



REVITALIZING BC'S ENVIRONMENTAL ASSESSMENT

**Submitted by SkeenaWild Conservation Trust
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PART I. INTRODUCTION

SkeenaWild Conservation Trust (“SkeenaWild”) commends the provincial government for its commitment and process to revitalize BC’s environmental assessment (“EA”) laws. Our experience over the last ten years with the current EA legislation shows serious deficiencies in protecting the environment, providing public trust, advancing reconciliation, and providing certainty to proponents.

The Province’s *Environmental Assessment Revitalization Discussion Paper* (the “Discussion Paper”) contains several recommendations that will help revitalize legislation to meet its stated goals. These recommendations reflect and address many of the issues highlighted by SkeenaWild and concerns raised by indigenous groups and the public. However, several key deficiencies remain. Unless these are addressed, this generational opportunity to reform our EA regime will be lost.

In the parts that follow, SkeenaWild provides its comments on the Discussion Paper.

PART II. ABOUT SKEENAWILD CONSERVATION TRUST

SkeenaWild is a charitable purpose trust whose goal is to make the Skeena River watershed and nearby coastal communities a global model of sustainability. To achieve this, we have worked in northwestern British Columbia since 2007 to conserve and strengthen fish populations, sustain healthy communities, improve decision-making and long-term planning, and support the rights of Indigenous peoples to free, prior and informed consent on development in the region.

The foundation of SkeenaWild’s work is using the best available science in working with local communities and all levels of government to increase the understanding of the impacts of existing and proposed development, as well as inform strategies to mitigate or avoid those impacts. SkeenaWild has been involved in numerous environmental assessments, planning processes, salmon conservations and rebuilding efforts, scientific studies, salmon population assessments, and public education initiatives in the region.

SkeenaWild has participated extensively in EA’s for major industrial projects in Northwest BC over the past 10 years. This experience includes direct engagement in LNG Canada, Aurora LNG, PRGT pipelines, Coastal Gaslink pipeline, Pacific Futures oil refinery & offloading facility, Northern Gateway oil pipeline, marine offloading, and tankers, KSM mine, and Morrison mine proposals.

SkeenaWild was also closely involved in the federal EA of the Pacific NorthWest LNG Project, a project involving the construction of a liquefied natural gas facility and export terminal near Prince Rupert. During the EA process, SkeenaWild challenged the reliance by the Canadian Environmental Assessment Agency on the proponent’s assessment of baseline data on fish, despite the existence of independent, peer-reviewed scientific evidence to the contrary.¹ Moreover, SkeenaWild challenged the Agency’s reliance on the 3D modelling provided by the proponent’s

¹ SkeenaWild Conservation Trust, *Comments on the CEA Agency draft environmental assessment report into the Pacific NorthWest LNG Project* (11 March 2016): <<http://www.ceaa.gc.ca/050/documents/p80032/108704E.pdf>>.

experts without adequate analysis of competing modeling results provided by independent experts from Indigenous and other groups.

These experiences have given SkeenaWild significant insight into the Province's environmental assessment model of regulation, and inform the submissions that SkeenaWild is now offering to this review.

PART III. RECOMMENDATIONS

In this Part, SkeenaWild makes its comments and recommendations on the areas of provincial EA that require attention and reform in order to restore public trust in the EA process and to enhance the rigour of provincial EAs. These comments and recommendations are roughly organized into the four areas of revitalization focuses articulated in the Discussion Paper:

- Focus on Public Confidence
- Focus on Reconciliation, including Alternative Dispute Resolution
- Focus on the Environment and Offering Clear Pathways to Sustainable Project Approvals
- Focus on Process Certainty and Predictability

A. Focus on Public Confidence

1) Move away from proponent-driven, professional reliance model

The current EA regime uses a proponent-driven, professional reliance model for the gathering of scientific and technical information. The Province cannot restore public trust without removing the responsibility of assessing impacts from the proponents. There are far too many examples of industry manipulating the results of impact models, withholding information, and asking experts to re-write reports and soften their language. Professional consulting companies, like any other business, need to make their customers happy or risk losing contracts or being hired back. This system of proponent hired science puts professionals in an awkward position of having to assess impacts in an unbiased manner while also promoting the projects they are assessing.

The Province has initiated a review into the use of professional reliance in the government's resource management decisions.² SkeenaWild was one of among many stakeholders that made submissions to that review.³ The submissions that SkeenaWild made in relation to professional reliance broadly are equally applicable to the provincial EA process. In particular, the Province should review whether professional reliance is an appropriate model for government decision-making in provincial EA and, if so, what safeguards need to be implemented to protect the public interest.

The use of professional reliance in EAs is problematic in terms of not only providing the EAO with the best available science (more on this below), but also restoring public trust in the EA process. Mark Haddock, in his seminal report on professional reliance, discussed nine factors to

² Government of BC, *Professional Reliance in Natural Resources*: <<https://engage.gov.bc.ca/professionalreliance/>>.

³ SkeenaWild Conservation Trust, *The Professional Reliance Model in BC: Lessons Learned and the Path Ahead* (19 January 2018): <<https://engage.gov.bc.ca/app/uploads/sites/272/2018/01/SkeenaWild-Conservation-Trust.pdf>>.

determine whether professional reliance is an appropriate model for government regulation.⁴ We will not discuss them all here, but some of these factors are particularly pertinent based on SkeenaWild's experience.

For example, conflict of interest or the perception of conflict of interest undermines the integrity of the science in EAs and public trust in EA processes, and militates against the use of professional reliance. The EAO relies heavily on the science that is bought and provided by project proponents. The perception of bias in this professional reliance model is compounded by the large imbalance in the ability of proponents versus the interested public in bringing forth evidence before the responsible authority.

Furthermore, where scientific uncertainty renders predictions and assessments difficult, the EAO should be cautious about over-relying on proponent-hired experts. This is particularly true in respect of assessing a project's potential impact on climate change. While climate change as a whole is uncontroversial in mainstream scientific community, addressing uncertainties in predicting how individual projects contribute to climate change is not an easy task. In the PNW case, the inadequacy of the assessment of climate change impacts was one of the key issues that SkeenaWild brought before the Federal Court. We will discuss the assessment of climate change impacts below: see Section C.

In the provision of science to the EA process, provincial EA should move towards a proponent-funded but EAO-led model. The EAO or the ministry with the proper expertise should conduct the investigation and EA, or they (rather than the proponent) should hire the most qualified independent consultants to provide technical reports. Moreover, the EAO should be able to recover the costs of the EA from project proponents. Proponents can, if they feel the need to, hire consultants to provide additional evidence to the EAO. However, the scientific and technical information provided by the proponent should be subject to peer review by government or government-hired experts. This peer review process should follow the same model of academic publication peer review, utilizing academic and industry experts to provide oversight. If this standard of peer review is required for publishing science, it should also be a minimum requirement for ensuring something as important as assessing potentially serious risks from industrial projects. Such a process would show the public that the province is serious about protecting British Columbians health and their environment.

This model of government-led science provides greater assurance to the public that the scientific and technical reports will be created in an impartial manner, rather than being tainted with an aim to help proponents obtain project approval. In the context of the federal review of regulatory processes, the expert panel on federal EA review made a similar finding:

IA [impact assessment] 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

⁴ Mark Haddock, *Professional Reliance and Environmental Regulation in British Columbia*, Prepared for the Environmental Law Centre (February 2015): <http://www.elc.uvic.ca/wordpress/wp-content/uploads/2015/02/Professional-Reliance-and-Environmental-Regulation-in-BC_2015Feb9.pdf> at 31-35.

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.⁵

Industry control and influence over data collection, data analysis, and conclusions of possible impacts of their own activities, through directly hiring experts, is a fundamental flaw in EAs, and in our regulatory system in general. Public trust cannot be restored unless industry control and bias are removed from the current system.

2) Adequate and accessible public registries:

Allowing the public to have adequate and ready access to all the documents in the record before the EAO is key to ensuring and allowing meaningful participation by intervenors, and ultimately to foster public confidence in the EA process. Currently, for every EA, the EAO maintains a public registry of documents; however, these registries are often deficient. The EAO's registries are very difficult to search, are not well organized, and may sometimes be incomplete. These deficiencies hamper the ability of intervenors to meaningfully participate and make submissions to the EAO.

SkeenaWild commends the National Energy Board for the public registries that it maintains. For example, the public registries maintained by the NEB for its EA of the Trans Mountain Expansion Project and for the Joint Review Panel's EA of the Northern Gateway Pipeline Project are much better organized, more easily searchable, and more complete.

All public registries of documents in provincial EA processes should be required to be organized, searchable, and complete.

3) Public Participation and Public Consultation

A key problem with the current EA process is that the public is only consulted after the most important decisions have been made. This lack of consultation on project siting and design leads to conflict and a feeling that the process did not provide meaning engagement. First Nations, the EA Advisory Committee, and the public identified these issues as key issues. We find it encouraging that the proposed EA process includes an early engagement phase to inform project design, location, alternatives and study requirements, and to shape the approach to public engagement. Further, new public engagement opportunities on a projects potential exemption from an EA, information requirements effects assessment and EA conclusions are important additions. These new process steps will improve public confidence in the process.

The current public participation process is usually relegated to Open Houses with one-sided information. Proponent-led Open Houses do not provide adequate and unbiased information, nor a space for public dialogue on key concerns and issues. The BC EAO needs to be responsible for providing unbiased information and a forum for public dialogue. The Discussion Paper fails the

⁵ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017): <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf> > at 46.

public in fixing this problem and provides little detail on how more meaningful public participation and participant funding will be delivered through the new process.

B. Focus on Reconciliation and Alternative Dispute Resolution

1) Commitment to Reconciliation

SkeenaWild commends the Province on their work to include Indigenous groups in a meaningful way in the EA revitalization process. The Discussion Paper reflects a strong commitment to develop a new legal framework that implements the *UN Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), and includes Indigenous-led Environmental Assessments. SkeenaWild fully supports the obligation on the Crown to protect s. 35 rights and to meaningfully implement UNDRIP within the provincial EA process. We believe this will not only be beneficial to Indigenous communities in protecting their rights, but also will help restore public trust and reduce conflict. This alignment will also bring more certainty to industrial proponents, especially when project proposals are properly aligned with Indigenous-led land use plans and planning initiatives. SkeenaWild’s only concern is the lack of a commitment to removing impact assessment from being done under proponent’s direction, and a strengthened commitment to regional and strategic assessments (see more on tiered EA below).

2) Alternative Dispute Resolution

SkeenaWild supports the EA Advisory Committee’s recommendations for government-to-government collaborations agreements for the EA of specific projects.⁶ We also agree with the consensus decision-making process between Indigenous communities and the provincial government that has been put forward. While the Alternative Dispute Resolution (“ADR”) process is an important component of this, it is important that affected Indigenous communities give consent before an EA certificate is issued. The ADR process cannot replace Free Prior & Informed Consent as defined by UNDRIP.

In addition to the government-to-government dispute resolution process, the EA process should have a process for the public to bring serious issues forward, both during the EA process and post certificate. On this front, SkeenaWild recommends that an entity set up at arms-length from the BC EAO similar to the Forest Practices Board.

C. Focus on Environment and Offering Clear Pathways to Sustainable Project Approvals

1) Impact assessments

SkeenaWild is in general agreement that provincial EA should protect the environment and foster sustainability across five pillars: environmental, economic, social, cultural, and health.⁷ Consistent with the move away from a purely environmental focus, the *environmental assessment*

⁶ Discussion paper at 10.

⁷ Discussion paper at 11.

should move to a broader *impact assessment* (“IA”). The federal expert panel on EA reform has also made the same recommendation.⁸

In our submission, the results of the IA should be “based on” (not merely “consider”) the following considerations:

1. The project’s net contribution to sustainability;
2. The project’s implications for BC’s climate change commitments;
3. Cumulative effects;
4. Malfunctions and accidents, including worst-case scenario; and,
5. Impact on Indigenous rights.

In addition, legislation for provincial IA should enshrine the precautionary principle.

For the sake of consistency, we continue to use the term EA in the rest of this submission. However, our submissions on EA equally apply to IA.

i) *Net contribution to sustainability*

Provincial EA should move towards a focus on net positive contribution to sustainability while avoiding significant adverse environmental effects. The focus on simply avoiding significant adverse environmental effects incentivizes project proponents to show that project effects are simply not significant, or can be mitigated below the significance threshold.

Instead, EAs should ask: “does a project provide net positive contribution to sustainability?” The “core characteristics of sustainability-based assessment establish net gains as the basic objective.”⁹ The assessment of a project’s contribution to sustainability requires a set of sustainability-based criteria that integrate social, economic, and ecological interests (often known as the three pillars of sustainability) in order to find mutually-supporting gains in all categories of sustainability.¹⁰

There are two main components to a sustainability assessment:

1. A set of sustainability-based criteria to identify the range of various effects that the project under review is predicted to have; and,
2. A set of trade-off rules to ensure that the project under review will generate net sustainability gain.

⁸ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017): <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>> at 13.

⁹ Robert B. Gibson, *Sustainability-based Assessment Criteria and Associated Frameworks for Evaluation and Decisions: Theory, Practice and Implications for the Mackenzie Gas Project Review* (2006), prepared for the Joint Review Panel for the Mackenzie Gas Project, online: Mackenzie Valley Environmental Impact Review Board <http://www.reviewboard.ca/upload/project_document/EA0809-001_Sustainability-Based_Assessment_Frameworks.pdf> at 20.

¹⁰ Robert B. Gibson, “Beyond the pillars: sustainability assessment as a framework for effective integration of social, economic and ecological considerations in significant decision-making” (2006b) 8:3 *J. Envtl. Assmt. Pol’y & Mgmt.* 259 at 262-267.

This sustainability-based framework has been adopted in various EAs in Canada, such as the Lower Churchill Hydroelectric Generation Project Joint Review Panel¹¹ and the Joint Review Panel for the MacKenzie Gas Project.¹²

For more on the topic of sustainability assessments, see the submissions to the federal EA reform expert panel by Nature Canada¹³ and Robert B. Gibson (one of the leading Canadian scholars on sustainability assessment),¹⁴ and also see reports from the West Coast Environmental Law Federal Environmental Assessment Reform Summit.¹⁵

ii) Implications on BC's climate change commitments

Integrating climate change considerations in project-level environmental assessments, while not new, has continued to face many challenges.¹⁶ Traditional methods of environmental assessment often fail at addressing climate change due to three pertinent characteristics of climate change. First, climate change is a global phenomenon that defy analysis at the project level. Second, climate change is a cumulative effects problem stemming from the accumulation of greenhouse gases (“GHGs”) from multiple sources. Third, climate change is an intergenerational problem because actions that cause climate change today are felt by future generations yet to come. In assessing this project’s potential climate change implications, the Panel must be attentive to and address these challenges.

SkeenaWild submits that an assessment of a project’s climate change impacts should be guided by the following pillars:

- Due to the global, cumulative, and intergenerational nature of climate change, the assessment should focus on the project’s implications on Canada’s and BC’s GHG reduction commitments, both internationally and domestically, and on BC’s timely transition to a carbon neutral economy for both present and future generations.
- The assessment should not only assess the direct and indirect *GHG emissions* associated with the project over its entire lifetime, but also on the project’s potential impact on available

¹¹ Lower Churchill Hydroelectric Generation Project Joint Review Panel, Report of the Joint Review Panel (August 2011), online: Canadian Environmental Assessment Agency <<http://www.ceaa.gc.ca/050/documents/53120/53120E.pdf>>

¹² Joint Review Panel for the MacKenzie Gas Project, Foundation for a Sustainable Northern Future: Report of the Joint Review Panel for the Mackenzie Gas Project, Volume 1 (December 2009), online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/155701CE-docs/Mackenzie_Gas_Panel_Report_Voll-eng.pdf>.

¹³ Nature Canada, Submissions to the Expert Panel (31 October 2016), online: <http://eareview-examenee.ca/wp-content/uploads/uploaded_files/nov.1-13h10-nature-canada-submission-for-presentation-.pdf>.

¹⁴ Robert B. Gibson, Submissions to the Expert Panel (9 November 2016), online: <http://eareview-examenee.ca/wp-content/uploads/uploaded_files/nov.9-14h10-robert-b.-gibson-presentation-gibson-...-9nov16.pdf>.

¹⁵ West Coast Environmental Law, Federal Environmental Assessment Reform Summit: Executive Summary (August 2016), online: <http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf>; and West Coast Environmental Law, Federal Environmental Assessment Reform Summit: Proceedings (August 2016), online: <http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf>.

¹⁶ See Meinhard Doelle, “Integrating Climate Change into EA: Thoughts on Federal Law Reform” (2016) online: <https://ssrn.com/abstract=2854522>, at p.1.

carbon sinks. Projects and project alternatives that may lead to carbon sink enhancements should be pursued in the environmental assessment.

- There should be comparative assessment of reasonable alternatives that compares their respective implications for the global need to both reduce GHG emissions and enhance carbon sinks.
- Mitigation measures should be assessed not only for their ability to reduce the significance of potential adverse impacts from GHG emissions, but also on whether they are consistent with Canada's GHG commitments and the transition to a carbon neutral economy. As part of this analysis, carbon offsets should be rigorously scrutinized to ensure that they are legitimate.
- Where possible, a project's contribution to Canada's and BC's climate change commitments and to BC's transition to a carbon neutral economy should be assessed using carbon budget for BC that is consistent with the principles of equity enshrined in the *Paris Agreement*.

SkeenaWild submits that the EA process should require the proponent to provide, at the very least, the following information:

1. An assessment of the project's implications on Canada's and BC's international and domestic commitments to reduce GHG emissions, including the potential for the project to delay or hinder Canada's ability to meet its NDC under the *Paris Agreement*.
2. An assessment of the project's contribution to BC's carbon budget calculated based on BC's equitable share of responsibility to maintain global surface temperature increase below 2°C above pre-industrial levels and pursue efforts to limit the increase below 1.5°C above pre-industrial levels.
3. An assessment of effects that would increase or decrease GHG emissions and/or carbon sink capabilities attributable to the project over its lifetime, including direct, indirect effects, and cumulative effects.
4. An assessment of means to reduce GHG emissions associated with the project and/or mitigate the adverse impacts from such emissions. This assessment should include only legitimate carbon offsets that may be used to mitigate the project's climate change impacts.
5. A follow-up plan that includes monitoring of actual impacts in order to reduce uncertainties in the assessment predictions, and response actions in the event that unacceptable impacts are detected.

iii) Cumulative effects

The results of a proper EA should be based on not only project-related impacts but also the cumulative effects from the project in conjunction with other projects or existing stressors in the region. However, it is often difficult to analyze cumulative effects within the ambit of project-level EAs. We provide further submissions in this regard below.

iv) Worst-case scenario

A proper EA should also analyze malfunctions and accidents that occur in relation to a project. These “malfunctions or accidents” are, by definition, unlikely events but which may carry tremendous consequences. A prime example is the environmental effects from oil spills.

In the Joint Review Panel’s review of the Enbridge Northern Gateway Project, the potential impacts from a marine oil spill was a key issue that emerged early in the hearing, and remained a source of contention throughout. Ultimately, the JRP adopted an approach to this statutory provision urged upon it by Northern Gateway, an approach that was in direct conflict with the one advocated for by Environment Canada, BC Nature, and other parties. According to Northern Gateway:

... the outcome of any assessment of the environmental effects of a major spill ... would arrive at a similar conclusion of multiple adverse and significant effects to the marine biophysical environment and human use. What is important in assessing these adverse and significant effects, is the likelihood or statistical probability that a spill will occur during the life of the Northern Gateway Project.¹⁷

Based on this approach, Northern Gateway never provided the JRP with sufficient information to adequately assess the environmental effects of an oil spill were one to occur. SkeenaWild submits that such an approach deprives the agency conducting the EA of the information necessary to carry out its duties to assess malfunctions and accidents. Accidents such as an oil spill are admittedly unlikely events. If proponents and assessment agencies can skirt the issue by suggesting that an oil spill is unlikely, they would never have to assess the environmental effects from such accidents.

The threat of a marine oil spill is a major concern for many British Columbians. SkeenaWild has a genuine and continuing interest in protecting the Skeena River estuary and salmon habitats in the Pacific coast, which may be severely threatened by oil spills. In order to reclaim public trust and legitimacy in provincial EAs, legislation must clarify the duty that the EAO has in providing a fulsome and adequate assessment of malfunctions or accidents that may occur in connection with projects under review, and not allow proponents to circumvent assessments of such accidents simply by suggesting that they are unlikely to occur.

v) Impact on Indigenous rights

See section on reconciliation above.

2) Precautionary Principle and Adaptive Management

Aside from the five factors for consideration discussed above, a revitalized EA process must include an explicit adaption of the precautionary principle in legislation. Regulatory decisions about resource management, environmental protection and public health inherently involve balancing the precautionary principle and the concept of adaptive management.¹⁸ These concepts can push regulatory decisions in opposite directions. In fact, over reliance on adaptive

¹⁷ Northern Gateway response to Federal Government IR No. 2 ([Exhibit B46-2](#)).

¹⁸ See *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at paras. 29-34.

management may be counterproductive to the precautionary principle, as adaptive management is used as an excuse to allow projects with serious threats to health or the environment to proceed when greater caution ought to be applied.¹⁹

However, the precautionary principle and adaptive management do not always need to be in conflict. When properly framed and utilized, adaptive management can be a useful component in the operationalization of the precautionary principle. A good example is contained in the reasons of the New South Wales Land and Environment Court in a case called *Telstra*²⁰ and the line of jurisprudence that it has produced in various courts in Australia and New Zealand, particularly the judgment of the Victoria Supreme Court in *Environment East Gippsland*.²¹ Under this line of cases, where the precautionary principle is found to be engaged due to a real threat of serious or irreversible damage to the environment and a lack of full scientific certainty regarding that risk, the onus shifts to the proponent to demonstrate that the threat is negligible. If the proponent fails to do so, the regulator must assume that there would be serious or irreversible damage and identify appropriate preventive measures proportional to the threat. At this final stage, the regulator may consider adaptive management, provided that the threat can be addressed by adaptive management.

A recent decision of the Federal Court in *Taseko* likewise affirms that there can be a more balanced approach to the implementation of the precautionary principle and adaptive management within the context of professional reliance.²² This case involved a judicial review of the federal EA review panel report concerning the New Prosperity Gold-Copper Mine proposed by Taseko Mines Limited. Taseko had proposed to rely upon adaptive management to deal with environmental risks during later stages of project development. However, the review panel rejected adaptive management as the proper approach in the circumstances. The Federal Court agreed, and its reasoning is worth reproducing:

It was reasonable for the Panel not to accept Taseko’s “vague assurances” that it would engage in adaptive management in order to deal with adverse environmental effects. The Panel sought information on environmental effects and mitigation measures, and Taseko refused to provide this information. It was entirely reasonable, and in line with the Panel’s (reasonable) interpretation of the precautionary principle, for the Panel to conclude that the

¹⁹ For an academic critique of adaptive management, see Martin Olszynski, “Failed Experiments: An Empirical Assessment of Adaptive Management in Alberta’s Energy Resources Sector” (2018) *UBC Law Review* (forthcoming).

²⁰ *Telstra Corporation Ltd. v. Hornsby Shire Council*, [2006] NSWLEC 133. See discussion of this case and subsequent jurisprudence on the precautionary principle in Chris Tollefson, “Trials and Tribulations of the Precautionary Principle” in Allan Ingelson (ed.) *Environment in the Courtroom* (forthcoming, 2018: U of C Press).

²¹ *Environment East Gippsland Inc. v. VicForests*, [2010] VSC 335. For other Australia and New Zealand cases that have further elaborated the *Telstra* approach, see e.g.: *Newcastle v. Hunter Valley Speleological Society v. Upper Hunter Shire*, [2010] NSWLEC 48; *Southern Highlands Coal Action Group v. Minister for Planning and Infrastructure*, [2013] NSWLEC 1032; *Sustain our Sounds Inc. v. The New Zealand King Salmon Co Ltd.*, [2014] NZSC 40.

²² *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1099. Other significant Canadian cases dealing with the precautionary principle include: *114957 Canada Ltee (Spraytech) v Hudson (Town of)*, [2001] 2 SCR 241; *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52; *Alberta Wilderness Assn. v. Canada (Minister of Environment)*, 2009 FC 710 (a.k.a. the Greater Sage-Grouse case); *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)*, 2009 FC 878 (a.k.a. Nooksack Dace case); *Wier. v. Canada (Health)*, 2011 FC 1322; *Morton v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 575.

concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect.

Indeed, acceptance of vague adaptive management schemes in circumstances such as these would, in my view, tend to call into question the value of the entire review panel process – if all such decisions could be left to a later stage, then the review panel process would simply be for the sake of appearances.²³

In keeping with the approach adopted in these Australasian cases, the Federal Court in *Taseko* recognized that, where there is a risk of significant adverse effects, industry proponents and their experts who wish to rely upon adaptive management should not be allowed to do so without demonstrating that adaptive management would indeed be an appropriate way to address that risk. Indeed, where there are risks to public health and environment that can have irreversible consequences, there is a powerful argument that adaptive management should *never* be relied on as regulatory tool. Moreover, the EA process should refrain from approving projects the basis of vague promises that risks to human health and the environment can be managed by the adaptive management measures so often promoted by industry-hired experts (and which, at the end of the day, are often administered by these very same consulting firms).

3) Tiered EA (Strategic and Regional EAs)

In the present EA regime, cumulative effects assessment forms a part of the project-level EA. There are several notable problems with the way in which cumulative effects are assessed in the current EA regime. Firstly, the regional scale of cumulative effects renders them ill-suited for assessment in a project-level EA setting. Secondly, project proponents have little motivation nor the knowledge to provide a rigorous analysis of the way in which negative impacts from other sources may combine, synergize, or interact with project effects. The incentive for proponents is to show that the project is not likely to cause significant adverse effects by itself, and that the project is unlikely to generate cumulative impacts. Thirdly, the responsibility for adverse cumulative effects is difficult to assign to any particular project proponent, as cumulative effects by their nature involve multiple sources. Lastly, there is little clarity or transparency in the way cumulative effects are assessed in the current EA regime.

The revitalized provincial EA legislation shall include provisions that encourage the Province to conduct strategic or regional environmental assessments (“SEAs” or “REAs”) in conjunction with federal, municipal, and Aboriginal governments where appropriate. SEAs/REAs can focus on specific sets of effects or a specific set of activities over a certain geographic scope, and would include an assessment of cumulative effects.

Under the new legislation, SEA/REA shall provide legally authoritative parameters for project-level IAs that are situated within the scope of the SEA/REA. In this way, SEAs/REAs provide greater certainty to project proponents, as the assessment of project effects would be situated within established baselines and development goals for the relevant region.

²³ *Taseko*, *supra* note 22 at paras. 123-124.

Legislation shall create explicit criteria for the assessment of cumulative effects, or shall require the EAO to create explicit criteria for the assessment of cumulative effects, both in SEAs/REAs and in project-level EAs.

For both REAs and project-level EAs, legislation shall create explicit public reporting requirements for long-term monitoring of cumulative effects, and assign adaptive management responsibilities to clearly identified parties.

Lastly, the legislative scheme for SEAs/REAs should be designed in such a way that they would not be abused as an avenue to avoid conducting project-level EAs.

4) Best Available Science

i) Testing the evidence

The EA process needs a better way to test the evidence that is put before the EAO. In SkeenaWild's experience, the current method of submissions and information requests is wholly inadequate at meaningfully testing the evidence in the EA. This problem is exacerbated by the fact that the provincial EA process is largely dominated by proponent-driven science: see section on public confidence above. More rigorous analysis of the information that is provided to the EAO is needed to restore public trust in the EA process. Ways to enhance the testing of evidence in provincial EAs include public hearings and scientific peer review.

Public hearings that include cross-examination of experts is one way to test the robustness and credibility of the science put forward by proponents in an EA process. One of the controversies in the National Energy Board's review and EA of the Trans Mountain Expansion Project was the lack of cross-examination.²⁴ Where the protection of public interest justifies their use, the Province should require provincial EAs to be conducted by way of hearings that provide opportunities for parties to cross-examine experts put forward by other parties in the EA process. Cross-examination is an effective way to test the reliability of the evidence and for the EAO to effectively determine the weight to be given to the evidence. The EAO should have the benefit of the testing and weighing the evidence before they make their findings and recommendations.

Another check on the quality of the science feeding into the EA process is a way to introduce a system of peer-review. In the "Proposed EA Process" diagram found in the Discussion Paper, peer review of scientific information can be injected almost anywhere in the process but will be most pertinent in the "information gathering and analysis" phase and the "impact assessment" phase. Under the current professional reliance model, regulators like the EAO tend to rely heavily on the science conducted and provided by industry-hired experts, with little opportunity for such science to be critiqued by other independent experts. The expert panel on federal EA review also made a similar finding in this regard:

²⁴ For example, intervenor Robyn Allan filed a motion dated April 14, 2014 to the NEB hearing panel seeking to amend the Hearing Order to include oral cross-examinations (Exhibit [C9-1-2](#)). This motion was supported by various other intervenors, including the City of Burnaby (Exhibit [C69-3-1](#)) and the City of Vancouver (Exhibit [C77-1-1](#)). The hearing panel dismissed the motion (Exhibit [A32-1](#)).

All participants [in the EA review process] recognized that trust in the accuracy and impartiality of this information is critical to its acceptability. Participants also expressed the need for peer review of studies and suggestions were made that this could be achieved through the use of advisory committees or working groups.... The development of the Impact Statement would be led by the Commission using a team of consultants and experts (the “assessment team”) retained by the Commission that is free of any conflict of interest and chosen through a collaborative process involving the project committee and government expert committee.²⁵

A revitalized provincial EA process should include a system of peer review whereby the information provided by the proponent can be analyzed and critiqued by other independent experts.

ii) Rigorous rules for responses to information requests

The revitalized provincial EA statute should include a mandatory provision requiring respondents to provide “full and adequate” responses to IRs.

In many cases, a process for written information requests (“IRs”) and responses is an inadequate substitute for cross-examination, as an IR process does not allow parties to adequately follow-up on questions asked, clarify issues of ambiguity and ensure that conflicts in the evidence are brought to light. Written responses to IRs can be carefully crafted to prevent exposure of unfavorable facts or conflicts in the evidence.

However, if the responsible authority decides to implement an IR process, it must be willing to hold proponents to account when they fail to provide full and adequate answers. This is particularly the case if the IR process is not supplemented by oral cross-examinations, such that the IR process is effectively the only method for testing the evidence. In provincial EAs, the EAO has failed to ensure that proponents provide full and adequate answers. Incomplete and inadequate answers leave important and significant gaps in the body of evidence, thereby depriving the EAO of critical information to allow the EA to be completed.

A mandatory provision in the legislation requiring respondents to provide “full and adequate” responses to IRs would enhance the ability of parties to test the evidence before the EAO. Furthermore, in our submission, “full and adequate” should, at a minimum, be: 1) responsive to the requests posed; 2) complete; and 3) clear and coherent.

D. Focus on Process Certainty and Predictability

1) EA triggers (What projects get assessed?)

SkeenaWild in encouraged that the BC EAO will be making changes to the *Reviewable Projects Regulation*. We agree that a clear framework and criteria for designating projects not on the list as reviewable is important. Introducing regional cumulative development triggers is a positive

²⁵ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017): <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>> at 61-62.

step. When looking at triggers for reviewable projects, it is important that the full build out and production of a project be used in assessing whether EA triggers have been met or exceeded.

2) Readiness Gate

SkeenaWild is concerned about the appropriateness of situating the “Readiness Gate” prior to the “Process Planning” phase of the EA. “Process Planning” involves scoping the EA and engaging the public on the information that should be required for the EA process. In our submission, the determination of whether the EA application is complete and ready to proceed further in the EA process should be done *after* proper scoping of the issues. An EA application cannot be assessed for its completeness if there is uncertainty over what issues are included within the scope of the EA.

3) Project approval and rejection

It is important that projects are rejected if they don’t meet important legal criteria, including a climate test and Indigenous consent. The EA cannot just be a process for making bad projects less bad before approving them, as is often the current case. A new EA law should require decision-makers to select the option from among reasonable alternatives that best protects Indigenous title and rights, and safeguards ecological, cultural, social, economic and health values. This must include the option of not proceeding with the proposal.

Projects that fail to meet defined legislative sustainability and reconciliation criteria – including Indigenous consent, a climate test and respecting ecological limits – must not be approved under a new EA law.

PART IV. CONCLUSION

In British Columbia, as at the federal level for all of Canada, we are at the crossroads of a generational opportunity to reform our EA law. The current way in which projects are assessed has shaken the faith of many British Columbians on how decisions that profoundly affect our environment, public health, and natural resources are made. In our view, the recommendations that SkeenaWild has made in these submissions will help this government to begin fostering public confidence back in our EA process and revitalize our EA laws.