



Tsleil-Waututh Nation səlilwətał



April 20, 2023

Tsleil-Waututh comments on the Terms of Reference for the Review Panel - DP4

ToR Section	Comments from TWN	Response from IAAC-EAO
<p>1. Introduction-Time Framework</p>	<p>It is noted that the timelines for the process (600 days) include:</p> <ul style="list-style-type: none"> • <i>450 days for the Review Panel to submit its impact assessment report to the Minister</i> • <i>150 days for the agency to post its recommendations under subsection 55.1(1) to assist the Minister in establishing proposed conditions with respect to the Decision Statement for the Project.</i> • <i>Then 90 days for the Governor in Council to make the public interest determination under the IAA.</i> <p>TWN requires a minimum of 45 days to review all documents, with best efforts to avoid overlap of multiple documents, followed by time for dialogue and solution-seeking. Meaningful consultation and potential consensus-seeking cannot realistically be obtained unless TWN’s concerns are adequately addressed and Indigenous Knowledge is appropriately characterized and validated. Please acknowledge TWN’s 45 days (minimum) review period and update the Terms of Reference (ToR) accordingly.</p>	
<p>2. Description of the project</p>	<p>The geographic extent of rail transportation and marine shipping are identified as <i>‘forming part of the description of the Project’</i>. However, it is unclear how these activities will be considered in the Assessment process. TWN requests clarification on whether the incidental effects of project activities will be considered as the context to characterize whether adverse effects are significant, or will these be assessed as any other VC for analyzing and determining residual and cumulative effects?</p>	
<p>3. Mandate of the Review Panel</p>	<p><u>Duties of the Review Panel</u></p> <p>The draft ToR indicates <i>that the Review Panel shall ensure that the assessment takes into account scientific information, Indigenous Knowledge, and community knowledge</i>. Please provide clarification as to how the Panel will incorporate the views and knowledge of Indigenous nations. Please update the ToR.</p>	

Principles of Engagement and Participation

It is noted that the *Review Panel shall design its approach to engagement and participation in compliance with the IAA and following the most recent frameworks and guidance documents produced by the Agency, including: Policy Context for Indigenous Participation in Impact Assessment and other guidance documents.*

These policy frameworks and statements represent a significant improvement compared to CEAA 2012. However, the new Act (IAA) itself does not impose specific obligations to work towards securing Indigenous peoples’ free, prior, and informed consent before making decisions that could affect them. The FPIC approach used by the Agency, the BCEAO, the Panel, committees or the Minister may vary widely depending on the rights and interests at stake.

Therefore, TWN requires further clarification on the guidance the Review Panel will receive on implementing UNDRIP requirements and principles. TWN reiterates the importance of establishing clear and consistent standards that apply to all assessment processes under the IAA.

Scope of the Assessment by the Review Panel

TWN notes that in conducting the assessment, *the Review Panel must take into account the factors listed in subsection 22(1) of the IAA.* However, it is not clear whether and how those factors will be prioritized. Please elaborate on this point.

TWN requests further clarification of Section 3.13:

g) Indigenous Knowledge provided with respect to the Project.

Please elaborate on how Indigenous knowledge will be incorporated as an evaluative tool in the IA process. As written in the Terms of Reference, this point does not provide clear frameworks for the consideration of Indigenous knowledge but simply lists Indigenous knowledge as one among many factors that must be considered by the Panel when conducting the assessment.

q) any assessment of the effects of the Project that is conducted by or on behalf of an Indigenous governing body.

Please clarify:

- how will content within Indigenous-led assessments (ILAs) be considered by the Panel Review, and
- how will ILAs inform conclusions and recommendations regarding Indigenous interests in its impact assessment report?

r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 of the IAA. TWN acknowledges that the IAA will incorporate new assessment tools and opportunities. However, it is unclear how these new tools will be coordinated and weighed in the decision-making process. Please clarify how the Crown or committee-led consultation processes (i.e. regional or strategic assessments), Panel Reviews and Indigenous-led Assessments will inform each other in the overall EA process?

Impacts on Indigenous Interests

(3.17) While the Crown retains the duty to consult, it also has the duty to ensure that Indigenous groups engaging in consultation know how consultation will be carried out. Guidance about the consultation process conducted by the Review Panel should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation. Please clarify how the Assessment conducted by the Review Panel will meet or intersect with the Crown’s constitutional duty to consult?

While the Cooperation Agreement establishes the terms and conditions for cooperation between the Agency and the EAO, it is still unclear who will bear the primary responsibility for leading Crown consultations in all cases.

(3.20) It is noted in 3.20 that *the Review Panel shall invite Indigenous nations to provide information regarding whether there is sufficient information for the Review Panel to conduct the impact assessment and to proceed to a public hearing.* TWN is concerned that public hearing may be held after a sufficiency review and 21 days will not provide sufficient time for TWN to review the draft sections, provide comments, and have space for dialogue before proceeding with the public hearings. Please provide a clear timeframe for when TWN will have an opportunity to share Indigenous knowledge and provide input on the Sufficiency Review.

(3.24) Section 3.24 indicates that *the Review Panel may develop procedures for the protection of Indigenous Knowledge. If any such procedures are developed, they will be posted on the Public Registry.*

TWN is concerned about the differing standards and policies used for the protection and confidentiality of Indigenous knowledge. For example, exceptions considered under section 119 may be subject to different interpretations. How and who will determine that the disclosure of confidential Indigenous is

	necessary for the purposes of procedural fairness and natural justice? TWN requests that clear and consistent standards are created in collaboration with TWN and in advance of any consultation process, to ensure the respectful use of Indigenous knowledge in all IAA processes.	
4. Assessment Process	<p>(4.29) TWN requests to be consulted on the draft sections of the Impact Assessment Report before it is posted on the Public registry. TWN is to review and comment on any sections pertaining to TWN to validate the Review Panel’s understanding and characterization of potential effects and impacts of the Project on TWN’s rights and interests.</p> <p>b. Please acknowledge that TWN requests a minimum of 45 days to review the draft sections and provide comments</p> <p>(4.32) TWN requests to be consulted before the full report of the Impact Assessment is submitted to the Minister and made publicly available to ensure TWN comments were meaningfully considered and incorporated in the final report. Please update the ToR.</p>	
6. Specialist Advisors to the Review Panel	<p>6.1-6.3 TWN requests to be consulted on the specialists or experts (provincial, federal or independent) that will be retained in service of the Panel for advice.</p> <p>6.6 TWN requests to be consulted anytime an External Technical Review is requested by the Panel. Please provide the Agency’s most recent policy on External Technical Reviews when independent scientific and technical experts are requested for advice.</p>	
7. Clarifying or Amending the Terms of Reference	The ToR indicates that the Review Panel may request an amendment to the Terms of Reference at any point in the process. Will this potential request affect the timelines for the impact Assessment?	
8. Record of the Impact Assessment	8.3 Please see comment for section 3.24. TWN is concerned about the differing standards and policies used for the protection and confidentiality of Indigenous knowledge. TWN requests that clear and consistent standards are created in collaboration with TWN. In advance of any consultation process, the Agency should ensure there are confidentiality provisions in place for the respectful use of Indigenous knowledge especially before any records are posted in the Public Registry.	