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Submission to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Statutory Review of the *Canadian Environmental Assessment Act*

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November 24, 2011

Mr. Chair, Committee members,

Thank you for this opportunity to appear before you on this important topic. I apologise that my speaking notes were not ready in time for translation, and also that my colleague Ramsey Hart was unable to be here today.

MiningWatch Canada is a pan-Canadian coalition of environmental, Aboriginal, social justice, international development, and labour organizations that advocates for responsible mining practices and policies in Canada and by Canadian companies operating internationally. We have extensive experience in the environmental assessment of mining projects, intervening in the public interest as well as working with community groups, First Nations and Inuit and others in their interventions, and we have also been actively involved in discussions of EA policy at federal and provincial levels.

The Review Process

I would like to start by expressing our concern over the present review. We don't know what the timing, scope, and focus are. Apart from groups and individuals who have been alerted to these hearings and have been invited to present, there is no indication of when and how the public will able to participate. Witnesses have very short notice to appear, and so have little opportunity to develop more comprehensive submissions or to coordinate with each other. Finally, there has been no public engagement process, not even a discussion paper to signal to the public what the government's key considerations for the review might be. I don't envy you your position; you are now faced with an array of opinions and options and will have to find a way to make coherent and constructive recommendations.

It is a real contrast with the process that led to the creation of the Act, which I was part of and which involved broad consultations and extensive deliberations, and included the creation of a Regulatory Advisory Committee to oversee the development of the Act's key regulations. It is also a contrast with the five-year review of the Act, with discussion papers, a national consultation process led by the Canadian Environmental Assessment Agency, and the participation of the Regulatory Advisory Committee. When that review reached this Committee, a witness list was developed before the hearings even began. While there was certainly some disappointment in the results, I don't think any stakeholder felt the process hadn't been fair or that they hadn't been heard.

With reference to CEAA, I will present a number of challenges and recommendations that in our view would help resolve these challenges.

1. Public participation and aboriginal engagement need to be reinforced.

You've heard mention of the MiningWatch Supreme Court case, and of course the key issue **was** public participation. I've circulated a short article about the case. Along the way it also had to deal with scoping and discretion. **Those** issues have largely been dealt with thanks to the Court's judgment, but there are still serious obstacles to consistent and effective public involvement in EA processes. While we may be safe from the most crass efforts at preventing the public from interfering in the process, there are still serious obstacles to consistent and effective public involvement. I've attached a short article about the case.

Timeliness is often invoked as an objective, if not a principle, of good EA. Unfortunately it's often code either for "at the proponent's convenience" or simply "speedy" rather than recognising the different realities faced by different participants in the process. A fixed period for public review and comment that happens to coincide with a major holiday or harvest season is only timely from an administrative perspective. Releasing documents just before Christmas, for instance, may be convenient for the person trying to clear his or her desk before the holidays, but if it happens too often, people begin to wonder if their input is really welcome.

Participant funding is another challenge. Both the amounts available and the timing of its availability make it difficult for the volunteer-based community organisations that we work with to participate effectively. Funding availability is often announced along with or even after the beginning of the public comment period for guidelines, with the actual allocations being made later on. This severely restricts people's ability to do serious work at the guidelines stage. Ideally it would be phased in coordination with the review, and some funding would actually be allocated before groups were expected to start work. Private contractors usually ask for a deposit or retainer.

Funding amounts are perennially inadequate. I'm sure there's a certain amount of impatience with this argument in some quarters, since it may be seen as mere self-interest on the part of groups like ours, and times are tough all over. That's just not the way it works. You can be sure that our other funders are actually subsidizing our participation in EAs. The shortfall is especially painful when it comes to technical advice. Perhaps the assumption is that the work that the proponent and their consultants put into EIS should be competent and adequate, but it's more the exception than the rule. We're very good at finding people to work cheaply, and there are a lot of people who've trained themselves in fairly technical material, but the fact is that there is often a real need for a technical critique or alternative analysis that simply can't be done within the available budget. And in the end, everyone loses.

Others have made the point, but it bears reinforcing: public participation is a cornerstone of good EA, for several reasons. On practical grounds, local knowledge is often important in understanding environmental impacts, and independent evaluations of project parameters are likewise important in verifying or challenging the proponent's predictions. At the same time, for any project to make a meaningful contribution to sustainability it must be socially accepted, and transparency and fair and meaningful involvement in the assessment process are part of that. People have an expectation of democratic involvement, and they rely on specialist groups such as ours to support them.

Proponents and bureaucrats often seem to have an aversion to greater public involvement. It's messy. People don't always behave. It costs money, takes extra time, and may highlight deficiencies in the project. It may help create consensus and a social licence for a project, or it may highlight fundamental conflicts of interest, and may even lead to cancellation of the project. But frankly, if a critical eye on something prevents a stupid and expensive mistake, isn't that a good investment of time and money?

2. Panel reviews are a crucial component to the EA regime.

The most effective public involvement is through panel reviews, where there are actual hearings where there can be an open and independent presentation and interrogation of evidence. People can be heard, and see how their concerns are dealt with, not just review documents and file comments.

The Supreme Court *MiningWatch* decision clarified the application of the Comprehensive Study List regulation, but we are concerned that decisions on panel reviews are being done arbitrarily. The assessment of the Cliffs chromite project in Ontario's famous "Ring of Fire" is a good example. The Matawa First Nations had asked for a panel review so as to be able to have a broader and more participatory assessment of cumulative impacts of the project and its related infrastructure and the sustainability of mining development in the region, and the Cliffs mine as a 'basin-opening' project. They have stated that they are not opposed to the project, but they have gone to court over having their concerns ignored in designating the EA as a comprehensive study. This was entirely avoidable. There are, unfortunately, a number of other examples.

You'll note I've been talking about trying to make the EA process effective, not efficient. There's two reasons for this. The first is that I think it's important to make sure the cart is not getting ahead of the horse. Efficiency is important, but it's cannot come at the expense of effectiveness. The second is that while I think all stakeholders would agree on the basic principles of effectiveness in EA in terms of promoting sustainable development and environmentally sound decision-making, efficiency is very much in the eye of the beholder. Investors may want to see a project producing a return on investment as soon as possible, but local residents may see an efficient process as one that doesn't interfere excessively with their lives and work. Ultimately a process that allows sustainability to be undermined and ends up destroying livelihoods is not efficient either.

3. A strong and consistent federal role is essential.

Arlene Kwasniak's submission to you was very helpful in drawing an important distinction between duplication and overlap. As the Mining Association, among others, has pointed out, now that the Agency has the necessary authority, unnecessary duplication can be dealt with. We also join the Mining Association and others in asserting the need for the continuation of funding for the Agency to carry out this central role, as well as the continuation of funding for the Aboriginal engagement program.

We disagree, however, with industry submissions calling for the elimination of overlap and the delegation of assessments to the "best-placed regulator," whether federal or provincial. In addition to the problem of ensuring that eliminating overlap doesn't leave gaps in jurisdiction, as you've already heard from other witnesses, there is not likely to be consensus about which regulator is "best placed." Mark Haddock's in-depth comparison of the provincial and federal assessments of the Prosperity mine project in BC shows that the two processes do not look at the same issues in the same light. (It's worth noting that under the current rules there's no reason **that** project wouldn't have undergone a coordinated joint review.) Based on our experience and observations of the Canadian Nuclear Safety Commission, the Canadian Environmental Assessment Agency is best placed to conduct EAs of nuclear installations.

4. Regional and strategic environmental assessment need to be included in legislation.

An area where I'm surprised to disagree with some of your industry witnesses is on the need for strategic EA (policies, plans and programs) and regional assessments. It is precisely by undertaking higher-level assessments that some of the most difficult challenges facing individual project assessments can be addressed. Meaningful EA of policy initiatives would assist in achieving coherence in sustainable development objectives and compliance with international obligations, as well as establishing clear criteria for both proponents and the public when individual projects are initiated. Regional EA, closely linked to the development and implementation of land use plans, would provide a framework for subsequent project proposals, and some industry groups have strongly supported it for this reason.

5. The Act should include monitoring and enforcement.

And finally, I think this review provides an opportunity to address the weakness of the CEAA regime in following up its predictions and commitments. As it now stands, compliance with the Act ends with the decision to approve a project. Monitoring and enforcement of mitigation measures is left to individual departments and agencies, so they are vulnerable to capacity limitations and institutional weaknesses. Furthermore, any recommendations emerging from the EA process that do not correspond to specific licencing or permitting requirements may simply slip through the cracks. Unfortunately these tend to be the innovative and positive measures.

Conclusion

We see EA as part of an integrated and participatory planning process with sustainable development as its ultimate objective. If that doesn't provide its own justification, there are also pragmatic and practical reasons to approach it this way: better projects and diminished long-term liabilities, public acceptance and a social licence to operate, or just to avoid lengthy delays and possible loss of investment due to litigation and public protest.

Appendices: Two recent news items and a bulletin on the MiningWatch court case

http://netnewsledger.com/2011/11/07/the-ring-of-fire-is-coming-under-fire-in-ottawa-today/

The Ring of Fire is coming under fire in Ottawa today

Written by: James Murray on November 7, 2011.
NetNewsledger.com

OTTAWA – The Ring of Fire is coming under fire today in Ottawa, as the federal and provincial governments are being told that greater environmental assessments must be done before the project can move forward. Ecojustice and CPAWS Wildlands League are calling on Federal Environment Minister Peter Kent and Ontario's Minister of the Environment Jim Bradley to appoint an independent joint review panel to assess a proposed mega-mine for chromite in northern Ontario by the American-based Cliffs Resources Company.

As well, the Matawa Chiefs withdrew their support from Ring of Fire development on October 20, 2011 until the Canadian Environmental Assessment Agency implements a negotiated Joint Review Panel Environmental Assessment instead of a Comprehensive Study EA Process. The Chiefs are launching a Judicial Review.

The move by the Matawa Chiefs has gained support as Regional and national leaders will stand in support of Matawa Chiefs:

• Mushkegowuk Council Grand Chief Stan Loutitt
• Nishnawbe Aski Nation Grand Chief Stan Beardy
• Assembly of First Nations Ontario Regional Chief Angus Toulouse
• Assembly of First Nations National Chief Shawn A-in-chut Atleo

The public interest groups are supporting the demand earlier this month by Matawa and Mushkegowuk First Nations that the federal Minister conduct a review panel.

The Cliffs project is the first proposed mine in this vast, intact area. The environmental groups are concerned that mining will cause massive permanent changes to sensitive ecosystems and local communities in Ontario's Far North. "The cumulative impacts of this project are wholly unknown at this point and approval of the first one will most likely lead to multiple others being developed. Just how much mining can one watershed sustain before its health is compromised?" asked Anna Baggio, Director, Conservation Land Use Planning for CPAWS Wildlands League.

Public interest groups have called on governments this year to conduct a regional assessment of mining in Ontario's Ring of Fire area to ensure that the total extent of impacts on the area will be fully considered before mining development proceeds any further. "Communities and indeed all concerned Canadians need this type of critically important information before massive exploitation of Ring of Fire mineral deposits commences, at the very least we need a joint review panel," added Baggio.

The groups say that "Contrary to the assertions of Cliffs Resources, an environmental assessment by a 'joint review panel' would be far superior to the current process of 'comprehensive review study' that the federal government has initiated. A joint review panel will avoid having multiple assessment process federally and provincially and will ensure that local First Nations who will be most impacted by this

project will have a role in deciding how it can be developed. Additionally, concerned Canadians will be able to participate and provide submissions in public hearings to impartial panel members".

"The Matawa and Mushkegowuk First Nations need a joint review panel in order to address concerns about how this project will impact their communities and the environment," said Justin Duncan, staff lawyer for Ecojustice. "Doing so will ensure those communities have a stronger voice on a project that will transform Ontario's Far North."

The federal and provincial Ministers of the Environment have the discretion to reach an agreement to bump up the environmental assessment of Cliffs Chromite Project to a joint panel review. For example, the Ministers struck a joint review panel for the proposed Marathon platinum and copper mine in August of this year. One of the main reasons for such a decision is public concern. Ecojustice and CPAWS-Wildlands League hope that other members of the public, including other companies operating in the Ring of Fire encourage Canada and Ontario to conduct a more thorough assessment of the project.

http://www.kamloopsnews.ca/article/20111110/KAMLOOPS0101/111109728/-1/kamloops01/who-should-oversee-ajax-review

Who should oversee Ajax Review?

November 10, 2011
By Cam Fortems
Daily News Staff Reporter

On one side, Environment Minister Terry Lake is satisfied with the environmental review being undertaken on the proposed Ajax open pit mine.

On the other side, mine opponents and now the City of Kamloops, are urging another kind of review, which they say is more thorough, independent and public.

But either way, Kamloops residents are almost exclusively dependent on specialists in everything from engineering to hydrology, fish, forestry and grassland habitat — whether in government or hired by the company — in the bid by KGHM-Ajax to develop an open pit copper mine adjacent to the Aberdeen subdivision.

The current government review of the Ajax mine proposal is called a comprehensive study, or comprehensive assessment — a jargon-filled, bureaucratic flow chart with two senior governments analyzing the application and running separate, but co-ordinated, assessments.

The two governments, through the provincial Environmental Assessment Office and federal Canadian Environmental Assessment Agency, are working together in a harmonized review.

But it doesn't have to be that way.

Under federal law, one of three processes is triggered when industrial applications are submitted to the federal government, typically because they involve federal lands or, most common, potentially affect fish, a federal responsibility.

The first process is called a screening, a method to document negative environmental effects from a project and find ways to treat them. The majority of projects in Canada are assessed in this way.

"It's a very basic process and doesn't have a lot of teeth to it," said Andrew Gage, staff counsel with West Coast Environmental Law.

The next level is reserved for large projects with potential for significant environmental effects, detailed in a set of federal regulations. According to the Canadian Environmental Assessment Agency, those projects would include large oil and gas and nuclear projects as well as those in national parks.

The third class is the review panel, a group of independent experts selected by government based on knowledge. Its job is to assess in an impartial and objective way and present findings to the federal Minister of Environment.

Projects under a review panel include the proposed Site C dam on the Peace River and the Prosperity Mine in the Chilcotin, where an entire lake was slated to be wiped out by mining.

Ajax opponents say the comprehensive study is not comprehensive enough and that Ajax must undergo a federal panel review.

Those opponents, under the banner of Kamloops Area Preservation Association, convinced Kamloops council to ask the federal Minister of Environment to declare that the project requires a review panel, something exclusively in his power.

In doing so, council went against the advice of its engineering department, which wanted to continue with the comprehensive assessment until it proved to be insufficient. The department recommended the comprehensive assessment because its staff have a relationship with engineers and experts in the provincial and federal governments.

With a review panel, however, the process becomes more formalized with less opportunity for discussion and trust among civil servants.

Environment Minister Terry Lake trusts his civil servants and those from Ottawa to do it right through the comprehensive assessment. He doesn't see the need for a panel review.

So who's right?

Bureaucrats in both the federal and provincial governments declined comment. But lawyers with expertise in the process say the public is best served by a review panel.

"Currently there's a high level of public concern here," said Gage. "The big difference is the comprehensive assessment is done by government agencies…. whereas a review panel is somewhat arm's length, by experts."

The federal environment minister, Peter Kent, has the power to declare a panel review, based on potential for adverse environmental effects or based on public concerns.

That panel can be declared when a comprehensive assessment is underway, taking over the process.

"Compared to a comprehensive study, which is an essentially in-house report with public comment periods, a panel review is significantly more independent, public, transparent and rigorous," wrote Victoria lawyer Jay Nelson in a report to the Kamloops Area Preservation Association.

Lawyers who specialize in the field say the panel review allows more public input and more trust in the process.

The Northwest Institute for Bioregional Research wrote a report this year comparing the provincial environmental assessment with the federal panel review by looking at the proposed Prosperity Mine.

The B.C. Liberal government recommended that the Prosperity Mine, which would have used Fish Lake in the Chilcotin as a tailings area, be approved. But the federal Minister of Environment turned the project down last year based on the panel review findings.

Two parallel processes looking at the same mine proposal, but with different conclusions.

Lawyer Mark Haddock, who authored the report, found nine reasons why the federal panel review came up with very different concerns. While the provincial office's concern was solely with loss of Fish Lake, which it said was overshadowed by economic gains from the project, the federal review panel identified grizzly habitat, tourism, grazing, a trapline and aboriginal rights.

Haddock found the different outcomes stemmed from factors that included a higher level of expertise on the federal panel as well as tougher federal legislation upon which to base decisions and independence.

"The question inevitably arises as to whether the reporting relationship of the EAO to the relevant provincial ministers subtly or indirectly affects its judgment, objectivity and neutrality," Haddock wrote.

That observation may be all the more keen in light of the scandal over the $30-million payout to Boss Power. The province's chief inspector of mines, Doug Sweeney, told The Daily News last month he was pressured by two senior bureaucrats in the ministry concerned about looking after their elected bosses.

The review panel, independent of government, rather than comprised of employees who ostensibly are free from influence, is at arms length from government.

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Bulletin — December 2009

Maybe They Didn't Think We Were Serious?

MiningWatch takes the federal government all the way to the Supreme Court of Canada over its denial of public participation in the Red Chris mine assessment

We just can't accept that pristine lakes and streams should be turned into toxic mine waste dumps without the public at least having a say.

On December 18, 2008, the Supreme Court of Canada decided to allow MiningWatch Canada to appeal a Federal Court of Appeal decision that had negated the public's right to be consulted on large mines and other industrial projects.

On October 16, 2009, the Court held its hearing on the case, and will render its judgment within the next few months.

"It was just too much," says then-National Coordinator Joan Kuyek, when asked why a small Ottawa-based organisation decided to take the federal government to court in the first place. "We were waiting for our opportunity to participate in the environmental review, and then they told us we wouldn't have that opportunity."

MiningWatch, represented by Ecojustice (formerly the Sierra Legal Defence Fund) had initiated legal proceedings in June, 2006, when we filed in the Federal Court for a judicial review of the environmental assessment of Imperial Metals' proposed Red Chris copper/gold mine in northern British Columbia. We felt that the federal government violated the Canadian Environmental Assessment Act by deciding to split the project into multiple pieces for the purposes of the assessment and to downgrade the assessment from a "comprehensive study" to a simple screening-level assessment.

A mining project producing 3,000 tonnes of ore per day must undergo a comprehensive study; Red Chris would produce over 30,000 tonnes a day. Under the Act, comprehensive studies include mandatory requirements for public participation, while screenings allow for – but do not require – public involvement.

Over our objections, the Departments of Fisheries and Oceans and Natural Resources Canada did an environmental screening – with no public participation – before approving the project in May 2006.

In a lengthy and thorough judgment released on September 27, 2007, the Federal Court (Justice Luc Martineau) overturned the environmental assessment of the mine by Fisheries & Oceans Canada and Natural Resources Canada, and prohibited the federal government from issuing any permits for the mine.

The government and the company appealed, and on June 13, 2008, the Federal Court of Appeal overturned Justice Martineau's ruling, asserting that the federal agencies had the discretion to determine the scope of the environmental assessment before applying the comprehensive study list regulations. In contrast to Justice Martineau's judgment, the Federal Court of Appeal reasons for judgment, authored by Justice Desjardins, are a cursory rebuttal to the Federal Court ruling, arguing that since federal authorities have the discretion to set the scope of an environmental assessment, they can do so whenever – and at whatever stage of the assessment – they feel like it.

The Red Chris project is located near an area known to First Nations as the "Sacred Headwaters" region, and would pose a serious threat to the headwaters of some of the continent's most important salmon rivers: the Stikine, Nass, and Skeena. It would also destroy Kluela Lake and several fish-bearing streams, turning them into a toxic mine waste dump.

Our appeal is the first time the Supreme Court has agreed to consider the Canadian Environmental Assessment Act. We asked the Court to build upon and strengthen the principles of environmental assessment and endorse the need for robust federal environmental assessment of major projects – including mining projects – and the need to provide for public participation in those assessments, as we believe Parliament intended when it passed the existing law.

We believe that strong and sound environmental assessments are a key element of rational planning and public decision-making. Public participation and accountability are crucial to their effectiveness and the credibility.

If mining companies want to use perfectly good lakes as tailings dumps, we want to at least have something to say about it.