

The Expert Panel Report on Federal Environmental Assessment: Discretion, Transparency, and Accountability

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Report Commented On: Expert Panel on the Review of Federal Environmental Assessment Processes, [*Building Common Ground: A New Vision for Impact Assessment in Canada*](#)

Last November, the University of Calgary's [Public Interest Law Clinic](#), on behalf of the [Canadian Parks and Wilderness Society](#) (CPAWS) [Southern Alberta Chapter](#), presented to the Expert Panel responsible for Canada's federal environmental assessment process. The presentation focused exclusively on problems with the federal environmental assessment process in Canada's national parks under the *Canadian Environmental Assessment Act 2012*, [SC 2012 c 19 s 52](#) (CEAA 2012). We described that presentation [here](#), and the full written submission to the Panel including exhibits is available [here](#) (CPAWS Submission). The Expert Panel Report, [*Building Common Ground: A New Vision for Impact Assessment in Canada*](#), was released April 5, 2017. Professor Arlene Kwasniak provided some background and an overview of key aspects of the report [here](#). CPAWS left the Expert Panel with three messages in relation to the current federal environmental assessment process in the national parks: there is (1) too much discretion; (2) not enough transparency; and (3) a complete lack of accountability. In this post, we comment on how the Report addresses each of these points.

As an overall comment, it is disappointing the Expert Panel did not specifically address environmental assessment in the national parks. The Report focuses on sustainability as the measuring stick for impact assessment: "Federal IA [impact assessment] should provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being." (at 2.1.3) While sustainability is a commendable objective generally, this commitment to sustainability and its polycentric consideration of factors is not consistent with the legislated priority of maintaining or restoring ecological integrity in the national parks. The legislated ecological integrity mandate set out in section 8(2) of the *Canada National Parks Act*, [SC 2000 c 32](#) demands an assessment process which skews in favour of environmental protection over economic and other social considerations. Perhaps, however, the Expert Panel was thinking of national parks and the ecological integrity mandate in its recommendation for regional impact assessments. The Report specifically calls for regional impact assessments that address matters such as baseline conditions and thresholds for federal lands with the potential for cumulative effects problems (at 3.5).

Too Much Discretion

CPAWS advocated for a return to a project trigger list for environmental assessments in the national parks, providing the Expert Panel with evidence to demonstrate that giving discretion to Parks Canada to decide when to conduct an environmental assessment has resulted in very few assessments being conducted. As Professor Kwasniak notes in her post, the Expert Panel does recommend the return of a project inclusion list but the list of projects which would attract non-

discretionary mandatory impact assessment is left somewhat uncertain. The Report states as follows (at 3.2.1, footnotes omitted):

A new Project List should be created that would include only projects that are likely to adversely impact matters of federal interest in a way that is consequential for present and future generations. Projects on the new Project List would automatically require a federal project IA. For projects not on the new Project List, two other triggering mechanisms should be provided:

1. Statutory criteria should be established to require an IA of projects that have the potential to impact present and future generations in a way that is consequential (e.g., the project occurs in a sensitive area). These criteria should be clear so that discretion is not required.
2. Provisions should be made for proponents or any person or group to request that a project require a federal project IA.

It may be that statutory criteria are developed to require non-discretionary environmental impact assessments for projects in the national parks, on the basis that such projects have the potential to impact present and future generations in a consequential manner. And while the Expert Panel states these criteria should be drafted clearly so that discretion is not required in the trigger process, this might turn out to be a high bar that excludes from assessment park projects that should be subject to an impact assessment. Moreover, the stated test of a potential for a consequential impact on future generations is so amorphous it is difficult to visualize how criteria can be drafted that completely remove discretion. The ‘all in with exclusion list’ approach used by the 1992 [Canadian Environmental Assessment Act, SC 1992, c 37](#) (see the [Exclusion List Regulations, 2007, SOR/2007-108](#)) was the method CPAWS advocated for, as it provides the most certainty about what kinds of projects may go ahead without an assessment.

A welcome recommendation in the Expert Panel Report is the elimination of what is now the discretionary section 67 process in the CEEA 2012. The upshot of section 67 of the CEEA 2012 is that Parks Canada has full discretion to decide whether to require an environmental assessment for a project in a national park, and many projects which one would expect to be subject to an environmental assessment have been approved without such an assessment. At its presentation to the Expert Panel in November 2016, CPAWS gave evidence demonstrating that between 2013 and 2016, Parks Canada excluded more than 1500 projects from environmental assessments by determining they were unlikely to cause significant adverse environmental effects under section 67. Not once did Parks Canada determine any project would have significant environmental impacts. This message was heard and received by the Expert Panel, which stated in its Report that the section 67 process in CEEA 2012 “is not consistent with the Panel’s vision for IA as it lacks transparency and meaningfulness.” (at 3.2.1)

The CPAWS submission also recommended that responsibility for assessments in the parks be administered by the Canadian Environmental Assessment Agency rather than Parks Canada. As explained more generally by Professor Kwasniak, the substance of this submission was to move away from self-assessment by regulatory authorities for federal projects where the exercise of discretion seems suspect at times, and the Expert Panel does recommend that all federal assessments be conducted by an impact assessment authority who is independent from line regulators such as Parks Canada (at 3.1.1). Similarly, another concern for CPAWS in federal environmental assessment was proponent-led environmental impact studies. The Expert Panel

addressed this point generally by calling for the impact assessment authority to prepare the impact study (at 2.5.3):

IA must rely on unbiased evidence; this is essential to restoring trust. Current practice is to delegate many IA responsibilities to proponents: they collect the data, conduct studies, analyze results and document findings in an Environmental Impact Statement. This practice has led to a clear perception of bias in the results, regardless of whether this is warranted. Canada should look to alternative models for data collection and analysis that exist in other jurisdictions globally. In the United States, for example, Environmental Impact Statements are prepared by the government, supported by consultants who are also retained by the government and funded by the proponent. In Denmark, data are collected by the proponent and provided to the government for analysis and the preparation of an Environmental Impact Statement.

The Expert Panel report also emphasizes the importance of an objective scientific approach for making predictions, and recommends that the impact assessment authority have the power to compel expertise from federal scientists, and to retain external scientists to provide technical expertise as required. (at 2.5.1) In summary, the Expert Panel's recommendations are a positive step towards removing discretion that exists in the current federal process under CEAA 2012.

Not Enough Transparency

The absence of meaningful opportunities to participate in decisions concerning the environmental assessment of proposed projects in the national parks and the absence of any transparency in the decision-making process was the most pressing concern raised by CPAWS to the Panel on the current state of affairs under CEAA 2012. Section 2.4 of the Expert Panel Report addresses public participation in the impact assessment process, and the Panel recommends significant enhancements to public engagement in federal environmental assessment. The Panel refers to a spectrum of engagement created by the [International Association for Public Participation](#) (from Inform on the low end to Empower on the high end) and places current federal assessment on the lower end of participatory involvement. The Panel makes recommendations to move the federal process more towards a system that doesn't simply inform the public but also allows participants to genuinely influence the outcomes of the process (at 2.4.1). These recommendations are premised on an acknowledgment of the legitimizing function of meaningful public participation in the exercise of public power. There is a contested debate over what is a proper level of public engagement in environmental impact assessment, and this dispute will never be fully resolved because at its core is an intractable disagreement over the purpose of an assessment process. Those who view the purpose as facilitating transparency and accountability will advocate for wider and deeper participatory entitlements, while those who view the purpose of assessment as a technocratic assessment of risks, costs and benefits will argue for narrower, more focused participation. There is no balance to be struck here, and policymakers either side with one group or the other. CEAA 2012 reflected a push towards narrow participation and non-transparency, and what we see in the Expert Panel report is a recommendation to reverse the direction implemented in CEAA 2012.

The Expert Panel asserts the importance of public engagement and transparency throughout the assessment process with the following recommendations:

- Remove statutory criteria which purport to limit participatory entitlements to those persons who may be directly affected by a project (at 2.4.1);
- Any person should be able to request that a project require a federal impact assessment (at 3.2.1);
- The impact assessment authority should maintain a public advocate function that facilitates public participation (at 3.1.2);
- Public notice of proposed projects should be issued, public participation should be invited into project planning and the setting of terms of reference for the assessment, and the impact assessment authority should be required to give reasons on decision points in the planning and scoping of a project where there was not consensus (at 3.2.2.1);
- A project committee consisting of representatives from community groups and interested members of the public has a role (alongside a government expert committee) in the development of the project impact statement and the statement would be subject to public comment (at 3.2.2.2);
- For projects where there is not consensus on important issues, the project should be referred to a review panel which conducts a public hearing in order to produce a decision statement on whether the project meets the sustainability test (at 3.2.2.3);
- A participant funding program should be instituted which provides funds commensurate with the real costs of engaging in the assessment process, including monitoring and follow-up (at 2.4.2);
- An accessible and user-friendly registry should be administered, which discloses all material documents and information considered in a project assessment (at 2.4.3).

If implemented, these recommendations would go a long way towards enhancing transparency in the federal assessment process. Much rests on the statutory design of these provisions, and we will observe with interest how this aspect of the Report is implemented by Parliament.

A Complete Lack of Accountability

This third point is really a product of the other two – too much discretion and non-transparency. In relation to the national parks under CEAA 2012, Parks Canada has the complete discretion to decide whether and how to conduct an environmental assessment and has no legal obligation to engage with the public or disclose its decision-making process. It is hard to hold anyone to account if you don't know when decisions are being made and there are no criteria upon which to assess their judgment. Thus the Expert Panel's recommendations on removing discretion and enhancing transparency, if implemented, should go a long ways towards restoring accountability in the impact assessment process.

The Expert Panel does recommend a new line of accountability from the impact assessment decision to the Governor in Council. The decision statement issued by the impact assessment authority or a review panel should be subject to a right of appeal to the Governor in Council (at 3.1.2). The Expert Panel does not delve into the details of this appeal process, but serious questions should be asked on the level of scrutiny that we might reasonably expect Cabinet officials to apply on an appeal and how this statutory appeal would affect the availability of judicial review.

This post may be cited as: Shaun Fluker & Drew Yewchuk “The Expert Panel Report on Federal Environmental Assessment: Discretion, Transparency, and Accountability” (19 April, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/04/Blog_SF_DY_EApanel_parks.pdf

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