



Comments on the Government of Canada Discussion Paper on the Review of Environmental and Regulatory Processes

August 28, 2017

Introduction

This is MiningWatch Canada's submission in response to the federal government's Discussion Paper on its reviews of environmental and regulatory processes, including the review of the *Canadian Environmental Assessment Act, 2012*, the *National Energy Board Act*, the *Fisheries Act*, and the *Navigation Protection Act*. Our focus here is on the environmental assessment portion of the Discussion Paper; we refer readers to our submissions to the Parliamentary reviews of the *Fisheries Act*¹ and the *Navigation Protection Act*² for our comments on those reviews. MiningWatch did not participate in the review process for the National Energy Board as we have little interaction with the NEB.

MiningWatch Canada was created in 1999 as a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat, and community interests posed by irresponsible mineral policies and practices in Canada and around the world. We are supported by twenty-seven Canadian environmental, social justice, Indigenous, and labour organisations. We have been an active member of the Canadian Environmental Network and its Environmental Planning and Assessment Caucus since 1999.

MiningWatch has worked on environmental assessments of dozens of mining projects, directly or in collaboration with communities and other groups. We have been very active in trying to improve environmental assessment law, policy, and practice, working with administrative and legislative bodies and even resorting to litigation when it proved necessary to do so to protect the public interest and the integrity of the EA process, winning a significant ruling in the Supreme Court of Canada in 2010.³

We agree with and support the Guiding Principles identified in the Discussion Paper. However, the measures proposed for their implementation are extremely vague, but to the extent they are specified they fall well short of what is needed and, in some areas, would replicate the problems with the existing policy/legislative/regulatory framework.

¹ MiningWatch Canada. Submission to the Standing Committee on Fisheries and Oceans on its Review of Changes to the *Fisheries Act*. November 30, 2016. <https://miningwatch.ca/publications/2016/11/30/submission-standing-committee-fisheries-and-oceans-its-review-changes>

² MiningWatch Canada. Submission to the Standing Committee on Transport, Infrastructure, and Communities on its Study of the *Navigation Protection Act*. December 7, 2016. <https://miningwatch.ca/publications/2016/12/7/submission-standing-committee-transport-infrastructure-and-communities-its>

³ *MiningWatch Canada v. Canada (Fisheries and Oceans)*. [2010] 1 SCR 6 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7841/index.do>

We note that the Discussion Paper largely does not account for the work of the Expert Panel on environmental assessment processes, as represented either in its report and recommendations⁴ or in the testimony and material that it gathered. In doing so, it does not move towards more specific and practical considerations drawn from EA knowledge and experience, but rather proposes little more than modest and incoherent modifications of the existing dysfunctional framework.

We urge the government to:

1. reconsider the Discussion Paper;
2. refer to the recommendations of the EA Expert Panel for direction; and
3. refer to the submissions and deliberations of various experts for specific direction on legal drafting instructions and the development of supporting regulations and guidance.

In this, we commend to the government the work of the Environmental Planning and Assessment Caucus and its members, including the Canadian Environmental Law Association, Nature Canada, and West Coast Environmental Law, as well as that of the Environmental Assessment Summit, the Multi-Interest Advisory Committee, and Olszynski *et al.*⁵

In our submission to the Expert Panel reviewing environmental assessment processes,⁶ we focussed on four key areas of concern. We will base our response to the Discussion Paper on them. We refer readers back to the Expert Panel submission for a more detailed explanation of each area, and limit ourselves here to how they relate to the contents of the Discussion Paper.

- 1. Sustainability:** Impact assessment must look at an undertaking's contribution to sustainability inclusively and holistically, integrating biophysical impacts as well as economic, social, and cultural aspects that are currently excluded – or applied as decision-making criteria without having been subject to expert and public review and scrutiny.

Projects and policies alike are often initiated for some kind of economic benefit, yet that projected benefit is not tested under existing environmental assessment processes. Whether public or private, investments need to be assessed according to the greatest and the most equitably distributed benefit they can bring – and the least and most equitably distributed damage (the Expert Panel specified economic, health, social, and cultural impacts as well as environmental). The Discussion Paper does widen the scope of information to be considered in an assessment but does not include a decision-making framework – principles, criteria and trade-off rules (eg. ecological thresholds that should not be crossed, or areas or social/cultural values that should not be impinged on). Without these, the process is susceptible to generating decisions that are arbitrary and/or based on political expediency, without even the minimal protection provided by the existing “justified under the circumstances” standard for allowing environmental harm.

- *New legislation should require decisions be justified by the greatest contribution to sustainability, based on all available options.*

⁴ Expert Panel Report. *Building Common Ground: A New Vision for Impact Assessment in Canada*. 2016. <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>

⁵ Martin Olszynski, Jocelyn Stacey, Jason MacLean, Arlene Kwasniak, Robert Gibson. *Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation for Sustainability*. August 18, 2017. https://s3.ca-central-1.amazonaws.com/ehq-production-canada/file_answers/files/28b387fc534e5697ef3120eb00dfc1288a80262a/004/713/091/original/Strengthening_EnviroLaw_Response_Paper_%2818Aug2017%29.pdf

⁶ MiningWatch Canada. *Submission to the Expert Panel reviewing environmental assessment processes: Making Federal Environmental Assessment Work for the Public and the Planet*. December 21, 2016. http://eareview-examenee.ca/wp-content/uploads/uploaded_files/miningwatch-submission-to-expert-panel-on-ea.pdf

- *Legislated sustainability principles, criteria and trade-off rules should be generic, to be complemented by guidelines and case-specific criteria.*

2. Regional and strategic assessment: Assessment of regional development plans (regional assessment) and policies, plans, and programs (strategic assessment) needs to account for their likely contribution to sustainability. There must also be effective linkages between project, regional, and strategic assessments.

The Expert Panel did focus on the use of strategic and regional assessment to guide subsequent project assessment, and to some extent recognised that issues identified in project assessment could require integration and assessment at the regional or strategic level. The Discussion Paper is vague but certainly doesn't go beyond this limited vision. Proponents and public alike have long objected to having larger issues – be they policy-based or related to regional development – ‘shoe-horned’ into the assessment of individual projects, and this cannot be effectively dealt with in a partial or piecemeal manner.

- *Legislation should require strategic assessment of policies, plans, and programs by the initiating department or agency. This would not be initiated across government all at once, but starting with priority areas, as capacity is developed and priorities are established.*
- *Legislation should allow for regional assessment of development plans, based on – but not limited to – areas of federal authority. It should provide for funding to be allocated for such assessments to provide incentives for other jurisdictions (Indigenous, provincial/territorial, municipal) to participate.*

3. A single assessment agency, leading cooperation with other jurisdictions: The federal government has the central role in ensuring transparency, consistency, and accountability in a coherent national assessment framework, in cooperation with provincial and territorial governments and in recognition and protection of Indigenous jurisdiction and authority.

The Discussion Paper retreats significantly from the Expert Panel's recommendations for a single environmental assessment agency by proposing joint assessment processes with regulatory agencies. While environmental assessments led by regulators like the Canadian Nuclear Safety Commission (for uranium mines, for example) have been touted as successful by proponents, they are subject to strenuously objections by the public and widespread ridicule by public interest groups. Regulatory agencies have an integral role in the assessment process as regulators, not as assessors; they should be ensuring that all the relevant information and analysis is available to allow them to effectively regulate a project, and that assessment decisions and conditions can be effectively monitored and enforced

Likewise, the Expert Panel put the federal process at the centre of cooperation with other jurisdictions, recommending that recognised Indigenous authorities' assessment processes be allowed as substitutes, but that substitution by provincial processes would be strictly limited. Given the record and state of provincial assessment processes, even this level of substitution would have difficulty gaining public credibility.

- *Assessments should be led by a single federal agency in cooperation with other relevant jurisdictions; Indigenous nations should be recognised as jurisdictions for the purposes of impact assessment and the law should provide for the substitution of Indigenous assessment processes in their territories and at their request (or automatically if it is already recognised and constitutionally protected as part of a comprehensive land claims agreement).*

- *Regulatory agencies should be obliged to participate in assessment processes as federal authorities.*

4. Meaningful public participation: The public must have a meaningful role in assessment processes, including sufficient time and resources to gather and analyse information as well as to share and discuss it. It is critical that assessment processes must allow projects or plans to be meaningfully changed or even rejected based on public input.

The Expert Panel's report makes important inroads in reconciling the technocratic and participatory aspects of impact assessment: to provide the most technically sound and robust predictions and information on which to make decisions, and at the same time to enable meaningful public involvement. Much of the Discussion Paper's treatment of public participation focuses on engagement early in the process, but it is important to recall that early engagement is important precisely to ensure that key decisions and determinations are not made before the public can have a say, and crucially, that the involvement of the public can actually change the outcome of the process. The Discussion Paper falls short in this respect as well, burdening proponents with public engagement that should properly be done by government, and then imposing legislated deadlines that will inevitably restrict public participation.

Transparency and accountability are also critical to the viability of a renewed assessment regime, and are only partially recognised in the Discussion Paper. Transparency is important both in terms of public access to information and possible learning – not just during an assessment process, but across all assessment processes and including follow-up monitoring and compliance. Accountability in this context means demonstrating to the public what the result of their participation is, how their input has been considered, and what criteria and priorities have been employed. The Expert Panel proposed an independent decision-making body to accomplish this, but the Discussion Paper proposes decision making by Ministers or Cabinet but proposes no measures by which they could justify their decisions.

- *Opportunities for public engagement should be identified in legislation starting with initial notification as early as possible in the assessment process and continuing through the process, under government coordination.*
- *Measures (including funding) should be authorised by legislation to build capacity for the public to understand, prepare for, and participate in, assessment processes.*
- *Timelines should be established in guidelines, not in legislation, to provide a reasonable degree of predictability for proponents and public alike without unnecessary and counterproductive rigidity.*
- *Public access to assessment information as well as monitoring data should be guaranteed in legislation, with appropriate protection for sensitive Indigenous and local knowledge.*
- *Legislation should set out standards for accountability in decision-making. Guidelines should set out criteria and reporting standards for procedural decisions and determinations.*

Conclusion

With these measures, and other described in more detail in our earlier submission to the EA Expert Panel, and in other submissions as indicated above, we are hopeful that the government can turn to meet the commitments it has made to create an impact assessment regime with rigour and credibility, deserving of the public trust.