

Environmental Assessment and Water Protection

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Submission and presentation to CEAA panel, Edmonton September 26, 2016

This presentation advocates better assessment and protection of water through Environmental Assessment (EA) processes by asking the expert panel to recommend reinstating and improving water protections that were stripped from legislation in 2012 by the Harper government. This is part of the Council of Canadians campaign "Every Lake, Every River" with the goal of restoring protection to the 99% of waterways in Canada that lost protection in 2012.

Current Problems: Watered-Down Assessments

The Harper budget bills of 2012 made changes to the *Canadian Environmental Assessment Act* (CEAA) that resulted in the cancellation of nearly 3,000 environmental assessments. The scope of environmental assessments was also drastically narrowed. Ecojustice notes that under the CEAA 2012, projects that go through comprehensive environmental studies – the second most rigorous of the three processes – no longer need to include a range of information in their project descriptions including:

- A description on the impact on navigable waters or any unique or special resources not already identified.
- A description of the components of the environment that are likely to be affected by the project and a summary of potential environmental effects and information relating to the terrain, water bodies, air, and vegetation that would give federal authorities a more accurate picture of the environment that may be impacted by the activity.
- A description of the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.

Current Problems: Overlooked Assessments

Previous to 2012, if the project would substantially interfere with navigable waters (as per the Navigable Waters Protection Act), it automatically triggered an environmental assessment under the *Canadian Environmental Assessment Act*. This is no longer the case, as the definition of "navigable waters" has been drastically restricted under the current Navigation Protection Act to just 97 lakes, 62 rivers, and 3 oceans. Changes made to NEB Act and Canada Oil and Gas Operations Act have also caused assessments to be overlooked: the change defines "project" as not including pipelines or transmission lines, and so EAs are no longer triggered by these kinds of projects. Though these changes were made through other Acts, improvements to the CEAA could help account for this oversight.

Our Asks for a renewed CEAA

- Strengthen Environmental Assessments by reinstating the requirement for environmental assessments to include the above information on relevant waterways and impacts on waters
- Respect and protect more waterways by reinstating the definition of "navigable waters" to its previous definition (through the NWPA) that affords protection and oversight to every lake and every river in Canada.
- Reduce oversight on impacts to water by reinstating a trigger for Environmental Assessment if a project would substantially interfere with water, including pipeline and transmission line projects.

The CEAA Panel Review Process

The panel has requested that presentations and workshops centre around 7 themes:

1. Environmental Assessment in Context
2. Overarching Indigenous Considerations
3. Planning Environmental Assessment
4. Conduct of Environmental Assessment
5. Decision and Follow Up
6. Public Involvement
7. Coordination

We will focus on the first 3 themes, as they are most relevant to our asks about environmental assessment as it pertains to water protection.

1. Environmental Assessment in Context

- Q1 - To what extent do current federal environmental assessment (EA) processes enable development in Canada that considers the environment, social matters and the economy?
 - EA helps us to protect invaluable natural resources such as water. Society and economy depend on clean water, and other natural environmental resources, to function. Right now current EA process does not do a good job of assessing impact to, and therefore protecting, natural bodies of water. These protections were taken away to allow faster development of industrial projects - this is a mistake, as now we do not have a full picture of potential impacts going into a project, and cannot make an informed decision about risks to important resources such as water.
 - Current EA process also doesn't take into consideration how pollution (whether operating pollution, or from an accident) from industrial projects can impact waterways which people rely on for local economies such as transportation, fishing, local tourism, recreation. Nor does it consider the impacts to people's drinking water.
- Q2 - What outcomes do you want federal environmental assessment processes to achieve in the future?
 - One of West Coast Environmental Laws' 12 pillars to a visionary and new EA process is: Consideration of the best option from among a range of alternatives, whereby assessments consider alternative scenarios, including the "no" alternative. The "no" alternative is key. In order for people to have faith in the EA system, need to see that rejecting a plan is a legitimate option.
- Q3 - How can federal environmental assessments support investor certainty, community and environmental wellbeing, the use of best available technology, certainty with respect to the protection of Aboriginal and treaty rights and timely decision making?
 - Clear thresholds by which a project will be assessed and rejected.
 - Clear translations of the right to water into legislation and policy. Clear translations of UNDRIP and treaty rights into legislation and policy (Free Prior and Informed Consent, for example).
- Q4 - How should federal environmental assessment processes address the Government of Canada's international and national environmental and social commitments, such as sustainable economic growth and addressing climate change?

- The federal government needs to implement strict safeguards for waterways within the framework of the United Nations-recognized human right to water. In the report *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*, Council of Canadians National Chairperson Maude Barlow outlines the three obligations the recognition of a human right to water imposes on governments: the obligations to respect, protect, and fulfill. This includes government's obligation to prevent third parties from interfering with the enjoyment of the human right. For example, a government is required to protect a community from pollution by corporations or governments.
- Forestry, fishing, mining, quarrying and oil and gas only make up 2% of the total number of jobs. If we look at the numbers for oil and gas extraction and support activities for mining and oil and gas extraction (226,020 jobs) that only makes up 1% of the jobs in Canada. The industries that produce the most jobs are trade (15%), health care and social assistance (12%), manufacturing (10%), professional, scientific and technical services (8%), construction (7%) and education services (7%). Sustainable economic growth means investing in green jobs - EAs must reflect a hard line on industries that perpetuate the causes of climate change. This can look like a cumulative impact assessment that considers climate change (and subsequent impacts on resources such as water, which are endangered by climate change - glaciers reducing river flow, and droughts, for example).

2. Overarching Indigenous Considerations

Some Context

- In the Terms of Reference for this panel, it says the Government of Canada fully supports the principles of the United Nations Declaration on the Rights of Indigenous Peoples, with the goal of renewing its relationship with Indigenous people in Canada and moving forward toward reconciliation
- The Harper government's 2012 budget bills fanned the flames of discontent amongst Indigenous communities. The federal government not only washed its hands of protecting lakes and rivers, it also ignored the constitutional duty to consult with First Nations. That fall, four Saskatchewan women started Idle No More, a movement that grew over the winter of 2013 and sparked a massive wave of rallies and actions across the country
- In January 2015, the Mikisew Cree First Nation won its legal challenge against Harper's C-38 and C-45, which removed federal protection for most of the waterways in the traditional territory of the Mikisew Cree in northern Alberta. Federal Court Justice Roger Hughes ruled that the Harper government should have consulted with First Nations before introducing the omnibus bills C-38 and C-45 two years ago.
- In order to implement the UNDRIP, Consult with Indigenous communities on a nation-to-nation basis and incorporate the obligation to obtain free, prior and consent into the CEAA so that Indigenous treaty and water rights are respected.
- Current Example: Energy East - Pipelines like Energy East run through many Indigenous communities and threaten their access to clean water. *Energy East: A Risk to Our Drinking Water* also warns about the impacts a spill from the Energy East pipeline would have on Indigenous peoples. The report states, "Many of the waterways along the Energy East route examined in this paper are on First Nations' treaty, traditional and unceded land. Waterways continue to play a critical role in subsistence cultures and beyond. These waterways and land are subject to unique rights enshrined under the Canadian Charter of Rights and Freedoms, Treaty Rights and the UN

Declaration on the Rights of Indigenous Peoples that must be respected by TransCanada and the federal government. In its pre-application to the National Energy Board (NEB), TransCanada presents an initial list of 155 Aboriginal communities that may be affected by this project." - To abide by UNDRIP and FPIC, each of these communities must give consent.

- Q1 - How can federal environmental assessment processes better reflect and incorporate the multiple ways in which Indigenous Peoples may interact with federal environmental assessment, including as potentially affected rights holders, proponents of development, self-governing regulators, and partners?
 - Perhaps a comprehensive Social Impact Assessment defining these roles (as well as others, such as "opponents of development") would be in order.
- Q2 - How is the need to address potential impacts to potential and established Aboriginal and treaty rights best incorporated into the federal environmental assessment process?
 - Assessment points that specifically correspond to treaty rights, such as impact to the ability to hunt and fish and impacts to drinking water.
- Q3 - What is the best way to reflect the principles of United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?
 - It is important to assess Indigenous communities as a whole - often official process only involves chiefs or band councils.
 - Official process may also favour communities that are agreeable to development
 - We must define a legitimate process and measures for obtaining consent, and also define what "free," "prior" and "informed" mean in concrete terms.
 - Consent must be given from people who are affected by a project - if they live or hunt on the land, drink the water, practice ceremony - they must give consent for that land or water. Someone who is not directly connected to that land or water cannot give consent for them (even if it is a chief).
 - "Free" must refer to the fact that there would be no direct repercussions/punishments for not consenting (as well as no "bribes" for consenting). This includes federal funding.
 - "Prior" must refer to a timeframe before approval, and before development of the project has even begun.
 - "Informed" must refer to a comprehensive process that seeks to educate and answer questions.
- Q4 - What role should Indigenous traditional knowledge play in federal environmental assessments and what are some international best practices?
 - It is important to remember that traditional knowledge is not a commodity to be used to further the goals of development. It has value far beyond informing development projects.
 - Best practice might include support for developing traditional knowledge outside the EA framework
 - There could be an assessment point that documents traditional knowledge - this information should be woven into other parts of the assessment, including cumulative impacts for topics such as climate change (eg. observing movement of animals north, water levels, drought, zones for finding berries, weather patterns, social structures and health, history).

- Q5 - How can the practices and procedures associated with federal environmental assessments, as well as the process itself, support the Government of Canada's goal of renewing the nation-to-nation relationship with Indigenous Peoples and moving towards reconciliation?
 - Free, Prior, and Informed Consent - There must be a legitimate option to be free, prior, and informed, and not give consent.
 - UNPDRIP sections relating to water:
 - "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination." Article 29 – 1
 - "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent." Article 29 – 2
 - "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Article 32 – 2

3. Planning Environmental Assessment

- Q1 - Under what circumstances should federal environmental assessment be required?
 - Pipelines and other large projects such as mines and transmission lines must once again be reviewed with their regard to impacts on water (previously was done through a mechanism under the NPA/NWPA) and environmental assessments conducted so that their impacts including potential pollution are assessed.
 - (The Energy East pipeline is an example of a project that is moving forward without scrutiny of how it will impact navigation and waterways. The 4,600-kilometre pipeline would cross and endanger 2,963 identified waterways and countless smaller streams and wetlands along the way. Energy East threatens the drinking water of 5 million people and in many cases would impact navigation such as transportation, fishing, recreation, etc.)
- Q2 - For project environmental assessments, do you think the current scope and factors considered are adequate?
 - Federal authorities need a more accurate picture of the environment that may be impacted by the activity. The scope and factors of Environmental Assessments must once again include:
 - Basic information about waterways: the name, width and depth of any waterway affected by the project and a description of how the waterway is likely to be affected.
 - The impact of a project or development on navigable waters or any unique or special resources (such as heritage sites)
 - The "components of the environment [in general] that are likely to be affected by the project and a summary of potential environmental effects." This includes information relating to the terrain, water bodies, air and vegetation.
- Q3 - Are there other things (effects, factors, etc.) that should be scoped into an environmental assessment?

- Cumulative impacts - especially in relation to climate change factors
- Q4 - Under which circumstances should environmental assessment be undertaken at the regional, strategic or project-level?
- Q5 - Who should contribute to the decision of whether a federal environmental assessment is required?
 - Indigenous communities and local residents should help decide whether a federal assessment should be required.

Summary of Thoughts

Many of the changes we are suggesting were previously done through the Navigable Waters Protection Act (NWPA), or other Acts, however it may be reasonable to expect that we should embed certain triggers directly into the CEAA, such as when a waterway near a proposed project is used for drinking or other activity such as fishing, tourism, or ceremony. That large projects like pipelines should be subjected to thorough environmental assessment seems an obvious change that must be made.

We believe that environmental assessment's primary purpose must be seen as protecting invaluable natural resources such as water, as opposed to simply legitimizing industrial projects. Environmental assessment can help us as a society to think about and understand pressing issues of our time, such as climate change, the health of Indigenous communities, and providing clean water for all. The more information we have, the more able we are to make decisions, generate creative solutions, and respect the rights of all people to lead healthy lives.

A very important factor for the future of environmental assessments is building in the expectation and structure for an assessment to come back with a "no" scenario. If the impacts to certain aspects of the environment are too great, such as risk to drinking water or contribution to climate change on a cumulative scale, then a project must be able to be turned down. Similarly, under the FPIC understanding when an Indigenous community does not give consent for a project then that project cannot go forward.

Environmental assessment is an important part of our societal progress. It is a system of oversight that must not only reduce or mitigate environmental and social harm, but must stand strong in the protection of human rights and the greater good. In many cases it may be the line of defence for fragile ecosystems, for irreplaceable natural processes that we rely on, and for the dignity of people. An environmental assessment is a serious contract that we must honour to the best of our ability. Thank you to the panel for your time spent on improving this process, we look forward to your recommendations.

Relevant Links

Council of Canadians Report: "Restoring Freshwater Protection" (to be released soon)

[WCEL "12 pillars" of a next-generation environmental assessment regime](#)

[Ecojustice Legal Backgrounder on CEAA](#)

[Ecojustice Legal Backgrounder on Bill C-45 and the Navigable Waters Protection Act](#)