Submission to the Standing Committee on Transport, Infrastructure, and Communities on its Study of the *Navigation Protection Act*

MiningWatch Canada

December 7, 2016

Introduction

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. It is supported by twenty-seven Canadian environmental, social justice, Indigenous, and labour organisations.

Navigation and the Environment

Our submission focuses on the critical relationship between the protection of navigable waterways and protection of the environment, and specifically through the environmental assessment of projects and activities that may harm those waterways. As pointed out by Ecojustice in its 2012 *Legal Backgrounder*,[1] "The interrelationship between navigation and the environment is such that the protection of the former consistently promotes the health of the latter," observing that the *Navigable Waters Protection Act* (NWPA) "has consistently served as a federal tool to achieve environmental protection" and that the Supreme Court of Canada, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, affirmed the constitutionality of this application of the NWPA. A fundamental aspect of the NWPA's role in protecting navigable waterways – not just navigation – was as a "trigger" for environmental assessment.

Environmental assessment (EA) is generally acknowledged as being properly construed as a planning tool, though all too often it is relegated to simply mitigating the environmental impacts of industrial projects and activities; it is this planning aspect that relates very closely to the protection of navigation and navigable waters. Essentially, for the environmental assessment process to work properly, it needs concrete links to federal authority over navigation and navigable waters. The exercise of federal power in

[1] Ecojustice. *Legal backgrounder: Bill C-45 and the Navigable Waters Protection Act (RSC 1985, C N-22).* November, 2012. https://www.ecojustice.ca/wp-content/uploads/2015/03/NWPA_legal_backgrounder_November-20-2012.pdf

these areas is closely connected and interdependent, as the government clearly understood when it put initiated the reviews of environmental assessment, the National Energy Board, the *Fisheries Ac*t, and the *Navigation Protection Act* as a package deal. "Restoring lost protection" to navigable waters is an important objective in its own right, of course, but it is also important as "trigger" for environmental assessment of projects that may affect those waterways as well as an important factor in determining "scope" – what should be included in the assessment.

While mines often do undergo environmental assessments, many do not. For example, of 91 Ontario mining facilities we reviewed in 2014,[2] less than a third had undergone a federal environmental assessment (including less than one tenth undergoing a joint federal-provincial assessment process).

The existing federal process cannot be relied upon to review the full suite of environmental or social issues associated with a mining project, especially since the *Canadian Environmental Assessment Act* was amended in 2010 to allow the Minister of Environment to limit an assessment to one or more components of a project,[3] and in 2012 to narrow the scope of review to areas of narrowly defined federal jurisdiction. The current federal process is also limited in application to mine of certain types and of a certain size – excluding many smaller gold mines and industrial mineral mines.

Mines also often include ancillary facilities – roads, airstrips, electrical transmission lines – that need to be included in assessment if it is to meaningfully address the project's effect on local and regional ecosystems and sustainability, including cumulative impacts. Prior to the 2009 and 2012 amendments, any action by the government to permit such activities under the pre-2012 *Navigable Waters Protection Act* triggered an environmental screening, which could be "bumped up" to a full review – comprehensive study or panel review – if public interest, or the project's size, complexity, and potential to cause significant adverse environmental effects, warranted. It is therefore quite possible under the present set-up that those assessments will omit key aspects of the project, resulting in potentially significant impacts going un-assessed and even completely undocumented.

Registry, Screening, and Assessment

Perhaps the most shocking result of the recent changes is the loss of information. Projects and activities that do not require a permit under the *Navigation Protection Act* are simply not recorded by federal authorities. As a result, there is no way to assess, monitor, or investigate their impacts, even retroactively. It would be far better to at least put all such projects and activities on a public registry, so that local people or authorities could verify their details and anyone interested in following up on their impacts – on navigation or on the environment – could do so: locals, academics, government agencies, even non-governmental organisations like ours. Regulation for its own sake makes no sense, so there needs to be a clear distinction of what types and sizes of projects and activities require environmental screening, or a

[2] MiningWatch Canada, *The Big Hole: Environmental Assessment and Mining in Ontario*. Report prepared by MiningWatch Canada for the Canary Research Institute, December, 2014. http://miningwatch.ca/sites/default/files/the_big_hole_report.pdf accessed Dec. 6, 2016.

[3] A 2010 Supreme Court of Canada decision, *MiningWatch Canada v. Canada (Fisheries and Oceans)*, regarding the assessment of the Red Chris Mine, determined that responsible authorities could not split a project into components and "down scope" it beyond the scope of the project as proposed by the proponent. More generally, it meant that an assessment of a project had to consider the whole project as proposed, not just a component that required federal regulatory approval.

full environmental full assessment. In other words, a ditching project or culvert placement would be registered but probably not require any further environmental review, while even a small dam would clearly require at least a screening, and a stream diversion associated with a mining project would be assessed as part of that project. Projects and activities with potentially significant environmental or navigational impacts that would otherwise be subject to environmental screening could also be exempted from screening if they met established criteria for mitigation, for example, as a "class screening" for routine permitting. We are making specific recommendations in this regard to the Expert Panel Reviewing Environmental Assessment Processes, and we would urge this Committee to also refer to the work of that Panel in making its own recommendations.

Conclusion

We urge this Committee to recommend that the *Navigation Protection Act* be amended to turn it back into the *Navigable Waters Protection Act*, with the full scope of application of that Act, but with clear direction on the appropriate level of scrutiny for projects and activities of different types, magnitudes, and durations. As per our recommendations to the Expert Panel Reviewing Environmental Assessment Processes, small, routine projects and activities should simply be entered in a public registry; larger ones with potentially significant environmental or navigational impacts should be subject to an environmental screening or class screening; and projects and activities that are likely to have significant impacts would be placed on a mandatory assessment list and automatically be subject to a full environmental assessment.

Thank you for the opportunity to share our views on this important matter.

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