Federal Environmental Assessment Reform Summit II

Executive Summary

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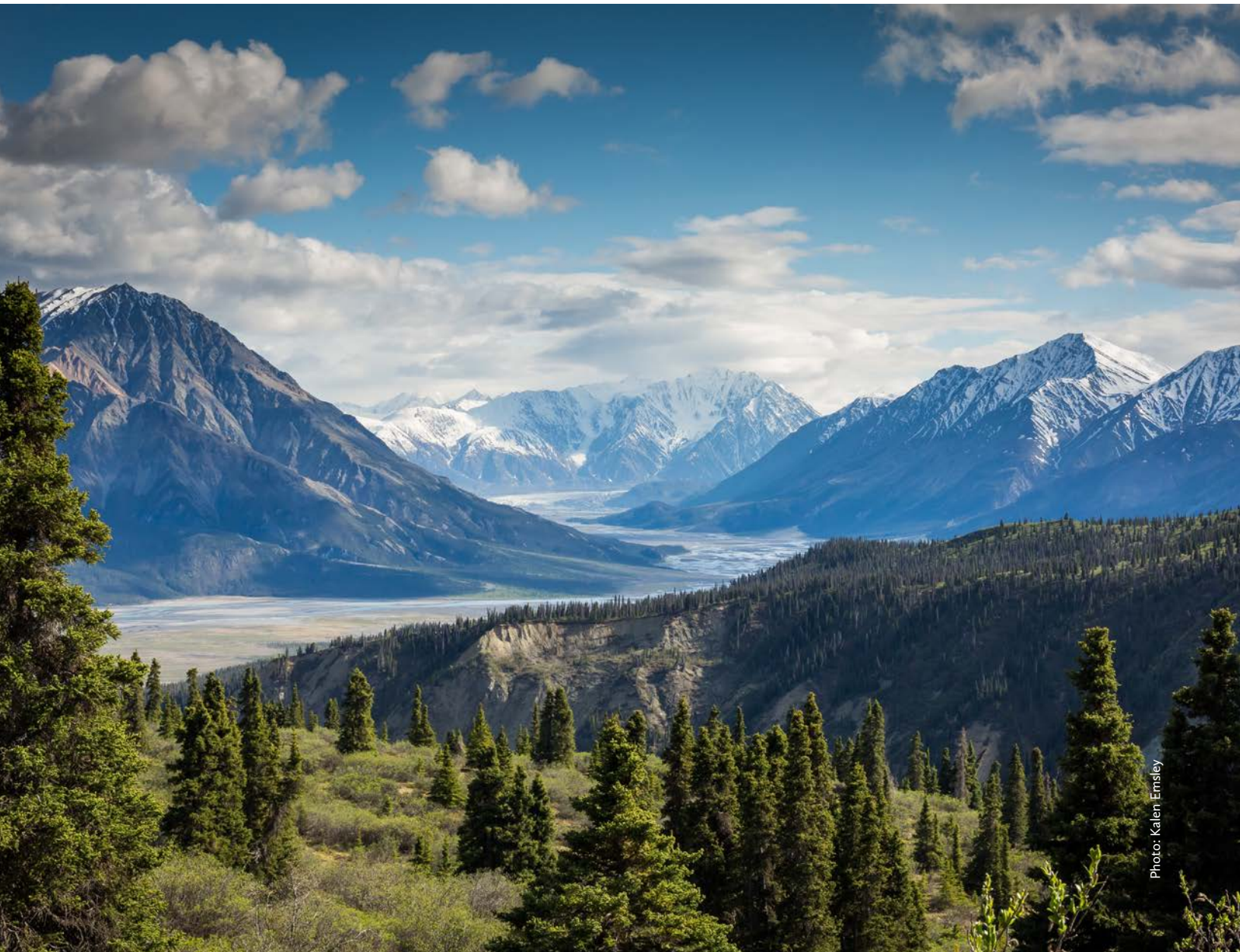

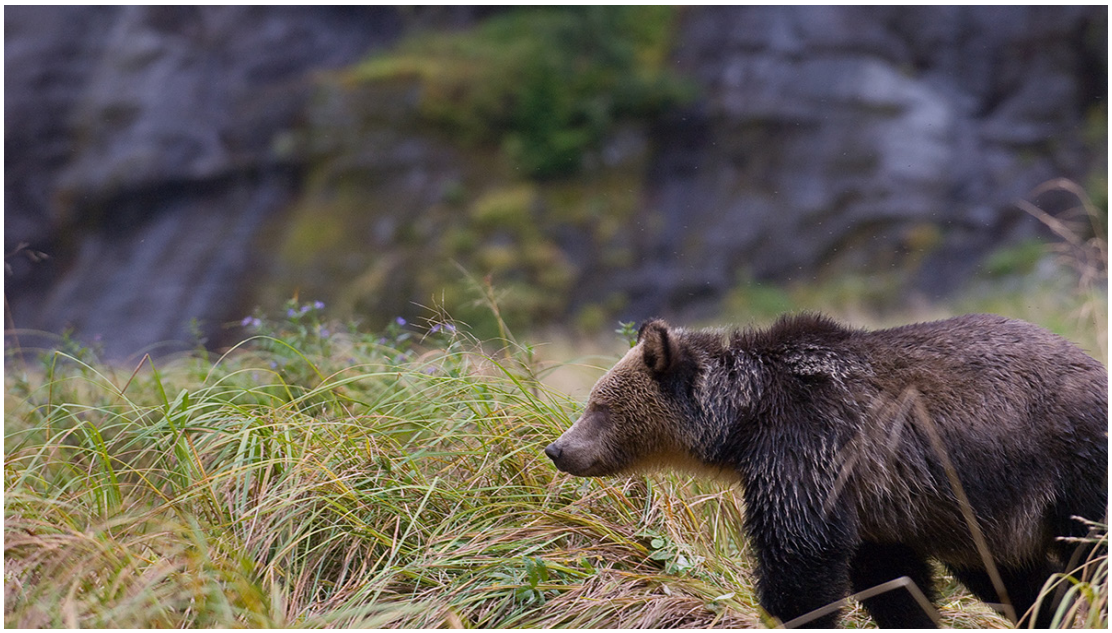

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Executive Summary

On June 7-9, 2017, approximately 25 environmental assessment (EA) experts from across Canada gathered in Ottawa to discuss how to implement next-generation EA principles in Canadian legislation. Federal Environmental Assessment Reform Summit II (EA Summit II) builds upon the outcomes of Federal EA Reform Summit I (EA Summit I) held in May 2016, and in particular the 'Twelve Pillars of a Next-Generation Environmental Assessment Regime.' The Twelve Pillars, which reflect general consensus achieved at EA Summit I, can be found at http://wcel.org/EASummit.

EA Summit II attendees included practitioners, academics, lawyers, and Indigenous consultants and technical staff. It consisted of facilitated discussions on key issue areas that were informed by discussion papers prepared collaboratively by members of the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, which can be found at http://www.envirolawsmatter.ca/easummit2.

The primary purpose of EA Summit II was to build consensus on how to implement key principles of next generation EA, the report of the Expert Panel appointed to review federal EA processes, and the reflections of leading-edge EA experts on that report.

The outcomes of EA Summit II presented here are offered as an input into the federal review of EA processes and related legislative reforms. Neither the issues discussed at EA Summit II, nor these resulting outcomes, are comprehensive; rather, they focus on what participants and organizers identified as the key issues and challenges encountered in federal EA processes, and what needs to be in legislation to achieve credible, fair, accountable and effective EA processes that respect Indigenous authority, promote reconciliation, ensure ecological integrity, and result in equitably distributed lasting environmental and socio-economic well-being.

Recommendations

Governance

Governance is key to achieving effective, accountable and transparent processes that the public and Indigenous peoples can trust. First and foremost, EA processes must embody a consent-based model, based on iterative decision-making from the beginning. To achieve this, the legislation should establish mechanisms for project, strategic and regional co-governance with Indigenous peoples, and collaboration with other jurisdictions. At the project level, lifecycle regulators like the National Energy Board (NEB) should not have EA authority. Instead, the legislation should establish a single EA Agency and an EA Commission to share responsibility for all federal environmental assessments. While lifecycle regulators should be consulted during EAs, they should not have EA process or decision-making authority. The Agency should be responsible for the early planning, conduct of EA and follow-up phases, while the Commission should be responsible for the review and decision-making phases. Additionally, the legislation should enable the appointment of review panels, with criteria for when they should be appointed. The Commission should make the final decision, subject to Ministerial override. For all assessments, the legislation should provide for the establishment of assessment-specific Multi-Interest Planning Committees and assessment-specific government committees in an Early Planning Phase. Additionally, the legislation should establish a standing Multi-Interest Advisory Committee (MIAC) to provide policy and guidance advice to the Agency and Minister, as well as a Canadian Environmental Assessment Research Council with a permanent EA Expert Advisory Committee established within it.

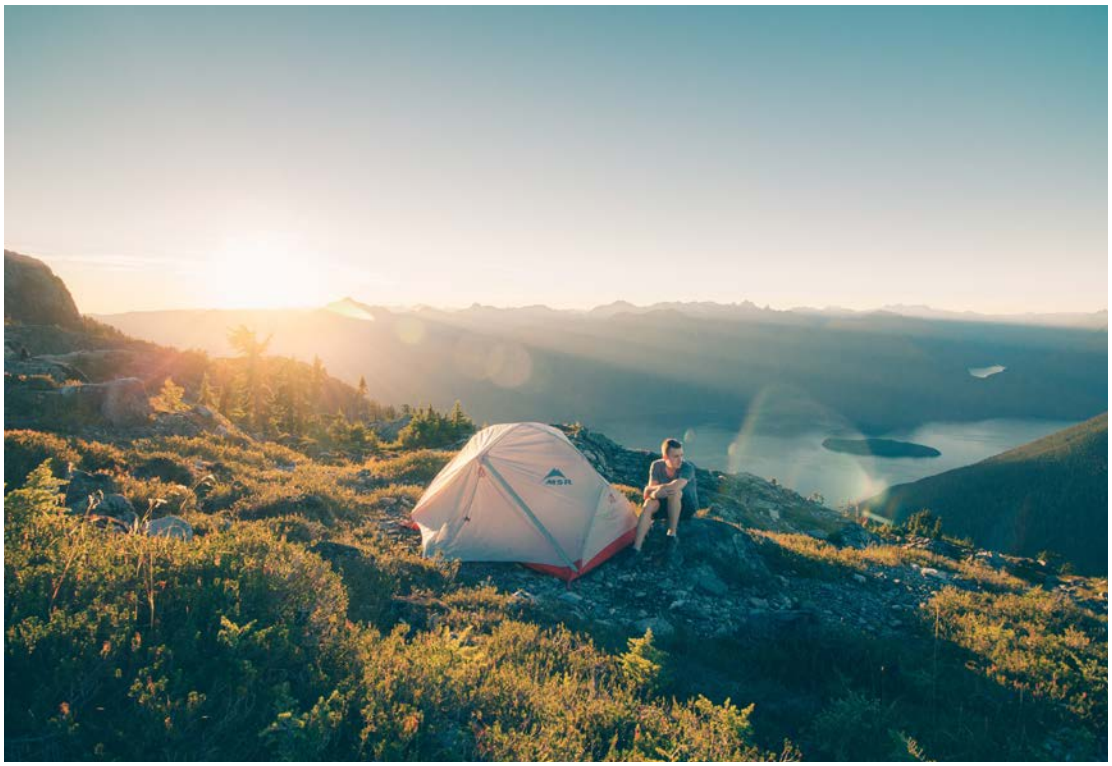

Photo: Glen Jackson

Multijurisdictional Assessment

Collaboration to the highest standard should be the goal, and substitution should not be an option. The Agency and Commission should have regional offices, and the federal government should provide financial incentives to the provinces to encourage collaboration. The legislation should explicitly recognize inherent Indigenous jurisdictions as authorities, with collaboration on two levels: 1) a general framework agreement (e.g., federal-provincial, Indigenous jurisdiction-federal); and 2) assessment-specific agreements. The legislative framework must be flexible, while ensuring that federal standards are upheld.

Regional and Strategic Assessments and Tiering

The legislation should provide for regional environmental assessments (REAs) and strategic environmental assessments (SEAs), and provide an off-ramp for SEAs of policy issues that arise in project EA. SEAs currently under the Cabinet Directive should be legislated. To ensure REAs and SEAs are done when appropriate, the Expert Advisory Committee should identify priority regions in Canada where they would be of particular value and recommend to the Minister a schedule for their implementation. The legislation should require a written response by the Minister to REA recommendations by the Expert Advisory Committee, or to a request by the public, another jurisdiction (including Indigenous authorities), Indigenous peoples or stakeholders. It should also require the Minister, based on the advice of the Expert Advisory Committee, to set a priority list of REAs to be conducted, and a minimum number that must be initiated each year.

In addition to the above, the legislation should include the following criteria for when the minister should order an REA or RSEA, and require the Minister to address these criteria in her written response to recommendations of the Expert Advisory Committee or a request from the public, another jurisdiction (including Indigenous authorities), Indigenous peoples and stakeholders:

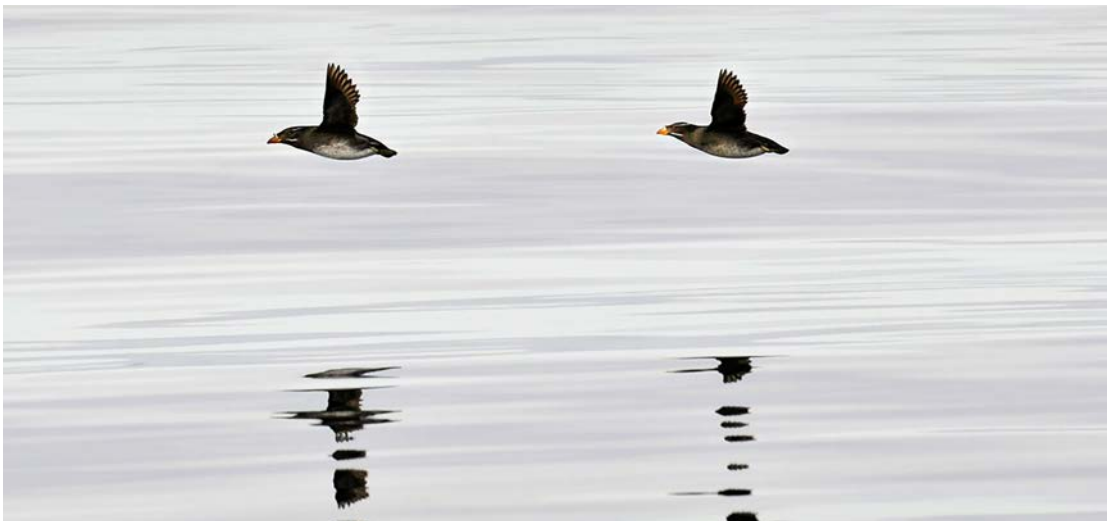

Photo: A. Wright

- When cumulative effects in a region are significant or otherwise hindering progress towards sustainability, or are affecting or likely to affect Indigenous peoples and their rights;
- When the Minister is informed of interest in, or plans for, new or intensified natural resource development, or significant development pressure with the potential to impact progress towards sustainability objectives is identified in a region, and federal decision making in respect of projects will be required in the future; and
- When the Minister is informed of significant socioeconomic or health concerns that may be linked to development in a region.

Cooperation among jurisdictions is preferred. The participation of other jurisdictions in cooperative regional assessments should include:

- federal financial assistance to a participating province(s);
- development of a joint vision of a sustainable future for the region;
- clarity in the law that the federal government may conduct its own REA regardless of other jurisdictions' participation;
- clear legislated timelines for arranging a coordinated assessment with affected jurisdictions, and the legislated ability to proceed without some or all of the other jurisdictions if cooperation fails to produce results within the legislated timelines; and
- legislated provisions for the involvement of the public in the development of any list or criteria for the designation of REA or SEA, as well as mandatory and adequate participant assistance.

Basic REA/SEA process requirements should include:

- Identifying proponents (feds, provincial, FN governments)
- Establishing scope of the assessment (geographic boundary, valued components, etc)
- Establishing funding agreements
- Establishing incentives for provinces to participate
- Identifying alternative development scenarios
- Recognizing that the process is iterative
- Indigenous collaboration and engagement
- Meaningful public participation
- Application of sustainability framework

Before legislation is in place, government should order an SEA of climate to provide guidance on how to consider climate at the project and regulatory levels and help ensure Canada meets its climate obligations.

Photo: TJ Holowaychuk

Project Assessment Triggering and Streams

Many more projects (approximately 1000 per year) than are currently assessed under the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*) should be required to undergo an EA; the number should be closer to the several thousand per year that were assessed under *CEAA 1992*. There should be a project list identifying classes of undertakings within federal jurisdiction that require an assessment, and the legislation should establish criteria for when project classes should be added to the project list and mechanisms for doing so, including by referral of the Expert Advisory Committee, the MIAC, Indigenous peoples, the public and stakeholders. Additionally, the legislation should enable the Minister to make regulations establishing additional assessment triggers. The legislation should require registration of all projects and activities that receive a federal environmental permit, and that registration be posted to an on-line public registry. It should allow for "abridged assessments" which are less onerous processes than comprehensive assessments, but the core elements of EA should exist in all assessment streams. The legislation should enable the Agency to 'bump up' and 'bump down' projects into different assessment streams, with criteria for when bumping up and down should occur and a matrix for making that determination following an initial scoping. Finally, there should be legislated triggers for undertakings not on the project list, such as for:

- International projects
- Projects involving a disposition of federal lands
- Projects in national parks
- Projects receiving regulatory permits and authorizations
- Projects receiving federal funding
- Projects with a federal proponent
- Projects that are not likely to have a transformational benefit or not likely to assist in the transition to GHG emission neutrality

Sustainability Assessment

The legislation should set out sustainability-based decision-making criteria and rules, and allow the Minister to enact regulations establishing other requirements. The legislation should require transparent reasons for the Commission's decision and any exercise of the Ministerial override. The core elements of sustainability assessment include:

- A strong sustainability purpose
- Legislated decision-making criteria and trade-off rules
- Enabling provisions for establishing further criteria and rules in regulations
- Enabling provisions for the Agency to identify project-specific criteria and rules
- Consideration of alternatives to and alternative means

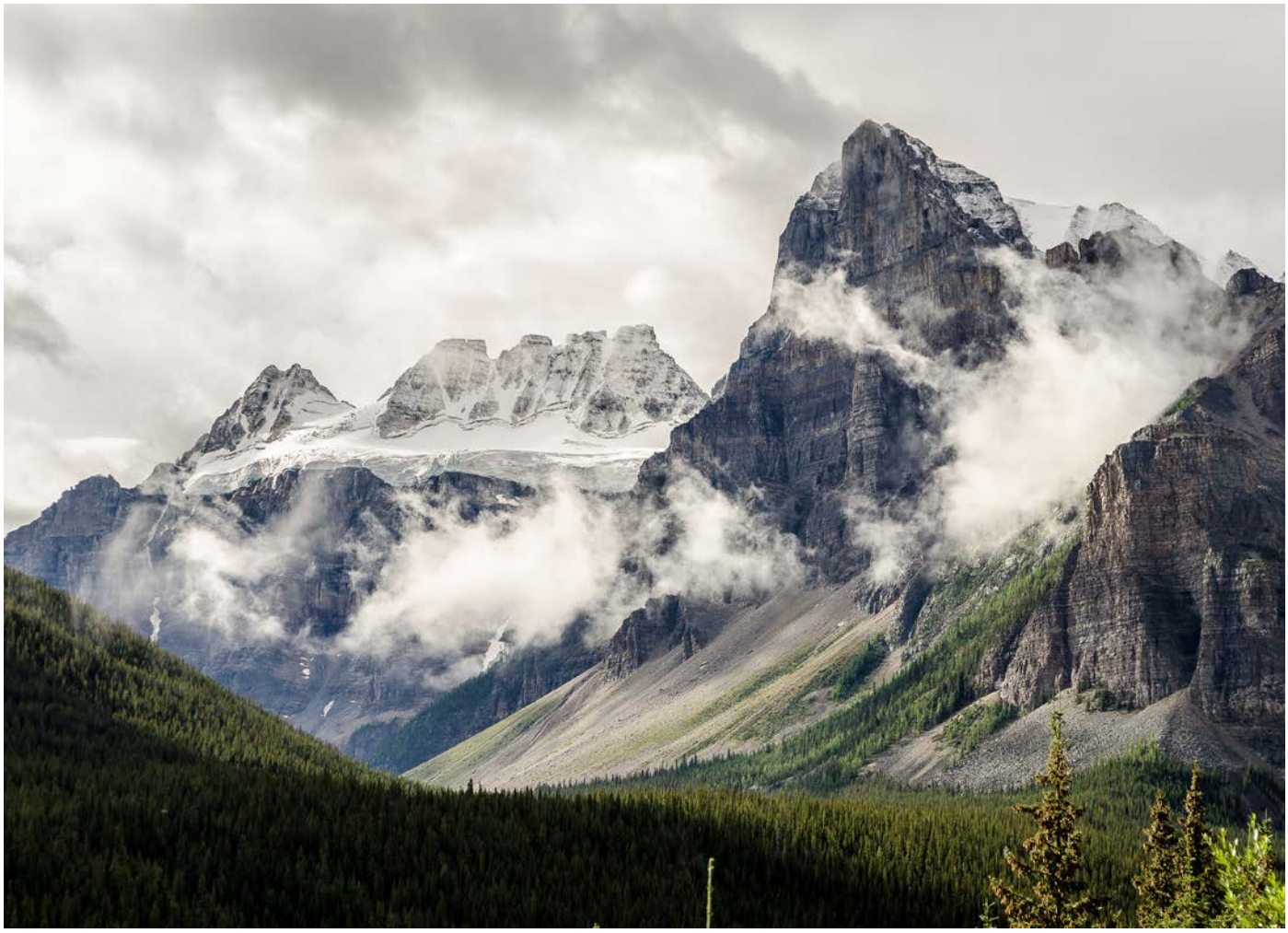

Photo: Matheus Bandoch

Early Planning Phase, Necessary Committees and Ongoing Participation

Formal, Agency-led assessment processes should be initiated early with the submission of a project notice by the proponent. The early assessment planning phase should identify, among other things, the membership of a Multi-Interest Planning Committee, assessment guidelines, studies and methodologies, a detailed project description, assessment plan, and participation and consultation plans. Legislation should enshrine principles of meaningful participation and establish that EA processes are open to all interested parties that want to participate in all EA phases, including follow-up and monitoring, in a deliberative manner and on a scale appropriate to the circumstances. The legislation should also allow for mediation and other alternative dispute resolution tools as an assessment stream and in order to facilitate participants' and jurisdictions' arrival at mutual understanding.

Conduct of Assessment

The legislation should mandate that decisions be based on best available evidence, including scientific knowledge, community knowledge and Indigenous knowledge. It should include standards for evidence in assessments, and there should be mandatory consideration of the distribution of risk and effects. The legislative framework should acknowledge the important contribution of Indigenous knowledge in EA and require the interfacing of Indigenous knowledge with science throughout assessments. There should also be expertise in Indigenous knowledge and the interface between the two traditions within the EA Agency and Commission. Evidence must be tested in a culturally-appropriate way and on the public record, and there should be a central repository (registry) of all EA data, along with a Chief Science Officer. Finally, the legislation should include a climate sustainability definition and principles.

Photo: Chris Montgomery

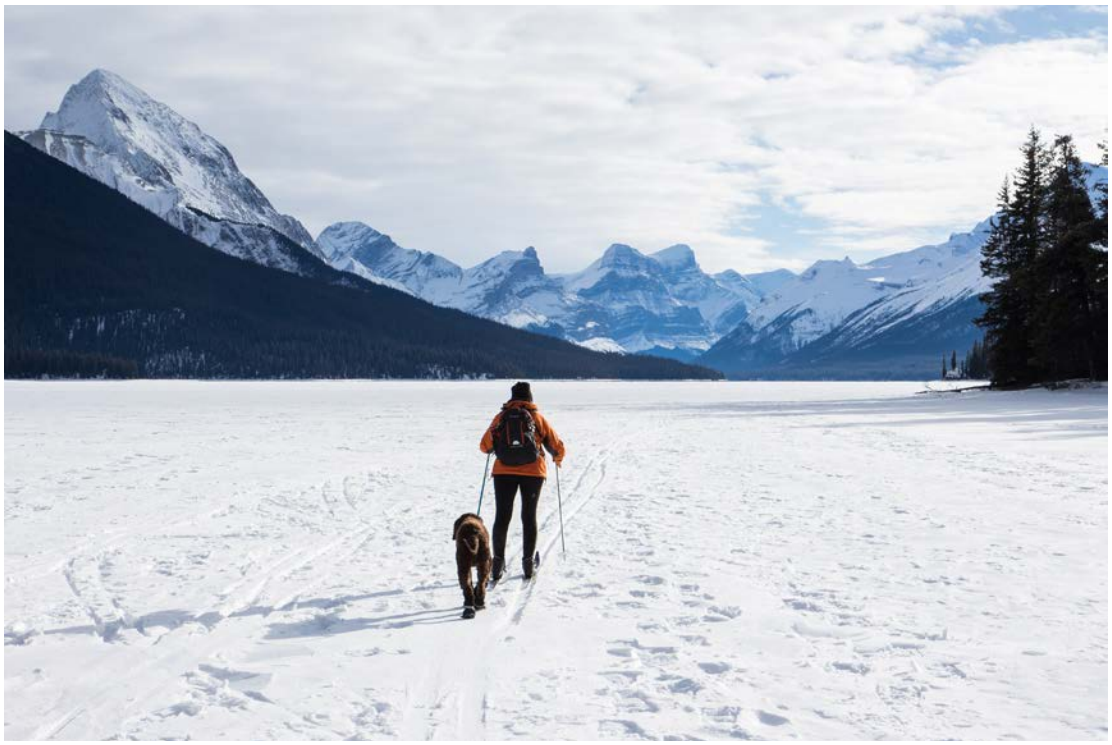

Photo: Jasper Guy

Decision-Making

The Agency and Commission should be responsible for facilitating collaboration and ensuring that the consent of Indigenous peoples is obtained on all interim as well as final decisions. The legislation should establish a right of appeal of process and final decisions, as well as compliance and follow-up activities, enable alternative dispute resolution, and establish a specialized body established to hear appeals. Decisions should be required to demonstrate the application of sustainability criteria and trade-off rules and reference the key supporting evidence that was considered and relied upon.

Post-Assessment Monitoring, Tracking, Reporting, Compliance Assurance and Regime Evolution

The increased fines for non-compliance introduced in *CEAA 2012* should be retained. Conditions of approval should be measurable and quantifiable, and monitoring should occur for anticipated and unanticipated effects, with monitoring data tied to predictions and conditions of approval. There should be sufficient capacity and "boots on the ground" to monitor and enforce, with clear triggers for management intervention based on the results of monitoring. Legislation should enable the establishment of implementation, monitoring and follow-up committees. Adaptation should be better defined and include a range of response types, up to stopping the project in cases of irreversible or unmitigatable effects. Legislation should also require the regular review of compliance conditions and commitments made by the proponent in the assessment, as well as the renewal of EA authorizations, and follow-up information should be made available on the public registry.

Appendices

Appendix A – Principles of Meaningful Public Participation

The following are ten principles of meaningful public participation recommended by the Multi-Interest Advisory Committee established by the Minister of Environment and Climate Change to assist with the review of federal EA processes.[1] They are:

- Participation begins early in the decision process, is meaningful, and builds public confidence;
- Public input can influence or change the outcome/project being considered;
- Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
- Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
- Adequate and appropriate notice is provided;
- Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
- Participant assistance and capacity building is available for informed dialogue and discussion;
- Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
- Programs recognize the knowledge and acumen of the public; and
- Processes need to be fair and open in order for the public to be able to accept a decision.

1 Multi-Interest Advisory Committee, "Advice to the Expert Panel Reviewing Environmental Assessment Processes" (9 December 2016) at 41-42, online: http://eareview-examenee.ca/view-submission/?id=1481330791.1676.

Appendix B – Summit II Participants

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