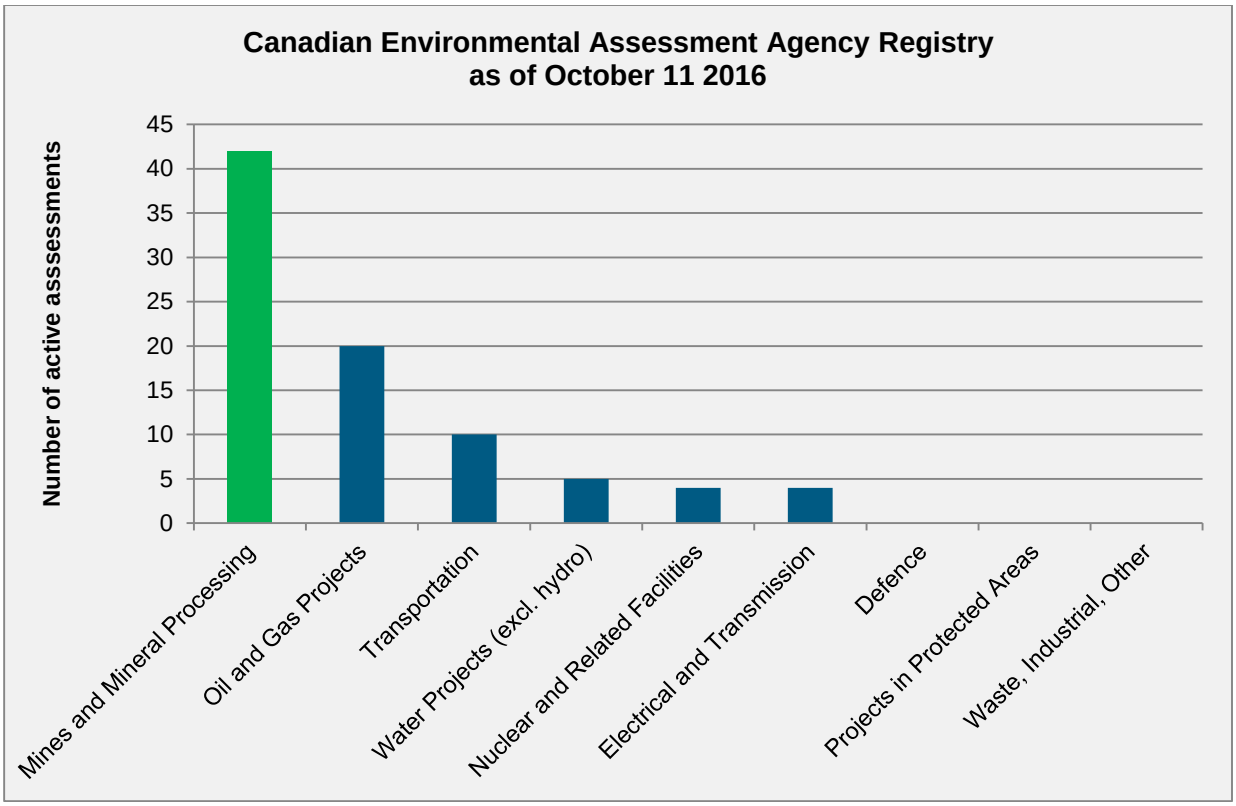
CEAA 2012 allows for the CNSC to serve as the Responsible Authority for physical activities that constitute "designated projects" in the Regulations Designating Physical Activities. The CNSC may carry out either an EA under CEAA 2012 or an EA under the NSCA, with the respective process determined following a review by CNSC staff. The public has the opportunity to participate in the process, and Aboriginal consultation activities are integrated within the process to the extent possible.

The CNSC is responsible for regulating the nuclear industry in Canada. Given its experience and technical capacity, it is our position that the CNSC is the best placed regulator for leading the federal EA process pertaining to the nuclear industry.

Panel Theme A: Environmental Assessment in Context

In answering the questions under this theme, MAC notes that CEAA 2012 is not consistent with the goals outlined in the theme. CEAA 2012 applies to "designated projects" rather than to "decisions made by the federal government" and, therefore, cannot achieve the goal that federal decisions be sustainable. One exception is in the case of the small number of designated projects, the majority of which are projects in our sector. These designated projects represent a tiny fraction of human activities in Canada that affect climate change, sustainable economic growth and Indigenous rights.

The snapshot below of the CEAA Registry in October 2016 illustrates the focus of the Act's application and should be compared, for example, to the environmental stressors identified in the government's *2015 Progress Report of the Federal Sustainable Development Strategy*.



Canadian Environmental Assessment Agency Registry as of October 11, 2016			
Nature of Project	**Active Projects**	**Completed[3]**	**Cancelled + Terminated**
Mines and Mineral Processing	42	18	8
Oil and Gas Projects	20	10	4
Transportation	10	6	5
Water Projects (excl. hydro)	5	1	0
Electrical and Transmission	4	5	2
Nuclear and Related Facilities	4	2	1
Defence	0	0	0
Industrial Facilities	0	2	1
Other	0	2	1
Projects in Protected Areas	0	0	0
Waste Management	0	2	0

CEAA 2012 currently applies to new mines and expansions that meet specified thresholds. The current thresholds have the effect of capturing nearly all new mines and major expansions. The regulatory reform of 2012 did not decrease federal oversight for mining approval processes. For all other sectors, it appears that CEAA 2012 applies only to federally-regulated projects, such as transboundary pipelines, or to very large projects that may be considered to be of national importance. Mining projects assessed by CEAA 2012 do not cross boundaries, and are not of a magnitude to be considered of national importance. Yet provincially-regulated mining projects constitute the majority of projects subject to CEAA 2012, reaching at times as much as 75 percent of all projects subject to CEAA 2012, and dwarfing the Act's application to any other sector.

The lack of clarity in the purposes of CEAA 2012 causes confusion and does not provide direction to CEAA participants, to project proponents or to the Canadian Environmental Assessment Agency. Our experience to date with CEAA 2012 is that the nine purposes identified within the Act cloud the primary intent of an environmental assessment regime and have contributed to its fragmented, unfocused implementation. For example, the phrase "protect the components of the environment that are within the legislative authority of Parliament" does not reflect the complexity and overlap of provincial and federal jurisdictions.

Experience with CEAA also points to the limitations of project-specific assessment. Project-specific federal assessments and decisions cannot address cumulative regional effects in the way that can be done through provincial regional assessments and land use plans. Even with a greatly expanded application of CEAA, project-by-project federal assessments can contribute to, but cannot discharge Canada's sustainable development goals or international commitments.

[3] Final decision

Similarly, project-specific assessments and decisions can contribute to, but cannot discharge the Crown's obligations to Canada's Indigenous Peoples. CEAA 2012 has become the primary tool, rather than one of many tools in a comprehensive system, to fulfill the Crown's duty to consult and support reconciliation with Indigenous Peoples.

MAC Recommendations:

MAC recommends that the Panel examine the purposes of CEAA to ensure that they provide clarity on the intent of the Act to the public, Indigenous Peoples and project proponents; guide the implementation of the Act by the Canadian Environmental Assessment Agency, Responsible authorities and others, including the prioritization of their resources and efforts; and contribute to the achievement of sustainable environmental, economic and social outcomes for Canadians, Indigenous Peoples and proponents.

MAC recommends that the Panel examine how the purposes of CEAA can focus the Act on the original intent of environmental assessment processes as a planning tool.

MAC recommends that the Panel propose a rationale for what federal environmental assessment processes should apply to. There are various approaches that the Panel could examine, such as to assess projects or activities that are regulated by the federal government, to inform federal decisions (as was the case with predecessor Acts), to assess and manage impacts on federal jurisdiction, or to assess projects and activities that significantly impact Indigenous rights[4]. Once the rationale is established, it would guide the design of the triggering mechanism for federal environmental assessment processes.

It is not MAC's purview to advise on the government's purpose, but we do respectfully submit that the absence of an articulated rationale for the current *Regulations Designating Physical Activities* has resulted in an arbitrary application of the Act. This results in a disproportionate application of the Act on the provincially-regulated mining industry, without providing effective protection for areas of federal jurisdiction because most of the causes of impacts on these areas of federal jurisdiction are not subject to the Act.

MAC also encourages the Panel to explore enhancing alternative approaches to meeting the government's objectives, such as regional and strategic assessments that look at all activities, to the extent that such alternative approaches respect provincial jurisdiction and do not become additional sources of delay and burden to projects.

[4] Consistent with the Supreme Court of Canada decision in Haida Nation v. British Columbia (2004 3 S. C. R. 511)

A.1 Question: To what extent do current federal environmental assessment processes enable development in Canada that considers the environment, social matters and the economy?

Paucity of Data

The Agency Registry includes only information on designated projects and assessments that were initiated under the predecessor Act but continued after 2012. As far as we know, information on the assessment of projects under s67 of the Act is not available in any registry.

CEAA 2012 has been in force for less than five years. The length of time that CEAA assessments take means that data on the impact of CEAA 2012 is still sparse. Only five mining projects have completed the process under CEAA 2012 and they received their final decision statements in 2015 or later. Challenges with some aspects of the Act have only become evident in the past year.

It is our understanding that the CEAA Registry will not include post-decision reports on follow-up and monitoring. Inadequate government mechanisms for gathering, maintaining and making accessible the data that flows from monitoring and baseline studies undermines learning and the quality and comprehensiveness of data available to project proponents, communities and governments.

Narrow Application

As noted above, CEAA 2012 does not apply to the majority of the development in Canada outside of mining that may impact the environment, society or the economy. The assessment of a mining project includes assessment of cumulative effects of other activities. However, the only decision CEAA provides is whether the mining project can proceed, even where the contribution to adverse effects of that mining project is very small compared to the cumulative effects of other activities. Moreover, the cumulative assessments undertaken in all mining projects can provide information on only a tiny fraction of the effects of all human activity in Canada. Thus, the thoroughness of CEAA 2012 assessments has to be considered in the context of the very narrow application of the Act when attempting to address the question whether the process enables sustainable development.

Lack of Evidence of Value Added

For projects on provincial lands to which CEAA 2012 applies (designated projects), we are not aware of any study of the value of CEAA 2012 assessments that are additional to the environmental assessment processes of provincial governments. There has been some research in the past on this topic, but we do not know whether it was able to answer the question, or whether the findings would be relevant to the very different structure and scope of CEAA 2012.

Consideration of Social Impacts

CEAA 2012 does not explicitly consider social or economic impacts of designated projects, although certain impacts on Indigenous People's interests are considered. For projects that are found to have likely significant adverse effects, the Governor in Council must decide whether they are justifiable. That decision presumably includes social and economic considerations, but the information underpinning that consideration is not an integral part of the CEAA 2012 assessment, nor is it transparent.

Decreasing Economic Development in the Mining Sector

The decision whether to invest in Canada and in particular mining projects is influenced by many factors. How long, onerous, and unpredictable Canada's assessment and permitting processes are is just one factor in that decision, but a critical one, with timeliness the most important factor. Taking the aggregate of all federal and provincial requirements, Canada's process is considered longer than those of other mining jurisdictions.[5] The 2012 amendments generally have not added delays to the CEAA process. However, we perceive a trend towards reduced alignment between federal and provincial processes, and towards reduced integration between environmental assessment and post-assessment federal approval processes that, taken together, are resulting in additional delays. The result is a perception that Canada's attractiveness for new mining investment is decreasing.

Unknown Effect on Federal Lands

Noting that provincial requirements do not apply to activities on federal lands, CEAA 2012 includes provisions for assessment of "projects" – physical activities other than designated projects – on federal lands. However, the Act does not mandate how these assessments of projects are to be carried out, omitting the elements that are mandated for designated projects such as consideration of cumulative effects, consultation, follow-up, monitoring, compliance or transparency. We do not know what physical activities are being assessed or the current health of federal lands.

Variable Compliance with the Cabinet Directive on Strategic Environmental Assessment

In her appearance before the House of Commons Committee on Environment and Sustainable Development on March 22, 2016, the Commissioner for Environment and Sustainable Development stated: "*For the most part, departments and agencies that we have audited have not adequately applied the cabinet directive. For example, in my 2015 report, I found that the cabinet directive was applied in only five out of over 1,700 proposals that the four departments we audited submitted to their ministers for approval. The results were better for proposals submitted to cabinet, where we reported that the cabinet directive had been applied in 110 out of 250 cases. However, that's still not getting a 50% grade.*"

MAC suggests that the Panel look at the Commissioner's reports on the subject. Further, we understand that those federal departments that do fulfill the cabinet directive do so without public consultation and consideration of cumulative effects.

A.2 Question: What outcomes do you want federal environmental assessment processes to achieve in the future?

The outcomes of federal environmental assessment must flow from processes that are grounded in federal jurisdiction and have clearly articulated purpose.

[5] World Bank's *Doing Business 2016 – Measuring Regulatory Quality and Efficiency*, 13th Edition. In the section of the report, "Dealing with Construction Permits", Canada ranks 53rd among 189 economies. Australia, Canada's principal competitor in mining, ranks 4th.

To support sustainable development objectives, environmental assessments must be timely, coordinated where overlapping processes cannot be avoided, effective, and respectful of Indigenous rights and provincial jurisdiction, with a predictable and transparent process.

A transparent process that fosters public trust and continuing improvement also requires a publicly accessible central registry of information. The Agency Registry is a good core, but falls short of the full range of information, such as information on projects other than designated projects and post-assessment follow-up.

A.3 Question: How can federal environmental assessments support investor certainty, community and environmental wellbeing, the use of best available technology, certainty with respect to the protection of Indigenous and treaty rights and timely decision making?

Investment Considerations in the Mining Sector

Investors in mine exploration assume a high level of risk because only very few exploration projects will yield a viable mine project. Several factors influence the decision to invest in a mining project and two of the most important are the potential for economic mineralization and regulatory certainty. The time span, from grassroots exploration to mine operation, occurs over one to two decades and involves intensive capital investment. This, in turn, leads to significant socio-economic benefits for communities and governments. The mining sector is, proportionally, the largest private sector employer of Indigenous Peoples, and provides training and significant procurement opportunities to Indigenous businesses. Several other sectors benefit from mining, from transportation providers to service and equipment suppliers to research and development (R&D) facilities.

Once a discovery is secured, investment costs escalate rapidly – unpredictable and time consuming project review and approval processes can discourage investment. Foreign and domestic investment can easily be diverted to jurisdictions that offer a greater likelihood of success, a reality that has increased over the past decade due to the significant concentration of the global mining industry.

Once a potential mine is found, the development is a lengthy and capital-intensive process. The following statistics provided by Indigenous and Northern Affairs Canada describe the timeframe and costs for each stage of a typical underground mine project:

Prospecting and exploration stage	3 to 5 years	$2 million / year
Discovery and Advanced Exploration stage	5 to 15 years	$5 million / year
Development and construction	3 years	$1.5 billion
Reclamation stage	2 to 10 years	$150 million

A 2014 University of Toronto study has shown that one typical underground gold mine costs $600 million over three years to build, generating 805 direct construction jobs with average annual salaries of $66,000 per worker. Once in operation, 600 direct jobs are created, with average annual salaries of $145,000 per worker. The construction phase adds $150 million to Ontario's annual GDP and the operating phase, $330 million. Approximately 2,200 direct and indirect jobs are created. Annual

government revenues during construction are about $50 million and $100 million during operation. In addition, about $13 million is paid to communities in local taxes. These figures do not include donations to local community organizations and charities, nor investments in educational institutions and in R&D.

On a national scale, mining contributed $57 billion to Canada's 2014 GDP; $24 billion in mineral extraction and $33 billion in mineral processing and manufacturing. The mineral extraction, smelting, fabrication and manufacturing industries employ 375,000 Canadians. Over the decade ending in 2012, $71 billion in taxes and royalties were paid to government and government agencies. In 2014, mining companies invested $677 million in R&D, surpassing the machinery, pharmaceutical, wood products, and forestry sectors. This created 4,500 jobs in R&D.

Mining and Indigenous partnerships are creating immense shared value for mining operations and Indigenous communities. Some 265 mining projects have over 350 active Impact Benefit Agreements (IBAs) and other agreements with their local Indigenous communities, which provide access to training, employment and business opportunities. In 2011, the Canadian Council for Aboriginal Business published a survey of 50 Indigenous economic development corporations. Survey participants commented that IBAs ensured that their community members could access employment and training opportunities and gain first access to contracting opportunities. Of those surveyed, 32 percent of respondents acknowledged benefitting from negotiated IBA provisions for contracting and subcontracting to local Indigenous businesses.

Other sectors benefit from a healthy mining sector. According to Transport Canada, minerals and metals represent about half of the commodities carried by Canadian rail. This is in contrast to the grain sector, which accounts for only one tenth. Mining companies support their local communities through donations and in-kind contributions to health care initiatives, educational institutions, local artists, community sport and recreational activities, and other charitable organizations. Mining projects in a northern or remote region can provide the stimulus for sustainable infrastructure development, such as the introduction of less carbon intensive energy sources to a region or community.

Investment in exploration and mining projects in Canada is required to maintain a healthy mining sector. According to Natural Resources Canada, the metal contained in proven and probable mineable ore of many major metals has significantly declined since 1980, including a decrease of 38 percent for copper and a 99 percent decrease for lead. Gold is the exception, with a 260 percent increase. The Canadian mining sector must successfully compete with other jurisdictions to attract investment to maintain its sector position.

CANADIAN RESERVES OF SELECTED MAJOR METALS, 1980-2012							
	Metal Contained in Proven and Probable Mineable Ore[1] in Operating Mines[2] and Deposits Committed to Production[3]						
	Copper	Nickel	Lead	Zinc	Molybdenum	Silver	Gold
Year	(000 t)	(000 t)	(000 t)	(000 t)	(000 t)	(t)	(t)
1980	16,714	8,348	9,637	27,742	551	33,804	826
2012	10,364	2,617	126	4,163	256	5,598	2,148
% Change	-38	-69	-99	-85	-54	-83	260
	Source: Natural Resources Canada, based on company reports and the federal-provincial/territorial survey of mines and concentrators. *1 No allowance is made for losses in milling, smelting and refining. Excludes material classified as "resources."* *2 Includes metal in mines where production has been suspended temporarily.* *3 Excludes metal in placer deposits because reserves data are generally unavailable.* *Note: One tonne (t) = 1.1023113 short tons = 32 150.746 troy oz.*						

Environmental Assessment and Cost

As Pierre Gratton, President and CEO of MAC, noted in a speech on September 21st:

> *Jack Mintz recently wrote about the cost of Canada's regulatory burden on the economy by its impact on the return on investment. He wrote "if the regulatory process was as efficient as Australia's, our tax burden amounts to roughly 24 percent of pre-tax profits. Add three more years of regulatory delay and the tax and regulatory burdens rise dramatically to 31 percent.*
>
> *Mintz referred to the 2016 World Bank's Doing Business report, which ranks the ease of operating a business in 189 countries. This report shows that Canada sits far below our key competitors like Australia and the U.S.*

Delays in the execution of the environmental assessment process have a greater impact on project economics than the costs associated with undertaking the assessment. Project delays increase the capital costs of the project, reduce the pre-tax internal rate of return and reduce a project's net present value. Delays reduce the viability of the mining project and the longer the delay, the greater the likelihood that the project will no longer be profitable.

The complexity of the ore, the mining and processing method and the availability of infrastructure such as roads and energy sources are project factors that can influence the costs for conducting the baseline environmental studies required for the environmental assessment. For a typical mining project, the baseline environmental work required for an environmental assessment can cost about $1.5 million per year and 2-3 years of fieldwork are necessary. Every additional year of field study increases costs rapidly. For certain studies, such as aquatic surveys, each additional study program may increase the stress on this natural resource.

A greater impact on costs is the cost resulting from delays in the execution of the environmental assessment process. Project delays increase the capital costs of the project, reduce the pre-tax internal rate of return and reduce a project's net present value (NPV).

The following scenario analysis illustrates the impact of delays on capital costs, the project pre-tax internal rate of return and the project NPV (assuming a cost of capital of 6%) for a small and a medium size gold mine.

Scenario Analysis

Case #1
Mine Life: approx. 10 years
Annual Production: approx. 0.1 million oz gold/year

	0.5 year delay*	1 year delay	5 year delay
Change in Asset Net Present Worth (US$M)	-8	-15	NPV=0
Change in Pre-Tax Asset Internal Rate of Return (%)	-1	-2	-9
Increase in Capital Expenditure (US$M)	5	11	56

Case #2
Mine Life: approx. 12 years
Annual Production: approx. 0.2 million oz gold/year

	0.5 year delay*	1 year delay	5 year delay
Change in Asset Net Present Worth (US$M)	-15	-31	-167
Change in Pre-Tax Asset Internal Rate of Return (%)	-1	-2	-11
Increase in Capital Expenditure (US$M)	5	11	53

** A six month delay can become a one year delay, for example, due to wildlife restriction windows during breeding season, sealift or ice road resupply constraints, seasonal restrictions for fish passage, seasonal restrictions for wildlife migration, and constraints due to construction activities that can only occur during open water or ice covered seasons.*

These scenarios show that even a six month delay can cause a significant reduction in the NPV of a mining project and significant increases to capital costs. Moreover, a six month delay can easily become a one year delay due to wildlife restriction windows during the breeding season, sealift or ice road resupply constraints, seasonal restrictions for fish passage, seasonal restrictions for wildlife migration, and constraints due to construction activities that can only occur during open water or ice covered

seasons. A five year delay significantly reduces the NPV and the internal rate of return, and increases the capital costs of the project. Smaller mine projects have less financial capacity for absorbing long delays as shown by a nil NPV. The longer the delay, the higher the likelihood that the internal rate of return will fall below project investment approval requirements, which may result in the project being shelved and the investment directed to another project in another jurisdiction. All of these scenarios would also result in lost income to governments in the form of lower royalty, corporate and personal income tax payments, as well as lost direct, indirect and induced employment, which for a capital-intensive sector like mining is significant.

Timeliness

As discussed above, the time required for a mining project to move through all provincial and federal review processes from environmental assessment to permitting is an important factor in the economic attractiveness of a mining project and in the attractiveness of a jurisdiction as an investment destination. The time required is the aggregate of all the project review processes of all jurisdictions. The design of the federal environmental assessment process must consider both the length of the process and how it will affect the timelines of all the other processes that a project is subject to, including provincial environmental assessment and post-assessment federal and provincial permitting. MAC urges the review to recognize the importance of timeliness and to assess the impact on timeliness of the options it considers for future federal environmental assessment processes.

It is challenging to compare the timeliness of processes because the start and end points, as well as reasons for delays, are varied and depend on many factors. There is no disagreement that steps such as Indigenous and public consultation, gathering baseline data, or assembling documents are necessary and need to take time. The sources of contention are delays that arise from poor process design or management, from unnecessary duplication, and from misalignment among processes in the project review continuum.

The *Canadian Environmental Assessment Act* was originally designed to inform federal decisions for both the government's own and private sector undertakings and activities. In the early years, the primary source of delays was in initiating a CEAA assessment. Thus the official start time of an assessment followed, at times, 18 months of advocacy by a project proponent to get the process started. Alignment with provincial processes was impossible. Another source of delays arose from lack of defined process steps or timelines. As well, when a project required more than one federal decision, as many mining projects do, there was no mechanism for coordination between the Responsible Authorities.

The 2010 amendments provided a critical improvement for the mining sector by placing responsibility for comprehensive studies with the Agency, and by allowing the Agency to initiate an assessment without waiting for each potential federal decision-maker to decide whether it would have to make a decision. The Agency discharged its obligations in a generally timely way, and also engaged with provinces to arrive at harmonized processes.

The enactment of CEAA 2012 introduced mandatory timelines for individual process steps with "stop clock" provisions for the proponent to submit requested information. Mandatory timelines for individual process steps have encouraged attention to timeliness. However, CEAA 2012 exacerbated problems of coordination. This is because the government initially assumed that CEAA 2012's substitution provisions removed the necessity for harmonization with provincial processes, and because

the removal of "federal decision" triggers weakened the link between federal environmental assessment and other federal processes.

The mining industry has experienced materially reduced coordination within the federal government between environmental assessment and post-assessment approvals. Whereas previously departments aimed to incorporate the early stages of their processes and their consultation obligations in environmental assessments, they now appear to be reluctant to begin until after all environmental assessment processes (federal, provincial and, in some cases, Indigenous) are complete. The result has been to extend the overall process by two years or more, and to fragment consultations. Multiple consultations on the same subject are confusing and burdensome to Indigenous communities, the public and the proponent. They also undermine the credibility of the environmental assessment process, if it appears that the project design decisions considered in the assessment are being reconsidered in subsequent approval[6] processes.

CEAA 2012 has been in force for four years, too short a time to definitively assess how it would impact timelines over the full range of projects to which it applies. An examination of the CEAA Registry in October 2016 for mining projects shows that assessments of five projects have been completed in 2.2-3.1 years after a project description has been posted on the Registry. Another 29 assessments have not been completed, with 16 of those beginning between three and four years ago. In addition, 13 assessments are still incomplete for which assessments began under the predecessor Act. As noted above, drawing conclusions from such numbers is difficult because many factors impact the timeline, and assignment of responsibility for delays is subjective.

Provinces have comprehensive regulatory processes. The federal environmental assessment process has struggled to fit with other federal approval requirements such as *Fisheries Act* authorizations and the parallel provincial processes grounded in different constitutional responsibilities. As such, priority should be given to continuously enhancing coordination, substitution and equivalency provisions as well as ensuring there is adequate capacity, resources and skills to manage the interplay between federal and provincial processes and associated federal regulation such as the *Fisheries Act*.

Choice of Technology

The goal of striving for continuous improvement in environmental protection is implied in the suggestion that environmental assessment mandate the use of Best Available Technology (BAT). However, determining what is "best" in the context of sustainable development is not a simple matter of identifying "best" technologies. For example, there is a significant difference between "proven" and "emerging" technologies.

What is "best" is also very dependent on the type of project and its unique local circumstances. For example, a technology suited to a hot desert landscape may be ineffective or even damaging on permafrost. There are trade-offs that must be considered as well. For example, some technologies for effluent treatment increase greenhouse gas emissions and generate waste products, which create long-term risks. Furthermore, impacts on the environment, as well as socio-economic impacts, are determined by much more than choice of technology, including location of major components and

[6] Post assessment approvals can include permits, licenses, authorizations, or regulatory amendments such as Schedule 2 of the *Metal Mining Effluent Regulations*.

infrastructure in the landscape, operating practices, hiring and training, etc. Technology selection is only one factor affecting the impacts of a project.

> **MAC Recommendation**:
> MAC recommends against embedding simplistic concepts such as BAT in environmental assessments, and instead focus on the net environmental and socio-economic factors unique to each project.

A.4 Question: How should federal environmental assessment processes address the Government of Canada's international and national environmental and social commitments, such as sustainable economic growth and addressing climate change?

Environmental assessment is a planning tool that is intended to inform decisions. The Government of Canada's goals and commitments should guide what information needs to be included in federal environmental assessments. Project-specific environmental assessments can contribute to the government's commitments. However, environmental assessment must be placed in the context of the totality of federal legislative, regulatory and policy framework, and project-specific environmental assessment must be able to proceed while the government works to address policy gaps in areas such as Indigenous reconciliation or climate policy.

Panel Theme B: Overarching Indigenous Considerations

The Government of Canada has committed to reconciliation and to a Nation-to-Nation dialogue with Canada's Indigenous Peoples. This commitment will lead to an array of actions over time, longer than this review, and the outcome will not be a simple or uniform adjustment to how decisions are made or who makes them. Thus, the Panel needs to be sensitive that its review is taking place and will be completed before the outcome of this dialogue is clear.

Relationships with Indigenous Peoples matter to industry as well as to how decisions are made. The current approach to government decisions on projects, characterized by multiple processes and fragmented and frequently unsatisfactory consultations causes unnecessary burden and confusion.

Project-specific environmental assessment can contribute to, but cannot discharge, the Crown's duty to consult and accommodate, or the government's reconciliation goal. The duty to consult and accommodate rests with the Crown, whether provincial or federal. Industry accepts that the Crown delegates many procedural aspects of consultation to the project proponent.

We support the exploration of processes that enhances Indigenous participation in decision making. However, several questions as to how such participation would be structured to apply to the federal context south of 60 would have to be resolved, including:

- How would this participation be structured in areas without settled treaties or where parties to treaties cannot agree on a process, and how would geographical areas be established?
- Would such participation contribute to providing greater certainty of outcomes, improved timeliness and reduced duplication?
- How would capacity needs be met?
- How would provinces be involved in or support such a process?

MAC members' experience in the territories or in northern Quebec, where co-management models through modern treaties exist, has provided some critical lessons, such as the importance of:

- Investing in board and staff capacity, including ensuring adequate remuneration to attract and retain knowledgeable and experienced staff and board members.
- Avoiding politicization of board appointments.
- Ensuring timeliness of board and staff appointments to avoid unnecessary delays.

MAC understands that the government is committed to implement UNDRIP in a manner that fits within Canada's Constitutional and legal framework. Free, prior and informed consent in this context is generally understood to refer to a process of continuous engagement. Several MAC members, who are also members of the International Council on Minerals and Metals (ICMM), have committed to "work toward the consent of Indigenous peoples" consistent with ICMM's Indigenous Peoples and Mining Position Statement. In practice, with over 350 active agreements between mining proponents and Indigenous communities in Canada, our sector has a proven track record of working towards and

maintaining positive and respectful relationships with affected Indigenous communities. Further, through TSM, MAC members have put in place effective systems for Indigenous engagement. In this context, a review process must be seen as one step in an ongoing relationship that, on its own, can inform but cannot assure the establishment and maintenance of effective relationships which, by definition, requires good faith by the parties to the relationship.

Governments can contribute to the establishment of effective relationships by fulfilling its fiduciary responsibility to Indigenous Peoples by undertaking a number of actions, including:

- Establishing trustworthy nation-to-nation relationships;
- Accelerating the completion of land claims;
- Directly providing capacity support for participation in project review and in the opportunities that projects provide, including by investing in education and training; and
- Sharing resource revenues collected from projects with affected communities.

As noted in this submission, the mining industry makes an important contribution to Indigenous employment and economic development and reconciliation goals, but cannot do this on its own.

MAC's Towards Sustainable Mining (TSM) program recognizes the importance of mining companies' relationship with Indigenous Peoples.

The TSM Framework "*Mining and Aboriginal Peoples*" states:

> Several Towards Sustainable Mining (TSM) Guiding Principles have direct applicability to the relationship between mining companies and Aboriginal Peoples (First Nation, Inuit, Métis) and indigenous peoples worldwide. We believe that our industry and Aboriginal communities share a common interest in ensuring that mining activity takes place responsibly, in a manner that creates economic opportunity, is respectful of community interests and protects the environment and ensures public safety. MAC members also recognize that we need to conduct our interactions with Aboriginal Peoples in a manner that reflects the particular interests of the communities where they reside. We also recognize that governments play an important role in enabling effective relationships between Aboriginal Peoples and the mining industry.
>
> Member companies of the Mining Association of Canada (MAC) have agreed to the following commitments with respect to our relationships with Aboriginal Peoples. We will:
>
> - Respect Aboriginal and Treaty rights and seek to understand local perspectives on those rights;
> - Acknowledge and respect the social, economic, environmental and cultural interests of Aboriginal Peoples;
> - Engage with Aboriginal Peoples, in accordance with the TSM Guiding Principles, to develop open and effective relationships throughout the mining life cycle. This includes:

  - building cross-cultural understanding so that company personnel understand Aboriginal Peoples' culture, values and aspirations, and Aboriginal Peoples understand the company's principles, objectives, operations and practices;
  - undertaking early, timely and culturally appropriate engagement with Aboriginal Peoples, including within the environmental assessment process, to ensure their interests in a project and its potential impacts are understood;
  - consideration of traditional knowledge to minimize or mitigate potential adverse environmental and social impacts and enhance positive benefits of mining and related activities;
  - developing agreements for participation, where appropriate, either directly with local Aboriginal communities or in conjunction with governments;
  - working with governments and communities to support and encourage community development programs, which may include education, training, health, culture, employment and business development or other community needs and priorities, such as capacity building;
  - supporting and encouraging Aboriginal involvement in environmental monitoring, closure planning and reclamation and other environmental activities that may be of interest to them; and
- Develop and implement company policies and systems that support these commitments and encourage suppliers of goods and services to the industry to do the same.

Further, MAC members publicly report independently-verified performance of their systems of engagement with Aboriginal communities and other stakeholders. We are not aware of any other sector in Canada that does the same.

B.3 Question: What is the best way to reflect the principles of United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?

Environmental assessment is only one tool, and arguably a limited one, for contributing to the Government of Canada's goal of reconciliation. It would be a mistake to assume that amendments to CEAA 2012, however good, would resolve decades of Indigenous mistrust of governments and address the significant economic gap that exists between Indigenous and non-Indigenous Canadians.

As noted above, the narrow application of CEAA 2012, which results in the Act focusing almost exclusively on mining projects, means that only those communities where there are mining projects, and only the effects of mining projects, are addressed by federal environmental assessment. Addressing the aggregate impacts on Indigenous interests requires a different, multi-jurisdictional approach.

Improved federal-provincial cooperation on environmental assessments may provide more space for meaningful Indigenous participation. Greater interdepartmental collaboration on consultation matters would also help.

Again, relationships with Indigenous Peoples matter to industry as well as to how decisions are made. We support the exploration of processes that enhances Indigenous participation in decision making. However, several questions as to how such participation would be structured to apply to the federal context south of 60 would have to be resolved, including:

- How would this participation be structured in areas without settled treaties or where parties to treaties cannot agree on a process, and how would geographical areas be established?
- Would such participation contribute to providing greater certainty of outcomes, improved timeliness and reduced duplication?
- How would capacity needs be met?
- How would provinces be involved in or support such a process?

More importantly, reconciliation goes far beyond project reviews and environmental assessment. UNDRIP has 46 articles, with Articles 26-29, 32 and 46 dealing with the management of natural resources. The remainder considers the rights to identity, language, culture, education, health and other matters. Addressing these issues should be seen as integral to any strategy that seeks to eliminate, once and for all, the gap that exists between Indigenous and non-Indigenous Canadians.

B.4 Question: What role should Indigenous traditional knowledge play in federal environmental assessments and what are some international best practices?

Indigenous traditional knowledge is an important aspect to understanding and mitigating the environmental impacts of a mine; from project design, to developing and executing monitoring plans to planning and implementing reclamation. Further, incorporating the unique knowledge about local environments that Indigenous communities can provide is important in integrating the perspectives of Indigenous Peoples into decision-making to strengthen relationships and respect Indigenous interests and aspirations.

The mining industry has a history of working collaboratively with Indigenous Peoples as evidenced by industry guidance and corporate practices described below.

Considerable guidance is provided to industry by best practices established through policies and tools developed by mining industry associations such as ICMM and MAC. ICMM's *Good Practice Guide – Indigenous Peoples and Mining* recommends that members partner with Indigenous Peoples regarding environmental impacts by:

> Consulting widely with Indigenous communities to understand their environmental concerns about mining and how these can be addressed, and incorporating traditional knowledge into environmental impact assessments.

MAC's TSM Mining and Biodiversity Framework encourages member companies to "enhance, through research, information sharing and/or partnerships, the industry's understanding of and contribution to biodiversity conservation, science and traditional knowledge."

The importance of incorporating traditional knowledge in engaging with Indigenous Peoples is often recognized in companies' internal guidance. For example, Teck's policy on Indigenous Peoples makes specific reference to the incorporation of traditional knowledge throughout the mining life cycle. HudBay's guidance directs employees to identify traditional use of the land in an area of development, and Cameco has a company standard on Engaging First Nations, Métis and Inuit Peoples.

Indigenous traditional knowledge is already a specific component in the federal environmental assessment process. CEAA 2012 S.19 (3) provides reference to the potential for inclusion of Indigenous traditional knowledge into federal environmental assessments. The Act also points to the consideration of Indigenous traditional knowledge through its definition of environmental effects:

> 5(1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are:
>
> (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to 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, or
> (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Defined in this manner, the Act requires the application of Indigenous traditional knowledge to effectively identify, evaluate and mediate potential environmental effects.

One of the goals of the current review is formalizing the application of Indigenous traditional knowledge in environmental assessment processes to effectively meet Canada and industry's goal of implementing reliable and consistent consultation processes that are supported by Indigenous Peoples. It will be vital that any decisions taken in this regard are consistent with Canada's commitments to UNDRIP and the recommendations of the Truth and Reconciliation Commission, and consistent with the Government of Canada's publicly stated views on the implementation of UNDRIP. In addition, outcomes of the review must reflect the perspectives of Indigenous communities regarding how traditional knowledge is collected and used. For example, MAC recognizes that each assessment process is unique, and recommends that deciding whether and how to share traditional knowledge should be left to the holders of that knowledge. It should also be recognized that collection and verification of traditional knowledge may require considerable resources for some Indigenous communities to undertake.

MAC members have significant first-hand understanding of the benefits that Indigenous traditional knowledge can bring to both regulatory processes and to the context of developing broader long-term relationships with Indigenous communities. The review presents an opportunity for all parties to have improved procedures and a stronger, shared understanding of how to more effectively achieve widely held objectives around reconciliation, including clarification of the application of this important resource. This is a key consideration of the current review.

> **MAC Recommendations:** MAC suggests that the legislative imperative to incorporate Indigenous traditional knowledge is already in place, but greater consideration should be applied to the formalization of its use and to the government-to-government collaboration required to achieve the greatest degree of certainty for all parties. For example, enhanced

policy guidance to provide clarity on the most effective process for collection and application of Indigenous traditional knowledge in assessment processes would add greater efficiency for both the communities providing Indigenous traditional knowledge, and also for industry in understanding how to support this work and apply the results. Also, policy consideration and guidance could be given to examining the most effective processes and mechanisms to achieve integration between Indigenous traditional knowledge and scientific information used to inform environmental assessments.

Panel Theme C: Planning Environmental Assessment

C.1 Question: Under what circumstances should federal environmental assessment be required?

The question of the circumstances under which federal environmental assessment should be required can only be answered once the purpose of federal environmental assessment is articulated, as well as the resulting rationale for doing a federal environmental assessment.

As stated elsewhere, the purpose of CEAA 2012 is not clearly articulated and no rationale is provided for the selection of "designated projects". CEAA 2012 requires assessment for private sector projects that are federally regulated or cross boundaries (e.g. uranium mining and pipelines), or that are of a magnitude to be considered of national interest. CEAA 2012 also requires assessment of nearly all mining projects. Mining on provincial lands is constitutionally the responsibility of provinces. Mines generally do not cross boundaries and, at the thresholds in the *Regulations Designating Physical Activities*, are not of a magnitude to be considered of national interest.

In addition to designated projects, CEAA 2012 mandates assessment of physical activities on federal lands but without specifying the selection or process for such assessments, and enables but does not mandate regional studies of federal lands. CEAA 2012 is silent on strategic environmental assessment of federal policies, plans or programs.

The result of CEAA 2012's application is duplication with provincial processes and federal intrusion into provincial jurisdiction. These are created without articulation of the rationale for such duplication or intrusion at the same time that gaps remain unaddressed in assessing what is primarily federal jurisdiction.

MAC notes that all involved in environmental assessments have limited capacity: governments, Indigenous communities, the public and the proponent. Unnecessary duplication thus diverts limited resources and attention, without enhancing environmental protection or progress towards sustainable development goals.

From the perspective of the proponent, multiplication of overlapping processes increases confusion and burden, and increases delays particularly from uncoordinated process steps. This, in turn, increases project costs, reduces the project's attractiveness and deteriorates the overall investment climate.

Experience since CEAA first came into force in 1995, and experience with provincial assessment processes, highlights that project-specific assessment cannot by itself carry public consideration of big-picture policies or substitute for land use planning. Project-specific assessment is also inefficient and ineffective for assessing and managing small-scale activities and undertakings that individually have little impact, but may have an aggregate impact that is a dominant source of environmental stress.

MAC Recommendations:

Taking together the harm that flows from duplication and intrusion into other jurisdictions, the gaps in the assessment of federal lands and responsibilities, the limited capacity of all

concerned, the limitations of what project-specific assessments can address and the goals of sustainable development, MAC recommends that a future federal environmental assessment framework be focused on:

- Strategic assessment of federal policies, plans and programs as envisaged in the Cabinet Directive on Strategic Environmental Assessment;
- Assessment of activities on federal lands;
- Assessment of projects that fall primarily in federal jurisdictions such as nuclear or transboundary projects; and
- Support for greater efforts to complete the negotiation of land claims and for building the capacity of Indigenous authorities to pursue their own processes and to better engage in provincial processes.

We recommend that priority be given to continuously enhancing coordination, substitution and equivalency provisions as well as ensuring there is adequate capacity, resources and skills to manage the interplay between federal and provincial processes and associated federal regulation such as the *Fisheries Act* and *Species at Risk Act*.

The above direction should be augmented by greater federal efforts to improve *Fisheries Act* compliance and *Species at Risk Act* implementation, the latter grounded in better federal-provincial collaboration.

In considering the above recommendation, the Panel should consider whether the previous purpose of the Act, to inform federal decisions, could serve as a better foundation for the Act, while avoiding unnecessary duplication of the processes of other jurisdictions and authorities.

C.2 Question: For project environmental assessments, do you think the current scope and factors considered are adequate?

In the context of the introductory text, MAC interprets this question as referring to the scope of effects specified in s5 of CEAA 2012 and the factors outlined in s19 of CEAA 2012.

Scope of Effects Assessed

The current definition of effects that are to be assessed under CEAA 2012 is the only link between the Act and federal jurisdiction. The foundation of the predecessor Act on federal decisions as triggers was eliminated by CEAA 2012. Although MAC is aware that there are questions regarding the jurisdictional foundation of the Act, we do not intend with this brief to engage in legal analysis of this issue, nor whether the scope of effects could be expanded without changes to the legal structure of the Act.

Putting aside legal considerations, the scope of effects assessed for mining projects has in practice been driven primarily through consideration of effects "with respect to Indigenous peoples", which are far broader than the scope outlined in s5(1)(a), and which are not materially different from effects considered under the predecessor Act.

Whether the scope of effects is "adequate" depends on how a future Act defines its purpose and its application.

Suggestions have been made in environmental assessment literature that environmental assessment should evolve to become a sustainability assessment, incorporating consideration of environmental, social, cultural and economic effects of a project (or of a proposal such as a policy or plan).

CEAA 2012 currently considers effects beyond bio-physical effects when they are "with respect to Indigenous peoples". Implicitly, effects beyond bio-physical effects are considered when the Governor-in-Council is asked to decide whether significant adverse effects are justifiable, although the evidence that informs that decision is not publicly available or reviewed.

The merits of evolving CEAA 2012 beyond its current scope of effects to include social, cultural and economic effects are uncertain.

The merits of doing so would be:

- Better alignment with the interests of Indigenous communities and the public;
- Better alignment with the approach taken by provincial processes; and
- Improved transparency and quality of evidence that informs federal decisions.

However, MAC members are also concerned that doing so would:

- Greatly increase intrusion into provincial jurisdiction by the federal government;
- Result in decisions that the federal government does not have the jurisdiction or means to act on;
- Require the private sector project proponent to explore effects in which it is poorly suited to assess and are not in the proponent's control to mitigate;
- Require a restructuring of the Act to ensure it is based on solid constitutional grounds;
- Require change to the expertise and capacity of Responsible Authorities; and
- Require change to the binary decision outcome of CEAA 2012, which is currently whether the adverse environmental effects of a designated project are "significant". Socio-economic and cultural effects of human activities can be a mix of both adverse and beneficial effects, with the potential of differences of opinion whether an effect is adverse or beneficial. The various types of effects cannot be practically and objectively aggregated into a single metric.

Taking all these aspects into consideration, it is MAC's view that it is impossible at this stage of the review to articulate a position and that expansion of the scope of effects to be assessed in federal environmental assessment should not be attempted without cautious consideration of the unintended consequences to the overall process.

Factors to be Considered

As with the question of scope of effects, the factors to be considered specified in s19 CEAA 2012 are appropriate within the current structure of the Act, and could not be modified substantially without consequential changes to the Act. For example, a proponent is already required to address "alternative means" for carrying out a project. However, a private sector proponent could not address "alternatives to" a project. Noting the flexibility provided by paragraph 19(1)(j) "any other matter" and subsection 19(2) enabling the Responsible Authority or the Minister to determine the scope of factors, CEAA 2012 appears to have adequate flexibility to adjust the factors to be considered to the context of a designated project assessment.

C.3 Question: Are there other things (effects, factors, etc.) that should be scoped into an environmental assessment?

As described in answering the question of the adequacy of the effects and factors scoped into environmental assessments, it is MAC's view that it is impossible at this stage of the review to articulate a position before the purpose and scope of application of federal environmental assessment is examined. Further, expansion of the scope of effects to be assessed in federal environmental assessment should not be attempted without cautious consideration of the unintended consequences to the overall process. In particular, MAC is concerned about increased duplication and intrusion by the federal government into other jurisdictions where robust regulatory regimes are in place, and the capacity of federal entities to act effectively on expanded responsibility.

C.4 Question: Under which circumstances should environmental assessment be undertaken at the regional, strategic or project-level?

MAC and other stakeholders have agreed on the value of and advocated for environmental assessment of federal policies, plans and programs. Such assessments would provide a more appropriate forum for public input on broader questions of policy than is provided by a private sector project proposal, and are more suitable for considering the aggregate impact of small activities or undertakings. The current approach through a Cabinet directive has fallen short as noted by the Commissioner for Environment and Sustainable Development in her audit. The current approach, which requires assessment of advice to a Minister or Cabinet, may also be unlikely to fulfill all the potential benefits of strategic environmental assessment even if it were implemented comprehensively and diligently. One challenge with the approach is that requirements of Cabinet confidentiality are incompatible with the transparency and public participation objectives of environmental assessment. Another challenge is that it may not be the appropriate trigger point in the formulation of a policy, plan or program.

It should be noted that the federal government undertakes many consultations on its policies and proposals. However, such consultations are generally within the narrow silo of a departmental mandate and the specifics of a policy or proposal. Broader considerations outside that mandate are, therefore, not explored. For example, in consultations on a proposed emission limit for one substance, concerns about impact on greenhouse gas emissions are ignored, because "greenhouse gas" policy resides in another part of government.

Regional assessments are an alternative that may be better suited to assessing cumulative effects of existing and future activities in a particular geographic area – not just mining. Provinces can provide examples of established approaches to regional assessments and land use planning. However, it is difficult to propose a practical approach to regional assessment for the federal government in a multi-jurisdictional context, particularly as CEAA 2012 impacts primarily provincial Crown land. There are many questions such as how regions would be delineated, how regional assessments would link to land use planning, or how a regional assessment would be triggered. It would also be unrealistic to expect all of Canada's landscape to have up-to-date regional assessments in a realistic timeframe or within current government capacity. A big concern for the private sector is that a requirement for regional assessments would become an impassible barrier for projects, since a single project proponent is unlikely to have the clout or means to force cooperation from all jurisdictions and authorities that would have to be involved. Consideration of regional assessments thus must consider how to avoid imposing additional delays and burdens on individual projects and how to proceed while respecting other jurisdictions and authorities.

C.5 Question: Who should contribute to the decision of whether a federal environmental assessment is required?

The answer to this question may be different for strategic, regional and project-specific assessments. From MAC's extensive experience with CEAA, for private sector projects, predictable triggering is important for the proponent and the public. As experienced by our sector prior to 2010, material delays in the decision whether a CEAA assessment would be triggered had very negative effects on the timeliness and effectiveness of the process, and prevented coordination. However, we recognize that no triggering process can foresee all possible real-world circumstances. The discretion provided in CEAA 2012, after a period of consultation with the public and Indigenous communities, appears to be an appropriate approach.

Panel Theme D: Conduct of Environmental Assessment

D.1 Question: Who should be responsible for conducting federal environmental assessments? Why?

The answer to this question will depend on how the Panel answers many of its other questions. In particular, MAC has emphasized the importance of better coordination among the federal government, provincial governments and Indigenous authorities, where overlap is unavoidable, and some options for improving coordination may lead to different structures than what now exists under CEAA 2012. Within CEAA 2012, as it exists today, the allocation of environmental assessment management for designated projects to three Responsible Authorities appears to be appropriate. In the case of non-uranium mining projects, the absence of a link between the Agency and the primary (provincial) regulator is an issue discussed elsewhere in answer to other questions. It should be noted that the management of environmental assessments of projects other than designated projects is diffused among many Federal Authorities.

As the Panel considers the various options for the future, MAC offers lessons from our two decades of experience with CEAA.

Whoever is responsible for managing an environmental assessment process must be an organization with a strong mandate to do so. The past experience of self-assessment by departments for which environmental assessment of private sector projects was not a core mandate has been negative.

In addition to clear mandate and capacity, the management of environmental assessments must be sufficiently centralized to allow the managing entity to develop expertise over time in managing complex assessments. One challenge in the past has been that an officer assigned to an assessment may have had no previous or subsequent experience, which hindered capacity building within a department.

In addition to experience and mandate, the managing entity must be allocated sufficient resources and the appropriate expertise. Managing environmental assessments, particularly for larger complex projects, and for projects with intersecting jurisdictions and interests, requires specialized management skills.

If the Panel considers recommending that the factors that are considered in federal assessments be changed, it should also note that the skill set of the Canadian Environmental Assessment Agency would have to be adjusted accordingly.

D.2 Question: What should be the role(s) of the proponent, Indigenous Peoples, the public, environmental organizations, experts, the government and others in the planning of, collection, analysis and review of environmental assessment-related science including community and Indigenous traditional knowledge?

In considering the question of roles in information gathering, MAC notes that there are established standards for how some scientific work is done, such as sampling for water quality and bird surveys. Where established methodologies exist, they should be utilized for efficiency as well as to facilitate

building a solid foundation for future assessments and environmental monitoring. Duplication of study programs such as baseline studies should be avoided as the studies themselves can be stressors to ecosystems and sensitive resources.

MAC notes that central public registries are vital to building a foundation of data. As with follow-up and monitoring, the inadequate attention by governments to the value of creating and maintaining public registries wastes everyone's efforts and prevents learning and transparency.

Several MAC members' Impact Benefit Agreements between their mining operations and Indigenous communities include provisions for environmental monitoring. MAC members recognize that transparent engagement and dialogue on key issues of concern with local communities is essential.

D.3 Question: How can environmental assessment processes be improved to ensure a timely, yet thorough process has been conducted?

The most important improvement towards timely, robust assessments with meaningful consultation would be one that enhances coordination, substitution and equivalency provisions as well as ensures adequate capacity, resources and skills to manage the interplay between federal and provincial processes and associated federal regulation such as the *Fisheries Act*.

If more than one environmental assessment of a project is unavoidable, effort is needed to align major steps and assessment guidelines. The current use of generic Environmental Impact Statement guidelines by the Agency, while reducing the time to issue the guidelines, undermines efficiency and effectiveness of the assessment by not focusing and adjusting the assessment to the key aspects of a project and concerns of those affected.

In regards to CEAA 2012, the mandatory timelines for process steps included in the Act are helpful, particularly in contrast to the unnecessary delays and uncertainty that mining projects experienced prior to 2010 that did not contribute to any type of environmental or other benefit.

Mining project proponents are experiencing challenges at each process step relating to federal coordination. Certain federal departments such as Fisheries and Oceans Canada and Environment and Climate Change Canada have significant roles in overseeing mining, specifically in assessing and managing environmental effects of mining projects (e.g. water use/impacts to water flows and volumes, *Metal Mining Effluent Regulations* and offsetting for serious harm to fisheries). Moreover, these issues are managed by the relevant federal departments long after the environmental assessment decision (some *Fisheries Act* authorizations are 30+ years and span until mine closure). The effective inclusion of specialist departments throughout the EA process is critical to the purpose of the environmental assessment.

Early and consistent engagement by specialist departments is required for the completion of effective and efficient environmental assessments, the avoidance of unworkable outcomes, and the prevention of fragmented consultations with affected Indigenous communities and the public and post-assessment delays. CEAA 2012 places the Responsible Authorities in the position of both specialist agency and decision maker for other specialist agencies. To date, CEAA 2012 has yet to deliver the promised coordinated process.

Since many mining projects require one or more post-environmental assessment decisions, the frequent failure to integrate major questions related to those decisions in the CEAA process leads to multiple, fragmented consultations on the same topic, creating delays and consultation burden. It also raises questions about the integrity of the assessment process if views resolved during the assessment appear to be revisited.

Development of the Environmental Impact Statement (EIS) guidelines with clear timelines is a positive step taken in CEAA 2012. However, without appropriate input at the guideline stage, including technical meetings with proponents, the process can generate unnecessary duplication. Further, specialist departments often update technical requirements or guidance documents during the environmental assessment process without communicating them to the Responsible Authority or the proponent, leading to additional review or conditions that cause delays in project development. This issue is particularly acute when the draft environmental assessment report is published without an opportunity afforded to the proponent to address stated comments or concerns.

During the technical review period, the effectiveness of the Responsible Authority's management of specialist departments is reflected in the information requests that are frequently out of the scope of the assessment and modified by the Responsible Authority, leading to delays in resolving issues. This suggests the assertion of an apparent lack of coordination, understanding or alignment between the environmental assessment process and the mandate of the federal departments involved.

The transition between CEAA pre- and post-2012 was particularly difficult for several mining proponents. Poor communication and preparation by the Agency and relevant federal environmental departments resulted in delays in project reviews (stopping some panel reviews that had progressed significantly). This was further hampered by government reductions and modernization, which occurred simultaneously (e.g. closure of the Winnipeg and reductions in the Edmonton Canadian Environmental Assessment Agency regional offices). This resulted in the loss of local and established support, which significantly impacted coordination between the Agency and federal departments.

Clear and appropriate delineation, acceptance and resourcing of duties and responsibilities in federal environmental assessment are required such that federal departments and agencies can properly lead and coordinate their respective federal responsibilities in environmental assessment. This will not only assure timely and responsible decision making (and thereby industry and investor confidence), it will restore public confidence in Canada's environmental assessment process.

MAC Recommendations:
To resolve these challenges, the Panel should recommend changes to CEAA that:

- Investigate and identify organizational barriers to effective implementation of CEAA 2012 within Responsible Authorities and federal departments, and develop alternate structures, policies and capacity building needed to support coordination and a seamless and robust process; and
- Consider the implication of other federal statutes and the mandate of federal environmental departments on the effectiveness of CEAA 2012 and the recommendations this review will generate.

Panel Theme E: Decision and Follow-Up

E.1 Question: What types of information should inform environmental assessment decisions?

It is impossible to answer this question in advance of resolving the purpose of federal environmental assessment, the scope of application or the factors that assessments are to consider.

E.2 Question: What would a fair, transparent and trustworthy decision-making process look like?

MAC can offer only a general observation that technical decisions should be made by the appropriate technical experts. It is more difficult for technical experts or officials to be charged with reconciling different views and different environmental, social and economic factors.

Ideally, the decision framework would avoid fragmentation and delays caused by inadequate capacity of the decision-making entity.

As well, evidence that informs the decision should be publicly available.

E.3 Question: Who should participate in the implementation of follow-up and monitoring programs and how should that participation be encouraged or mandated?

The answer to this question will depend on the answers to the other questions raised. That said, MAC would like to stress that regardless of who participates or who enforces follow-up and monitoring, the information that is generated should be accessible, ideally through a centralized, accessible registry or registries.

E.4 Question: Are enforceable conditions the right tool to ensure that the Government of Canada is meeting its environmental assessment objectives and, if so, who should have a role in compliance and enforcement?

CEAA 2012 creates a life-of-project stand-alone "permit". In the case of non-uranium mining projects, the federal government does not have a life-of-project regulator or regulatory framework, but CEAA 2012 lacks a mechanism and the Agency lacks the institutional capacity to recognize the regulatory role of provinces, to resolve conflicts between its requirements and those of provinces, and to adjust its conditions to evolving knowledge and societal needs.

While assessments must consider the potential impacts of the full life cycle of a project, they do so at an early point in that life cycle. For provincially-regulated sectors such as mining, any federal assessment must take into account that future regulatory decisions taken by a province will be based on information that is not available at the time of the assessment. For example, decisions by a province on how a closed mine site should be reclaimed will be made decades after the federal assessment. CEAA 2012 decision statements thus have the impact of imposing conditions not only on the proponent, but also on the provincial regulator by handcuffing future decisions.

While obligations and prohibitions in decision statements may come across as black and white, in reality circumstances encountered through life of mine operations are not. The enforceability of such conditions by the Agency could be questioned given that they are time-stamped to a pre-project period and cannot take into account the developments and changing risk management climate of the present time.

It is felt that many of the conditions listed in decision statements to date are not enforceable, as they often do not have a direct linkage to environmental effects and when they do, CEAA 2012 is not the most appropriate Act to regulate them. The Agency suggests that any mitigation deemed "key" to preventing an adverse effect forms the decision statement, and therefore non-compliance with any condition would result in demonstrable impacts. However, in practice, most of the conditions defined to date are administrative in nature or related to monitoring.

Finally, in developing condition statements, decisions and recommendations that either could not be or were not managed by the Agency are downloaded to federal departments (often who did not know or were not clear that they were assuming these responsibilities). The result has been disagreements between the Agency and federal departments, commensurate time delays and project uncertainty for the proponent.

MAC Recommendations:
The Panel should recommend changes to CEAA that:

- Reflect the role of the provinces as the full life cycle regulator of mining on provincial lands;
- Would enable conditions to be amended in response to evolving knowledge and societal needs, including the application of a risk management approach to compliance;
- Would result in the ability to harmonize data collection and reporting between different regulatory authorities (both federal and provincial);
- Ensure clarity of condition statements; and
- Avoid the need for independent compliance and enforcement mechanisms.

E.5 Question: Given that environmental assessment decisions are made in the planning phase of proposed actions, how should these decisions manage scientific uncertainty?

As noted above, a clear coupling between environmental assessment and the post-assessment regulator(s) of a project are the most effective means of managing scientific uncertainty. Ensuring that the results of well-designed follow-up and monitoring are gathered and accessible will also enable learning from experience and continuing improvement in the soundness of decisions made in the planning phase.

Panel Theme F: Public Involvement

MAC appreciates that public confidence in regulatory review processes is essential to long-term sustainable resource development in Canada. However, given the nature of the specific questions posed by the Panel under this theme, it is challenging for MAC, an association representing project proponents, to answer them.

However, MAC would like to share with the Panel how our TSM program encourages member companies to develop and implement "*formal processes for engaging with communities of interest, including Indigenous communities and organizations, affected or perceived to be affected by their operations or that have a genuine interest in the performance of a facility*" and "*ensure that facilities are engaging in meaningful dialogue with communities of interest and that their feedback is being considered in decision-making. Facilities must also be able to demonstrate that there is a clear mechanism for receiving complaints and concerns from communities, and ensuring they are effectively responded to*."

The TSM Aboriginal and Community Outreach Protocol details performance indicators to measure facility progress in:

1. Community of Interest (COI) Identification
2. Effective COI Engagement and Dialogue
3. COI Response Mechanism
4. Reporting

As well, all of TSM's other performance indicators related to matters such as biodiversity conservation and energy and greenhouse gas management include community engagement criteria.

Further information on the TSM program as well as annual progress reports can be found at www.mining.ca/tsm.

Panel Theme G: Coordination

As noted throughout, avoidance of multiple overlapping processes to the extent possible, and coordination between jurisdictions and within the federal jurisdiction are key to timeliness and effectiveness. Inadequate coordination is a burden on the public, Indigenous communities and project proponents, and undermines the achievement of goals such as environmental protection and species recovery. Unfortunately, coordination is not easy in a multi-jurisdictional context. Individual departments and agencies have little incentive to expend effort on coordination, particularly as the burden of inadequate coordination falls on others – the public, the proponent and Indigenous communities.

A further complication is that jurisdictions are not identical. The approach each province takes to discharging its responsibilities varies. Indigenous Peoples are also diverse in the nature or absence of their treaties with the Crown, and in their aspirations and capacity. Indigenous Peoples' relationships with the Crown are also evolving rapidly. Taken together, this means that it is highly unlikely that there is a permanent, single answer to the question of coordination. The practical approach is most likely to be one of flexibility, enabling mechanisms and incentives that allow and encourage better coordination and effective and timely processes.

G.1 Question: To what extent can the Government of Canada coordinate with other jurisdictions (e.g. provincial and/or Indigenous governments) while maintaining process integrity in the conduct of federal environmental assessments?

The ideal process would be one of seamless integration across jurisdictions and across the assessment and regulatory frameworks. The starting point should, therefore, be for the federal government to ensure that it is adequately addressing its exclusive jurisdiction and to develop a thoughtful approach to shared jurisdiction that recognizes provincial jurisdiction and avoids unnecessary duplication and intrusion.

To the extent that overlap is unavoidable, encouraging and enabling coordination should be a key design feature in the federal environmental assessment framework. Recognizing and respecting the diversity of approaches among other jurisdictions is likely to require a degree of flexibility that can adjust the federal approach to a particular Indigenous or provincial approach.

We support the exploration of processes that enhances Indigenous participation in decision making. However, several questions as to how such participation would be structured to apply to the federal context south of 60 would have to be resolved, including:

- How would this participation be structured in areas without settled treaties or where parties to treaties cannot agree on a process, and how would geographical areas be established?
- Would such participation contribute to providing greater certainty of outcomes, improved timeliness and reduced duplication?
- How would capacity needs be met?

- How would provinces be involved in or support such a process?

MAC members' experience in the territories or in northern Quebec, where co-management models through modern treaties exist, has provided some critical lessons, such as the importance of:

- Investing in board and staff capacity, including ensuring adequate remuneration to attract and retain knowledgeable and experienced staff and board members.
- Avoiding politicization of board appointments.
- Ensuring timeliness of board and staff appointments to avoid unnecessary delays.

MAC Recommendation:
At minimum, CEAA 2012 should be amended to enable adjustment to process and timeline details to better align the federal process with that of a provincial government, to encourage agreements for single harmonized processes, and to provide for some suitable method of Indigenous participation, where applicable, in the decision-making process.

CEAA 2012 and SARA

The inadequacy of federal-provincial cooperation is particularly evident with respect to the *Species at Risk Act* (SARA). Project proponents subject to CEAA 2012 are now being held responsible for past, present and future cumulative effects, including those on species at risk not caused by the project. The application of CEAA 2012, in conjunction with SARA, incorrectly places the obligation on designated project proponents to deal with cumulative effects on species at risk, while disregarding the impacts of others not regulated under the Act. This is resulting in decisions that include projects being found "likely to cause significant adverse environmental effects" with the potential to lead to permit denials, project delays, and onerous and ineffective permit conditions. Not only does this put designated projects at a disadvantage, but it also undermines species recovery as a result of unregulated cumulative effects, leading to environmental, social and economic impacts.

Contributing to the challenges of CEAA 2012 is the inadequate cooperation amongst federal government departments and the lack of federal-provincial cooperation. On at least one occasion, a federal government department has provided information on a project within the CEAA process, but then refused to provide permits to the proponent despite the project being approved under CEAA. Inconsistent information requirements related to species at risk during the CEAA process have led to proponents collecting information beyond the scope of their projects that would typically be the responsibility of the federal or provincial government. Uncertainty with regards to the identification and characterization of critical habitat by Environment and Climate Change Canada in recovery strategies and its relationship to important habitat identified provincially in action plans is of particular concern. Similarly, the reliability of provincial action plans to effectively protect species is unclear. Given that the provincial government is the primary jurisdiction responsible for species management and landscape disturbances that may impact listed species, increased coordination between provincial governments and the federal government is a necessity.

Application of CEAA 2012 and SARA aside, the current federal regulatory framework was not designed to address cumulative effects and prevent species from becoming at risk. For example, the purposes of

CEAA 2012 is "to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments" (CEAA S.4(1)(i)), while SARA's purpose is "to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened" (SARA S.6). In fact, SARA does not even mention cumulative effects at all. While CEAA 2012 mentions cumulative effects, it only captures a small subset of projects having impacts. SARA's primary focus is on listed species, leaving a significant regulatory gap. Indeed, a fair and comprehensive regulatory framework to deal with cumulative effects for species in advance of them becoming at risk is needed.

The lack of cooperation amongst federal departments and their provincial counterparts with the implementation of CEAA 2012 and the application of SARA is leading to confusion, frustration, delays and postponement of some projects. Certainty with regards to key aspects of the implementation of SARA under CEAA 2012 is needed, such as information requirements of proponents versus that of the Crown, clarity on critical habitat, its definition, identification (or adoption from provincial action plans), the reliability of provincial action plans to effectively protect species when implemented, and the adherence of other federal government departments to CEAA project decisions.

MAC Recommendations:

- Project proponents only be held responsible for cumulative environmental effects that are directly related to their project and are likely to occur;
- Ensure that mechanisms are in place to address compliance related to species at risk and critical habitat;
- Ensure cooperation amongst federal departments and their provincial counterparts on key CEAA and SARA implementation issues such as:
    - clarity on what information is required of proponents versus the Crown;
    - agreement between departments on methods used to collect the information that the proponent is responsible for;
    - clarity on critical habitat, its definition, identification (or adoption from provincial action plans); and
    - the reliability of provincial action plans to effectively protect species when implemented.
- That the federal government work with its provincial and territorial counterparts to find and implement solutions that address cumulative effects and prevent species from becoming at risk in Canada.
- That species protection take a regional ecosystem rather than species-by-species approach.

G.2 Question: To what extent is the current approach to substitution and equivalency effective?

Only one province (British Columbia) has pursued substitution for some of the projects subject to CEAA 2012 in the province. Of these seven projects, none of the substituted assessments of mining projects has yet to be completed. It is, therefore, too early to judge whether substitution will function well to

inform the subsequent federal CEAA 2012 or other decisions. As noted elsewhere, there are ongoing challenges with integration between CEAA assessments and post-assessment processes. It is for this reason that MAC is concerned that substituted process may reduce duplication at the assessment stage, but will further complicate post-assessment processes.

In light of experience to date, MAC's view is that while substitution is a potentially effective and necessary tool, and should be maintained, in the future the focus should be to reduce the need for substitution by reducing duplication and enhancing coordination or harmonization.

To date, MAC is not aware of any project having been granted equivalency, and it is, therefore, not possible to comment on its effectiveness. As with substitution, MAC's view is that it is an approach with potential and that continued efforts to enhance federal-provincial coordination mechanisms is critical.

G.3 Question: ***Do you think duplication between the federal environmental assessment process and the environmental assessment process of other jurisdictions exists? If yes, what are ways in which duplication could most effectively be reduced while maintaining process integrity?***

In the case of the mining sector, duplication of federal and provincial processes exists because mining on provincial lands is constitutionally the responsibility of provinces. As described earlier in this submission, each provincial government has in place a regulatory framework to review and regulate mining projects over their life cycle. Thus, in the current structure of CEAA 2012, while reducing 100 percent duplication is impossible, the effects of duplication could be mitigated by continuously enhancing coordination, substitution and equivalency provisions as well as ensuring there is adequate capacity, resources and skills to manage the interplay between federal and provincial processes and associated federal regulation such as the *Fisheries Act*.