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Supplementary 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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MiningWatch's previously discussed concern over the lack of clarity and public engagement in the present review process has been sharply focussed by discovering that this Committee's hearings have been abruptly ended and that there was 96 hours in which witnesses or other intervenors could submit written comments. This concern is heightened by the fact that many knowledgeable and experienced witnesses have been identified but have not appeared before the Committee, including, *inter alia*, the Canadian Environmental Network's Environmental Planning and Assessment Caucus, of which MiningWatch is a long standing member. In this context we will provide the following notes, following the outline published on November 24th for the Committee's report to the House of Commons.

1. The inefficiencies of current practices and the need for improving processes

Lack of standard approach: Federal and provincial EA processes have different designs, coverage, and requirements such that any efforts at harmonization will necessarily be limited and may not be satisfactory. A national standard would resolve this.

Legislated authority to conduct strategic and regional environmental assessments is necessary to address inadequate assessment of policies, plans, and projects as well as the lack of regional assessments and lack of linkages between project assessment and regional or local land use planning processes.

Intervenor funding is inadequate for public interest groups to undertake the necessary technical and community work, and it is provided after the assessment has been initiated and guidelines for the assessment have already been drafted. This can readily be rectified for a low price.

There is no clear government policy on consultation and accommodation and inadequate funding for Aboriginal communities and organisations to participate in the EA process. This creates potential conflicts and uncertainty for all parties. Processes must be initiated immediately with First Nations and Aboriginal organisations at all levels to identify the appropriate procedures and resources needed to put them in place.

2. Duplication of environmental assessment activities which cause unnecessary delays in the overall process

Failure to negotiate terms of a joint review between jurisdictions leads to parallel processes. This is simply unnecessary.

Fixed timelines are apparently forcing one jurisdiction to initiate a review before terms of a joint review can be established. A standardised approach to EA would help, but greater attention to potential complications needs to be applied to drafting legislation and regulations. The Regulatory Advisory Committee helped provide this attention when it was operating.

3. Ambiguities which exist in the current CEAA legislation

Discretion on scoping creates potential uncertainty, i.e. *Jobs and Economic Growth Act* amendment to s.15(1) to reverse the Supreme Court decision in MiningWatch has not yet been used but would cause serious process uncertainty if it were.

Discretion in declaring Panel reviews creates potential for abuse, eg. Raven Coal project with massive public interest (thousands of comments registered for the Comprehensive Study) but no Panel review, or Cliffs chromite project referred to in previous submission.

The definition of environmental impact as including social, cultural, and economic impacts only as caused by the environmental impact of the project excludes non-environmentally-based impacts, whether positive or negative, and is inconsistent with the stated (and crucial) purpose of promoting sustainable development.

Key concepts such as ‘no significant environmental effect’ or ‘justified under the circumstances’ are not defined, even just in a non-prescriptive manner to give direction to decision-makers and clarity to stakeholders.

There is no systematic monitoring in place to determine whether and how commitments made by proponents or government through the EA process are implemented; neither is there systematic monitoring of regulatory implementation of measures identified in the EA process. The Agency should be given a clear responsibility and adequate resources to begin to implement an expanded Quality Assurance Program, and contingent on the adoption of a ‘certificate’ approach to authorising EA approvals, clear legal penalties should be set out for deliberate, negligent, and/or persistent violation of or failure to implement conditions prescribed in an EA approval.

4. Other timeline issues

Delays in EA often result from proponents not providing information on time, or providing inadequate or incomplete information. Poor quality, redundant, and poorly-organised information also adds to delays as it must still be reviewed by EA administrators and other intervenors alike before requests for revision or additional information can be filed.

5. How to address small projects

The previously-mentioned idea of standardizing EA processes would allow small projects to be handled effectively by different agencies or levels of government, though maintaining a national registry of such projects would help ensure accountability and transparency.

6. CEAA triggering mechanisms

The use of triggering mechanisms under CEAA has been greatly improved by having the Canadian Environmental Assessment Agency initiate EAs based on initial project submissions without waiting for further determinations.

However, projects that have previously undergone an EA may be subject to another assessment based on a regulatory trigger, or at the request of the proponent, eg. re-submission of the Prosperity mine project. Provisions such as s.24 need to be clarified and strengthened to ensure that substantially unchanged projects are not unnecessarily re-assessed. At the same time, projects that have undergone substantial design changes since their assessment, include elements that were not part of the original assessment, or were assessed many years ago, are allowed to proceed based on an earlier assessment. There needs to be greater clarity on the limitations of EA approvals and conditions, whether directly in the legislation or via a certificate of approval approach. Criteria need to be in place to evaluate the extent of project design conformity with approved EA conditions as well as the potential for external change over the time since the original EA; these would cover the state of environmental knowledge and science related to the project, environmental changes in the project area, regulatory changes, etc.

7. Concerns brought forward by project proponents and stakeholders

Where there is a Panel review, the Panel is able to receive and respond to concerns. Within a Comprehensive Study review it is up to the Agency to handle such issues, and it is not necessarily well equipped to do so. A clearly defined mechanism within the Agency, perhaps a sort of Ombuds office, would be very useful in improving transparency and accountability.

8. Substitution and equivalency as options for EA

Substitution should be done only where standards of transparency and public access and participation can be maintained, and with agencies that are independent of the regulatory process with respect to the industry concerned. The Canadian Nuclear Safety Commission, for example, claims to be part of and speak for the nuclear sector. Its regulatory mandate and capacity do not extend to independent assessments.

Equivalency, as previously noted, can be achieved through a standardised process, though a national standard level of transparency and access to documentation would still need to be maintained.

9. Simplifying the process when and where possible

The process, while not simple, is relatively straight forward, and education and training for the public, industry, and government officials (such as that undertaken previously by the Canadian Environmental Assessment Agency, professional impact assessment associations, and environmental groups through the Canadian Environmental Network's Environmental Planning and Assessment Caucus) has been very effective in helping people participate more effectively in EAs in various capacities.

10. Improving predictability and consistency in processes

CEAA is currently being applied quite consistently apart from issues noted above. As noted, achieving consistency with other jurisdictions' EA processes is a more distant goal, though there is a growing body of experience in coordinating harmonised EAs.

CEAA procedures are generally well known and highly predictable, though determinations and decisions are not. As discussed above, having clear criteria and greater accountability for those determinations and decisions would be useful to all participants. However, final determinations of a project's environmental impact, its contribution to sustainability, and its "justification under the circumstances" are necessarily dependent on the information and analysis presented through the assessment process. Asking for a predictable outcome represents a fundamental misapprehension of the assessment process for a regulatory process.