

ESSENTIAL CONSIDERATIONS FOR NEW LEGISLATION ON FEDERAL ENVIRONMENTAL ASSESSMENT IN CANADA

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Executive Summary:

After our participation as commenters in the National Energy Board's Hearings of the Trans Mountain Pipeline Expansion Project, as a collective our group developed a vision of the basic criteria that required by a process of Environmental Assessment (EA) to be fair and unbiased.

Our submission deals with nine aspects that we consider essential in an EA process, and we would like to share our vision. Transparency, fairness and accountability are essential ingredients to ensure the credibility of an EA process. Additionally the process needs: to be firmly rooted in science; must consider the project's impact on human health and well-being, and on climate change and Canada's ability to meet its greenhouse gas emission international commitments; must be a process with environmental sustainability as its main goal; must evaluate the combined effect of other projects at a regional level; must manage information transparently and keep it available for other EAs and the public; must be collaborative with and respectful of First Nations rights, traditions and beliefs; and must impose on the project proponent, as an approval condition, a legislated financial requirement for the life of the project in order to protect the public

Our vision is that the goal for an EA is to ascertain whether a proposal merits approval by the pertinent authorities based solely on the proposal's level of impact on the environment. The panel conducting the EA must make no judgment on other aspects of the proposal such as level of employment, impact on the economy, etc., nor make comparison between the environmental merits or impacts and the proposal's merits on other aspects.

SUBMISSION

- **Transparency, fairness and accountability of the process.**
 - ◆ **Transparency and fairness** require a review panel where the members are independent of the project's proponent. Members of the panel should have no direct ties to the project proponent for a given period of time before the project's EA, nor have worked for the sector of the proponent in a capacity as managers, executives, or lobbyists. Thus, for example, if the proposed project is an independent run-of-the-river power hydro generating plant, no member of the review panel should have worked for the hydro sector for 5 years immediately before the project's Environmental Assessment (EA).
 - ◆ **Fairness requires** that the project proponent has the burden of proof for their assertions about the project's impact on the environment. The proponent has the obligation to answer questions from intervenors in the process, and provide clarification. Intervenors have the right to cross-examine the proponent.
 - ◆ **Fairness is ensured** when at the onset of the process, the objective of the EA is stated as "to determine whether the project can proceed as stated by the proponent, or whether it must be modified to include alternative scenarios, from a range of alternatives, including the "no" alternative." This will indicate to all participants in the process that the go ahead of projects must be established based on the evidence presented during the process, and that if the proponent is unable to establish that the project will not affect negatively the environment, or will not increase the risk of environmental degradation, the project will not be approved.
 - ◆ **Fairness is severely compromised** when proponents make monetary offers to communities, or local Governments, affected by their proposal in advance of completion of the EA, and conditional to EA approval. This is essentially a bribe the proponent offers communities in an attempt to sway them to support the project. The new legislation should state clearly that proponents may not negotiate with, or offer compensation to communities before completion of the EA.
 - ◆ **Accountability of the process** can only be ensured when the rules of the process are known to all participants and they are stated in clear and unambiguous language that. In addition to the independent and impartial character of the body conducting the EA, legislation must guarantee a meaningful right to appeal by the public through an impartial and independent

body. Furthermore, after approval of the project, legislation must establish mechanisms for assurance of compliance with the terms of approval, and with powers to act and enforce corrections in cases of non-compliance, including fines, or revocation of the project approval until the non-compliance issues are corrected.

- **A process based on science.**

- ◆ **The environment** is a complex and dynamic system, and understanding thoroughly its nature and of the effects of the proposed project on its integrity, one must apply the rigour of science. Therefore all evidence presented at the EA must be backed up by science, and duly documented following accepted standards of bibliographical citation . The evidence presented by the proponent should be examined and, if needed, must be cross-examined.

- **Impacts on risk to human health and well-being.**

- ◆ **No proposal** that in the EA process is found to increase the risk to human health or well-being will be approved. Projects that through direct emission or discharge, or by fostering undesirable changes in ecosystem health contribute to the accumulation of toxins or toxic materials in water bodies, air and soils, that promote changes in the quantity and availability of water, or that affect the quality or quantity of food produced have ultimate effects on human health and well-being. New legislation will establish a list of substances in air, water and foods, and project-induced processes that are unacceptable.

- **Evaluation of the project's impact on climate change.**

- ◆ **The EA will determine** the contribution of the project to emission of greenhouse gases and their effect on the ability to maintain Canada's commitments and targets. Here the question is whether during its duration the project will help or hinder Canada to meet its obligations and goals of greenhouse gas emissions. Assessment must be conducted in a framework of sustainability and that will be evaluated against more rigorous targets than those agreed to by Canada in Paris¹. The evaluation must consider the emissions from cradle to grave. That is; from construction, operation, decommissioning at the end of useful life of the project, and restoration of the site or sites affected by the project.

- **A process with sustainability of the environment as core objective.**

1 United Nations Climate Change Conference, Paris, France, 30 November to 12 December 2015

- ◆ **Our concept of environmental sustainability**, follows the proposition of Daly, 1990², who proposed that environmental sustainability is achieved when:
 - **For renewable resources**, their rate of harvest or use should not exceed their rate of regeneration,
 - **For waste generation**, their rate of generation should not exceed the assimilative capacity of the environment, and
 - **For nonrenewable resources**, their rate of depletion is matched by a comparable development of renewable substitutes for that resource.
- ◆ **The EA must be** about enhancing sustainability and ensure a fair distribution of benefits and risks. It fundamentally asks whether proposals represent the best options for achieving the goals of net sustainability outcomes. Ultimately, the EA must weigh the proposal to other reasonable alternatives in terms of net contribution to social and economic well-being without imposing adverse environmental effects.
- ◆ **The new legislation** will make sure after EA approval follow-up and monitoring conditions are attached to approval conditions, establishing that these conditions and mitigation measures are legally binding for the life of the project, to ensure continued environmental sustainability of the project.
- **Assessment of the cumulative effects of the proposal at regional level.**
 - ◆ **The EA must recognize** that the environmental impact of the proposal is not isolated, but its environmental impact is cumulative and interactive with other projects and the level of regional development. Often these interactions are non-linear; i.e. the combined impact of the proposal and that of other development in the region is greater than the impact of each project on its own. Assessment of cumulative effects must focus at the ecosystem level and look backwards to historic evidence to determine trends and trajectories, looks at the present level of development to determine present day stressors, and projects to the future to find likely directions and adjust future scenarios. This forward-looking assessment of cumulative effects strives to focus on achieving a balance between enhancing sustainability outcomes and societal well-being.
 - ◆ **Assessment of cumulative effects** is particularly important in the EA of complex proposals consisting of a number of separate, but interdependent, complementary and interacting phases, and a rush of similar proposals for a

2 Daly, H. E. 1990. Toward some operational principles of sustainable development. *Ecological Economics* 2:1–6. As quoted by "Finding and Resolving the Root Causes of the Sustainability Problem" available from <http://www.thwink.org/sustain/glossary/EnvironmentalSustainability.htm>

particular region or watershed submitted in a short time period. These proposals shall be considered as a single project, even if the various phases or proposals are proposed by different proponents. New legislation should establish clear and precise procedures and criteria to guide these types of projects.

- **Transparent and accessible information.**

- ◆ **The EA process starts** with identification and collection of the information needed to create the basis for making decisions about the project's impact at the various geographic levels it embraces. Information collected for this purpose should be collated and made available to all parties participating in the process. These data, including the data collected before the baseline assessment should be made available in a public repository so that they may be used by others for current and future evaluation of proposals.

- **Collaborative assessment with First Nations.**

- ◆ **In the conduction of the EA**, the Federal Government complies with the United Nations Declaration on the Rights of Indigenous peoples, works on a nation-to-nation basis, being respectful of the First Nation's right to free, prior and informed consent. The recommendations of the Truth and Reconciliation Commission, flexibility to adapt to various circumstances and nations, and respect of traditions and beliefs are a guiding principles for working together in a constructive and fruitful manner.
- ◆ **In British Columbia** and other regions where First Nation have not signed treaties with the Crown, "Crown Lands" are in fact Unceded Territories. In these areas the Supreme Court of Canada Decision on the Tsilhqot'in Nation v. British Columbia³ shall be the guiding principle for collaborative work with First Nations.
- ◆ **Action on these two points** can be assured by funding an independent EA conducted by the affected First Nations. This independent First Nations' EA would follow a structure given by the participant First Nations according to their traditions and beliefs.

- **Fiscal responsibilities of the proponent and/or project operator.**

- ◆ **Commonly, enterprises** operating developments or projects that have the potential to damage the environment have relied on taxpayers paying for the cost of environmental cleanups, restoration and remediation. Furthermore, on their financial planning seldom is there is consideration for project

3 2014 SCC 44

amortization so that at the end of its useful life the project is decommissioned in an environmentally safe fashion, instead of leaving the installations as a liability for taxpayers.

- ◆ **As a condition for project approval**, a new environmental legislation, will require proponents to have a certified insurance policy for an amount such that it covers, firstly, the costs of cleanups, restoration, or remediation required when acts of omission or accidents result in environmental degradation that decrease the Natural Capital and lowers the quality of Ecological Goods and Services. Secondly, it covers the costs of liability and damage to public and private property, as well as the cost of environmentally safe and adequate decommission and restoration at the end of useful life of the project.
- ◆ **Legislation should also enact** procedures and provide for the overseeing capacity and mechanisms to enforce these obligations as described earlier under the “Accountability of the process” paragraph.