

Comments on the Gazoduq Project Integrated Review Panel Terms of Reference, draft for consultation

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Summary

The terms of reference for the Gazoduq panel review must ensure that the panel's report includes the analyses needed to support the panel's assessment conclusions and recommendations and to inform public interest decision making covering the key considerations and assessment factors under the *Impact Assessment Act*.

The draft terms of reference for the Gazoduq panel review limit the mandatory contents of the panel's report to a short list of matters centred on reporting potential effects and mitigation measures. The proposed report contents do not include analyses supporting recommendations to inform the rulings decision makers must make under the Act on contributions to sustainability, impacts and Indigenous groups and rights, and effects on meeting environmental obligations and climate change commitments. They also do not require evaluation of the project in comparison with alternatives or overall assessment of the project in light of all the key factors and considerations set out in the Act.

Analyses centred on these considerations individually and taken together are central to defensible and credible application of the Act in all assessment cases. They need to be required explicitly and unambiguously as mandatory contents of the Gazoduq panel's report to ensure the panel and all other participants in the assessment know what is expected.

Context

The terms of reference for the Gazoduq panel review are likely to influence the approach taken to future assessments under the *Impact Assessment Act* [IAA]. The document and the case may have particular significance as an early assessment by a joint review panel under the IAA and the *Canadian Energy Regulator Act* [CERA] and as a federal panel review that is also to be coordinated with a concurrent public review by Québec's Bureau d'audiences publiques sur l'environnement [BAPE].



The following comments focus on major concerns about how the draft terms of reference define what is to be provided in the review panel's report. Matters concerning the combination of IAA and CERA requirements, the Canada-Québec cooperation agreement, scope and independent expertise, and the concurrent panel and Agency reviews of the sufficiency of the proponent's Impact Statement, are discussed at the end.

The major problem area

1. The most serious limitation of the draft terms of reference is the inadequacy of its requirements for panel analyses in support of conclusions and recommendations. The document sets out a narrowly constrained mandate for the review panel's report (section 4.3(d), p.5). The draft language implies that the panel's report is essentially to describe the likely project effects and the extent to which they are significant, without providing analyses of the implications of these effects for key decision factors, and without providing a basis for the conclusions and recommendations needed to inform decision makers.
2. The language in section 4.3(d) of the draft terms of reference is drawn directly from IAA s.51(1)(d) about the required contents of a review panel's report. The Act prescribes similar mandatory contents for Agency reports (IAA s.59). While the listed mandatory content items are reasonable enough as standard minimum base for all assessments, and may have been intended for that role, they are insufficient and unworkable if taken to be the full set of contents for a review panel assessment report. Unfortunately, the latter interpretation is likely unless the Terms of Reference are not revised to include an adequately comprehensive listing of what must be in the review panel's report.
3. Of the five public interest factors that the decision makers are to consider under IAA s.63, the reporting section of the Gazoduq panel's draft terms of reference identifies only two (the extent to which the project effects will be significant and mitigation/follow-up needs) for attention in the panel report. The report requirements do not mention
 - a. the panel's assessment of impacts on any Indigenous group or on the rights of Indigenous peoples of Canada, or
 - b. its assessment of the extent to which the project would contribute to sustainability, or
 - c. its assessment of the extent to which the project would hinder or contribute to meeting Canada's environmental obligations and climate commitments.



Crucially, they also do not mention analysis of the overall implications of the project's anticipated effects on all of the mandatory considerations in s.63, including their interactions, the adequacy of recommended mitigations, and the nature and acceptability of any trade-offs.

4. Inattention to these factors in the panel's report would be inconsistent with the draft terms of reference inclusion of all of the IAA s.22(1) factors for consideration as within the scope of assessment (ToR section 3.1). It would conflict with section 4.7 of the draft terms of reference, which requires the panel to assess "impacts that the Project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982." Also, it would disregard the panel's apparent obligation to undertake analyses of these key matters to have a basis for its "rationale, conclusions and recommendations" (section 4.3(d)(v)).

Defensible conclusions and recommendations under the IAA clearly depend on attention to all matters in the scope of the assessment and those emphasized in the mandatory considerations for decision makers under the IAA, including their interactions and any trade-offs involved. Given the legislated requirements in s.22(1), the analysis should also feature comparative evaluation of the project as proposed in comparison with alternatives, including the project with implementation of recommended mitigation measures, alternatives to the project, alternative means of carrying out the project and the null option (project not undertaken).

5. A consequence of the minimalist list of report contents in the Gazoduq panel draft terms of reference, and in any future cases that adopt this approach, is uncertainty not only about what analyses will be done and by whom, but also about what analyses will be available for public scrutiny.

In the absence of clearly mandated requirements for specified analyses, the public assessment reports by review panels and the Agency might well be limited to discussion of predicted project effects, the extent to which they are significant, mitigation and follow-up needs and (if ToR section 4.7 prevails over section 4.3(d)) "effects" related to impacts on Indigenous groups and rights. Such reports would include no analysis of projects' contribution to sustainability, or implications for Indigenous peoples and rights, or implications for meeting environmental obligations and climate change commitments.

6. If not done and reported by the panel, analyses of these matters would have to be done by some other body – perhaps the Agency and/or the minister's office – to provide the necessary basis of support for decision making. That approach would take



responsibility for the key analyses out of the hands of those who held the review and heard the evidence.

7. Moreover, unless the full set of analyses in support of decision making is included in review panel reports (or in Agency reports in non-panel cases), the analyses would not necessarily be available for public scrutiny. Panel and Agency reports are to be made public (IAA, s.55 and 28(4)). The IAA, s.65(2) and 66, also requires decision makers to prepare and publish reasons for their decisions, based on the considerations set out in s.63. However, the requirement for published reasons for decision does not guarantee publication of the analyses upon which the reasoning rested. The public could be left with generalities serving as the reasons for decisions. Such an approach might have short term political attractions but it would undermine the accountability of assessment decisions and the credibility of the assessment process.
8. All panel reports, including the Gazoduq review panel report, should be required to provide conclusions and recommendation based on a comparative evaluation of the project and its alternatives (including the null option and the project with implementation of recommended conditions of approval), in light of explicit contribution to sustainability criteria, with attention to all the IAAct s.22(1) considerations and emphasis on the five considerations for decision makers in IAAct s.63. Section 4.3 of the Gazoduq draft terms of reference should be revised accordingly.
9. It can be argued that these requirements are already implicit in the draft ToR, for example through the reference to the IAA s.22(1) factors in section 3 of the ToR. Certainly, it should be obvious that analyses centred on these considerations are central to useful application of the Act, and are logical imperatives for panel reports (and Agency reports in non-panel cases) that make recommendations for decision makers. Implicit requirements are unreliable at best. Review panel experience suggests that panels may be most hesitant to go beyond their explicit mandate.

The mandated requirements for analyses should be explicit so that neither the panel nor other assessment participants are left guessing.

10. Recommendations:

- (i) Section 4.3(d) of the draft terms of reference should be amended to require the joint review panel's report to include analyses
 - a. covering all of the considerations set out in IAA s.22(1) and reproduced in section 3.1 of the terms of reference; and



- b. addressing specifically effects related to the five factors for consideration by decision makers in IAA s.63, their interactions and implications.
- (ii) Section 4.3(d) of the draft terms of reference should be amended to require that the analyses mentioned above consider the project as proposed in comparison with the alternative means and alternatives to the project as proposed (including the null option and the project with implementation of recommended conditions of approval), in accord with IAA s.22(1)(e) and (f).
 - (iii) Section 4.3(d) of the draft terms of reference should be amended to
 - a. require an overall comparative analysis in support of the panel's conclusions and recommendations;
 - b. require the overall analysis and the more specific analyses of the matters related to the five factors for consideration by decision makers in IAA s.63 to consider and compare the advantages, disadvantages and likely trade-offs concerning the project as proposed and the project with recommended mitigation measures in comparison with the assessed alternatives to the project, and the alternative means of designing and carrying out the project; and
 - c. require the overall and specific analyses, including the comparative evaluation in (b), above, to set out and apply explicit criteria for evaluating contribution to sustainability under IAA s.21(1)(h) and s.63(a) and covering the requirements of IAA s.63(b)-(e).

Comments on certain other matters

1. As noted above, the draft terms of reference are for a joint federal panel review under the IAA and CERA. The uncomfortably combined requirements reveal the federal government's contrasting approaches to statutes included and passed in the same bill.
2. Unusually, these draft terms of reference for a federal panel review include as an appendix in a cooperation agreement between Canada and Québec. The agreement is designed to facilitate coordination of separate reviews by the federal IAA/CERA panel and Québec's BAPE panel. The cooperation extends admirably to joint sessions by the federal panels and Québec panels.

As a precedent for potential future applications, the review arrangements established in the Canada-Québec cooperation agreement raise the interesting possibility of coordinated but separate reviews and decision making by a federal panel and a panel established by an Indigenous governing body.



3. Aside from the deeply deficient report requirements, much of the content of the draft terms of reference seems reasonable. Positive elements include the scope related to the IAA (ToR section 3.1). It includes all of the mandatory factors for consideration in IAA s.22(1), despite Agency musings about being able to “scope out” some of those factors. Also positive are the provisions for the panel to retain independent non-government experts (ToR section 9.2) and seek external technical reviews (ToR section 9.5).
4. The draft document (much of ToR sections 5.8-5.27), establishes that the Agency and the panel will do concurrent but separate reviews of the proponent’s Impact Statement to identify any deficiencies. This apparent redundancy may be useful, but the reasons for it are not obvious and merit explanation. Also, the draft document does not indicate how any disagreements between the panel and the Agency concerning the sufficiency of the proponent’s Impact Statement will be resolved. That too merits explanation.
5. The draft document is silent on how the Gazoduq panel is to approach key assessment requirements on matters for which existing guidance is clearly deficient. Most challenging for the panel may be determination of “the extent to which the effects of the designated project [would] hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change” (IAA, s.63(e)). Because the Gazoduq project centres on facilitating expansion of the hydrocarbon economy with infrastructure likely to have a life expectancy beyond the federal governments stated 2050 deadline for net zero greenhouse gas emissions, the topic demands serious attention.

In the circumstances, reliance on independent expertise as provided for in section 9.2 of the draft ToR may be suitable in this instance. But given the likelihood of further hydrocarbon project proposals meriting panel review, it is past time for federal clarification of means to evaluate how individual projects may or may not fit on a pathway to meeting our climate commitments, including the 2050 net zero GHGs deadline.

