Comments on the Discussion Papers on the Proposed Project List and the Proposed Information Requirements and Time Management Regulations

Jamie Kneen

May 31, 2019

MiningWatch Canada submits these comments on the *Discussion Paper on the Proposed Project List* and the *Discussion Paper on the Proposed Information Requirements and Time Management Regulations* under the proposed *Impact Assessment Act*, Part 1 of Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* that were published on May 1, 2019.

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. MiningWatch has been an active member of the Canadian Environmental Network (RCEN) and its Environmental Planning and Assessment (EPA) Caucus since 1999, and currently co-chairs the Caucus along with Anna Johnston of West Coast Environmental Law. I also sit on the Minister's Multi-Interest Advisory Committee (MIAC), and predating MiningWatch, I was a member of its predecessor Regulatory Advisory Committee (the RAC) almost continuously from its start in 1992 until its last meeting in 2008.

MiningWatch has also worked on environmental assessments of dozens of mining projects, providing research and advice as well as intervening directly or in collaboration with affected communities and other groups, both Indigenous and non-Indigenous.

1. Consultations on the Discussion Papers

Before addressing the content of the discussion papers, we must note that the process of developing the discussion papers and the draft regulations has been deeply inadequate from a public interest perspective, with little consideration for transparency or accountability. Consultation papers were first published in April 2018, with public comments received until June 1, 2018. The proposed regulations were also

subject to discussion at the MIAC, and the Canadian Environmental Assessment Agency did some useful engagement work with the public and expert groups like the EPA Caucus. However, the current discussion papers, with significant changes in the proposed regulations, were not published until May 1, 2019, and only 30 days have been allowed for public comment. There is little opportunity for the public, or public interest groups like MiningWatch, to do meaningful work to understand and respond to the proposed regulations and their implications, especially when so little information has been provided regarding the evidence and analysis behind the proposals.

Disturbingly, not only do the "what we heard" sections of the discussion papers not reflect what we submitted in any meaningful way, but crucially, the content of the discussion papers and the proposed regulations do not evidence any consideration of that input. It is clear that our contributions were discarded and we would like to know why.

The Information Requirements and Time Management (IRTM) regulations discussion paper erases the distinction between the initial project description and the detailed project description without acknowledging the depth of work and the broad consensus that support that distinction, apparently giving precedence to numerically small but influential voices to the contrary and trying to obscure this distortion by attributing views to "some stakeholders."

The Project List discussion paper outlines the criteria that were used to develop the proposed regulations, but does not say what they actually were, much less explain how they were applied. Nor does the discussion paper explain why some criteria that were proposed in the initial consultation paper[1] were discarded, or how and why new criteria were added. This is all the more remarkable given that thirteen environmental and nature groups sent a letter to the Minister of Environment and Climate Change on April 18, 2018, in response to the initial consultation paper, specifically requesting that this evidence be made publicly available. [2] When the discussion paper was published on May 1, 2019, without that evidence, and without that evidence having ever been made available, we again asked the Canadian Environmental Assessment Agency to provide the rationale and analysis behind the proposed project list entries. We have not received it. The discussion paper proclaims that the government has "committed to a transparent, evidence-based approach to creating a new Project List and this was strongly supported in the comments received," but does nothing to demonstrate this commitment. The process has been far from transparent, and if, in fact, an evidence-based approach was used, that evidence has not been made public. Indeed, if the government intended to show any level of accountability to the public, of which transparency is the most basic, it has also failed to do that.

2. Discussion Paper on the Proposed Project List

These comments refer to the *Discussion Paper on the Proposed Project List* for the proposed *Impact Assessment Act* (Part 1 of Bill C-69) published on May 1, 2019.

The comments refer back to the CEAA 2012 Project List Regulations that the proposed Project List is based on. The proposed Project List replicates the arbitrary threshold-based approach used in the existing Project List, which is fundamentally inappropriate for sectors like mining, and makes the problem even worse by making the thresholds even more permissive, allowing projects with potentially serious negative impacts to completely avoid assessment.

[1] Consultation Paper on Approach to revising the Project List. https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/consultation-paper-approach.html

[2] Letter to the Minister of Environment and Climate Change re: development of the Project List under the proposed Impact Assessment Act. https://miningwatch.ca/sites/default/files/mckennaprojectlistletterapril2018.pdf

It is important to note that the CEAA 2012 list was largely drawn from the Comprehensive Study List (CSL)[3] under CEAA 1995, which served a different purpose. In a nutshell, the comprehensive study process was intended to guarantee public participation and a higher level of scrutiny than was required for a screening, though screening-level assessments could range from fairly rudimentary to in-depth reviews; they allowed for but did not require public participation. All undertakings requiring federal authorization (among other things) had to at least undergo a screening. CEAA 1992 also allowed for projects to be "bumped up," that is, to be referred to a panel review based on the screening report. Unfortunately, the CEAA 2012 Project List was never reviewed and revised to take into consideration the design of the CEAA 2012 process and the implications of the differences with the CEAA 1992 process.

One of the features of the CSL that made it inappropriate for use under CEAA 2012 is the application of thresholds to listings, and in our experience, specifically for mining projects. CEAA 2012 requires listed projects to undergo a screening to determine whether an environmental assessment (Standard or Review Panel) will be conducted. (This is a different and potentially confusing use of the word "screening"; unlike CEAA1992, it does not mean that any form of impact assessment is being carried out.) Under CEAA 1992 there were problems with potentially damaging mining projects avoiding a comprehensive study if they fell below the production thresholds for mining projects, but they would not avoid any environmental assessment at all, and indeed, could be bumped up to a panel review if there were significant concerns. The CEAA 2012 Project List replicates the CSL thresholds, which are no longer appropriate. A project that triggered CEAA 1992 but was below the CSL threshold would at least be subject to an environmental screening; under CEAA 2012 any project not captured on the Project List Regulations is not even considered for an environmental assessment. The proposed Project List exacerbates the problem by making the thresholds even more permissive, allowing projects with potentially serious negative impacts to completely avoid assessment.

In our view the use of thresholds for new mines should be eliminated. All new commercial scale metal and industrial mining operations, including diamond mines, should be required to submit a project description to CEAA. Our rationale for this recommendation is outlined below.

Considerations

1. Distinguishing different types of mines with different thresholds – especial metal and gold mines – is especially problematic with polymetallic mines that may be hard to define as one type of mine or the other. This came to be an issue with the environmental assessment process for the Tulsequah Chief mine that was below the Comprehensive Study List threshold for a metal mine but above it for a gold mine, and despite being a poly-metal mine with significant gold values it was not evaluated as a Comprehensive Study but only underwent a screening under CEAA 1992. Under the current CEAA 2012 regulations this project would have received no federal review whatsoever despite significant potential impacts on various areas of federal responsibility, notably fish and fish habitat and the rights and title of Indigenous peoples.

2. Thresholds based on processing capacity do not take into consideration the total amount of material processed over the life of the project, or the risks posed by the waste generated. Depending on the technology used, a small mine operating for a long period could produce significantly more waste than a large, short-lived mine. Depending on the nature of the site, the ore, and processing and waste storage technology, wastes can vary greatly in their toxicity and potential risks to the environment and human health.

3. Mines that fall under the current thresholds may well have the potential for significant negative effects. Proposed mines that would fall under the threshold could be small open pits but would mostly

[3] Comprehensive Study List Regulations, SOR-94-638. https://laws-lois.justice.gc.ca/PDF/SOR-94-638.pdf

be underground mines, so their physical footprint would be smaller. Even so they would still be required to manage hundreds of thousands if not millions of tonnes of mine wastes, millions of litres of reagents, mine water, and process water, and may still require extensive infrastructure to support the operation. The potential impact of smaller-scale mining on fish is clearly demonstrated by the history of the Mt. Washington mine on Vancouver Island. This was a small open pit that only operated for three years in the 1960s and would have come in under the 3,000 tonnes per day threshold in the existing regulations. Despite its short life span and small size, the amount of acid mine drainage generated was enough to wipe out resident and anadromous trout and salmon populations. The clean-up of the site has improved water quality and some of the fish are returning, but only after significant resources have been spent on clean up. The Yellow Giant gold mine on Banks Island in Gitxaala territory near Prince Rupert, British Columbia, is another example: a small mine processing about 100 tonnes per day, it did not have to undergo an environmental assessment, but it was shut down over environmental violations (including to fish habitat) in 2015, after barely a year of operation. The operator went bankrupt, leaving the province and the Gitxaala Nation to look after the mess.

4. Mines and their surrounding infrastructure have the potential to significantly affect Indigenous rights and title in a number of ways, from alienating areas of traditional territory from current use as well as potential land claims, to impacts on resources such as fish and game, to disturbance of important cultural areas. Such impacts do not stop at any threshold of mining activity.

5. Thresholds may be "gamed" by proponents to avoid an environmental assessment, despite plans to operate above the threshold. We have seen examples of project that have incrementally increased the size and scale of operation, for example, Quebec Lithium's application for a mine just below the existing 3,000 tonnes per day threshold (proposed to be increased to 5,000 tonnes per day for no apparent reason). Little would stop a firm from making such an application and then increasing its extraction rate at a later time. The mine could avoid an environmental assessment so long as any individual incremental increase is less than 50% of production.

6. Uranium mines and mills must be included with no exceptions. No rationale has been presented for setting a production threshold of 2500 tonnes per day where the CEAA 2012 project list,[4] like the CSL, has no threshold. The additional condition, that only uranium mines and mills that are not within the licensed boundaries of an existing uranium mine or mill are to undergo assessment, is spurious and injurious to the public interest, as it allows major facilities to be constructed, operated, expanded, and even decommissioned without ever being subject to assessment, in an area of clear federal jurisdiction. This condition has never had any justification or rationale.

7. In situ recovery (in situ leach) mining projects must be included. The practice of injecting solvents into rock formations in order to extract uranium and other metals is extremely risky to deep and shallow aquifers and surface water quality alike, and the management of contaminated water can be very tricky.

8. Offshore (seabed) mining must be specifically included, wherever it is proposed to take place in Canada's offshore jurisdiction. The impacts of such activity on poorly understood ecosystems are equally poorly understood, and could be extremely serious.

9. Smelters must be included, based on impacts to air and water quality (and fish habitat), and on greenhouse gas emissions, given their energy consumption.

[4] Regulations Designating Physical Activities, SOR/2012-147. http://www.gazette.gc.ca/rp-pr/p2/2012/2012-07-18/html/sor-dors147-eng.html

At the very least, the proposed thresholds should be lower than the current CEAA 2012 thresholds, not higher, in order to reduce the number of projects with significant and potentially very serious environmental and sustainability impacts that will undergo no federal impact assessment at all – and may or may not even be subject to provincial assessments of varying and mostly deeply inadequate qualities. (Ontario, for example, does not require assessment of privately-owned industrial projects.)

For comparison, British Columbia requires metal and mineral mines over 75,000 tonnes of ore *per annum* production capacity to undergo environmental assessment (that's about 205 tonnes per day).[5] Quebec requires all uranium and rare earth mines to undergo environmental assessment, metal mines if their production capacity is 2000 tonnes per day or greater, and all other mines (graphite, phosphate, potash etc.) if their production capacity is 500 tonnes per day or greater.[6] Quebec also requires assessment of any mining project in or within 1000 metres of a planned urbanisation or an Indian reserve (sic). The original CEAA CSL included metal mines, other than gold mines, with an ore production capacity of 3000 tonnes per day or more, and gold mines of 600 tonnes per day or more. These thresholds are replicated in the CEAA 2012 project list, but the discussion paper proposes raising them to 5000 tonnes per day for metal mines other than gold or rare earth element mines, and to 2500 tonnes per for day gold or rare earth element mines. Notably, no justification or analysis is provided for the proposed increase, although based on existing and currently proposed mining projects, the change would probably allow several large-scale mining projects, with significant environmental effects, to escape federal impact assessment annually.

Conclusion

Environmental assessments should make mining projects better from a technical and environmental protection perspective, but they should also provide a participatory public forum to allow people to assure themselves that the highest standards are being applied and that community concerns are being appropriately and adequately addressed, especially if the rights and title of Indigenous peoples may be affected. In addition to assisting in meeting other legal obligations, this helps provide the project with a social licence to operate. Allowing mines to escape this scrutiny based on an arbitrary production threshold does no favours to the public, the environment, or the proponent. If there is some reason that we have been unable to discern that requires a threshold to be set, it should be set based on reasonably anticipated environmental and sustainability impacts.

2. Proposed Information Requirements and Time Management Regulations

These comments refer to the *Discussion Paper on Information Requirements and Time Management Regulations* for the proposed *Impact Assessment Act* (Part 1 of Bill C-69) published on May 1, 2019.

In general, we observe that the discussion paper does not emphasise deliberative public engagement processes; regulations should not prescribe measures or methodologies that may not be applicable or appropriate in all cases, but should make reference to options that include and emphasise deliberative and participatory processes that would, in turn, be described in policy and guidance. The regulations can and should only describe the essential elements required to fulfil the objectives of the legislation, but care needs to be taken to describe those elements in a way that refers to those deliberative and participatory methodologies, for example, as tools that are available and should be used wherever it is possible and appropriate to do so.

[5] Reviewable Projects Regulation, B.C. Reg. 370/2002. http://www.bclaws.ca/civix/document/id/complete/statreg/370_2002
[6] Regulation respecting the environmental impact assessment and review of certain projects, Q-2, r. 23.1. http://legisquebec.gouv.qc.ca/en/showDoc/cr/Q-2,%20r.%2023.1

Project description

The proposed project description template is extremely problematic, both in its content and in the fact that there is no longer any clear distinction between the initial project description and the detailed project description, as there had been in the initial consultation paper of 2018.[7] The templates provided in that consultation paper of 2018 are far preferable to the current version. They include crucial elements such as alternatives to the designated project and alternative means of carrying it out (in the detailed project description), while the revised single project description not only omits this, but adds gratuitous and superfluous elements such as including "the potential benefits of the project" as part of the purpose of the project.

The elimination of a separate template for the initial project description is extremely problematic, and as mentioned earlier, undermine the principles of early engagement and the effort to make the early planning phase of the assessment a useful and meaningful opportunity for public and Indigenous engagement, with the potential to identify contentious issues before they become too difficult to resolve – and to identify non-issues before a lot of effort is expended assessing them. Pressure on proponents to provide more detailed information before the early planning phase begins means that it is no longer early planning, as proponents will be doing more preparation and more work to provide that information. Proponents will also have more incentive to identify and start working with willing partners in the host community – creating precisely the conditions for potential polarisation and marginalisation that early engagement in the official assessment process, under government supervision, is meant to prevent.

Using a single template for project description goes against the principle of early notification, including as it does a lot of information that proponents will have to work to provide. This could be avoided if the template were to clearly require only basic information at the outset, as the originally proposed consultation paper proposed, and specify what additional information needs to be included under each heading at the end of the early planning phase. If the intent of the proposed single template was to provide a mechanism to include additional information as it becomes available, then it needs to be structured accordingly. It also needs to include headings like "alternatives to" and "alternative means" that are not necessarily appropriate for the initial project description, but are critical to the detailed project description.

Nonetheless, this seems to be an unnecessary complication, as the original detailed project description template can easily be used as a framework for information to be added as it becomes available, leading to a finalised detailed project description at the end of the early planning phase. In any event, proponents should be encouraged to add whatever other information they have available to the initial project description, but there is no obvious reason to make this a regulatory requirement.

Conclusion

The proposed unitary project description needs to be completely reworked if the intent and principles of the early planning phase are to be maintained. It would make more sense to revert to the "book-end" approach of the initial consultation paper, with separate 'initial' and 'detailed' project descriptions. In either case, key components like "alternatives to" and "alternative means" must be included in the final project description in order to allow for their consideration in the assessment itself.

[7] Consultation Paper on Information Requirements and Time Management Regulations. https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/consultation-paper.html