
West Coast Environmental Law

Comments on Draft Agreement to Conduct a Regional Assessment in Ontario's Ring of Fire

February 1, 2022

Introduction

We are pleased to provide these comments on the Draft Agreement to Conduct a Regional Assessment in Ontario's Ring of Fire (Draft Agreement).

West Coast Environmental Law Association (West Coast) is a British Columbia-based non-profit environmental law organization dedicated to safeguarding the environment through law. One of Canada's oldest environmental law organizations, West Coast has provided legal support to British Columbians to ensure their voices are heard on important environmental issues and worked to secure strong environmental laws for almost 50 years.

Since its founding, West Coast has been involved with various aspects of provincial and federal environmental and impact assessment (IA). West Coast was involved in the development of the *Canadian Environmental Assessment Act* (CEAA) and its seven-year review, made submissions to the House of Commons and Senate committees that reviewed the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), and was deeply involved in the development and Parliamentary review of the *Impact Assessment Act* (IAA, enacted via Bill C-69).

In addition to providing legal services to First Nations, community groups and individuals involved in IA processes, West Coast co-chairs the Environmental Planning and Assessment Caucus of the Canadian Environmental Network, and staff lawyer Anna Johnston is a member of the Minister of Environment and Climate Change's (the Minister) Advisory Council on Impact Assessment (MINAC) in her personal capacity. Since the review of federal EA processes that commenced in 2016, we have been deeply involved in advancing leading-edge thinking on next generation IA for Canada.

West Coast's mandate pertains to environmental law as it applies in what is now known as British Columbia. The regional assessment in Ontario's Ring of Fire is relevant to our work because as the first regional assessment commenced under the IAA, it raises important questions about and may set a precedent for the governance, objectives and conduct of potential future regional assessments in BC. As a result, we focus our submissions on issues of relevance to the conduct of regional assessments broadly, in order to help ensure that the Ring of Fire regional assessment sets the stage for regional assessments in BC that respect Indigenous authority and rights, meaningfully engage the public, and ground sustainable, climate-safe decision making.

Comments and Recommendations

Governance

We are deeply concerned that the Draft Agreement is between the Crown governments of Canada and Ontario only, excluding the First Nations with territories in and that would be affected by development in the Ring of Fire. We are aware of calls by First Nations chiefs to co-design and implement a collaborative process with Indigenous peoples in a manner that respects their rights and decision-making authority in their territories, as well as a campaign by Friends of the Attawapiskat River for an Indigenous-led regional assessment.

In light of the clear requests by Indigenous jurisdictions and peoples in the region for the regional assessment to recognize and uphold Indigenous jurisdiction, and of Canada's commitments and obligations to respect Indigenous rights and authority, in our view this regional assessment must not proceed until it is designed with and has the consent of First Nations. Doing so would be contrary to the spirit and intent of the IAA and magnify the risk of Crown decision-making that runs afoul of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration).

The purposes of the IAA include:

- to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each — and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;
- to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;
- to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act.

While regulations that would allow the First Nations in and around the Ring of Fire to be recognized as jurisdictions for the purposes of the IAA have not yet been made, it is critical that the federal government (and Ontario) recognize and respect the inherent authority and jurisdiction of Indigenous peoples, rather than perpetuate a colonial approach of “granting” rights and authority through Crown law. The fact that the Minister intends to proceed with a regional assessment without acknowledging the need to cooperate on a nation-to-nation basis with Indigenous authorities, and so clearly in contradiction to First Nations' requests, clashes with the federal government's commitments to advance reconciliation and uphold the UN Declaration. It also runs contrary to the mandate given to the Minister to “implement the United Nations Declaration on the Rights of Indigenous Peoples and to work in partnership with Indigenous Peoples to advance their rights.”

Additionally, while the Draft Agreement does not indicate that the regional assessment will result in any direct decisions for the Ring of Fire, the assessment is intended to inform future Crown decisions in the region, particularly for mining projects. Additionally, the Draft Agreement is based on a presumption that mining should occur in the region. Respectfully, we cannot conceive how a regional assessment that excludes Indigenous jurisdictions as parties and is based on a goal that may not reflect how Indigenous peoples envision the occupancy and use of their territories can succeed.

Recommendation 1: Out of respect for the First Nations calling for a reset of the regional assessment until an approach can be co-designed that respects their rights and authority, and in order to better ensure that future regional assessments will align with commitments and responsibilities respecting

Indigenous peoples, we urge the Minister to pause this assessment and sit down at the table with the First Nations who have been governing the territory since time immemorial.

Committee and secretariat

In addition to the above, we offer the following comments and recommendations respecting the committee and secretariat. At the outset, we support the decision to appoint a committee to conduct the regional assessment, although as noted above it should be appointed in cooperation with Indigenous jurisdictions.

Recommendation 2: In order to set up the regional assessment for success and best ensure outcomes that result in sustainable decisions that advance reconciliation and uphold Indigenous rights and authority, we recommend:

- Committee members should be co-appointed by coordinating jurisdictions (including Indigenous);
- Members should not be federal or provincial politicians or civil servants;
- Membership should include equal Indigenous representation;
- The committee should have the funding and mandate to commission its own studies;
- Committee membership should include expertise in meaningful public participation, ethical space and meaningful, respectful Indigenous engagement;
- The secretariat should have relevant experience and knowledge, including in meaningful public engagement, Indigenous engagement that respects and upholds Indigenous law and protocol, and best practices in regional assessment; and
- The secretariat should be tasked with helping the committee develop Indigenous engagement and public participation plans.

Committee terms of reference

We have some concerns respecting the committee's terms of reference. For example, it is difficult to imagine how the committee would be able to paint an accurate prediction about potential impacts on Indigenous and treaty rights given the limited scope of the regional assessment (see below). The committee should be required to take a rights-based approach and look comprehensively at threats to Indigenous and treaty rights. A narrow scope of assessment risks ignoring potential cumulative effects, which could result in an eventual breach of the Crown's fiduciary and treaty obligations. A recent example of how myopic, project-by-project Crown decision-making can result in cumulative effects that violate treaty obligations can be seen in the recent *Yahey* case in the BC Supreme Court, which found that:

1. In causing and/or permitting the cumulative impacts of industrial development on [Blueberry River First Nations' (Blueberry's)] treaty rights, the Province [of British Columbia] has breached its obligation to Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8;
2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has therefore unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights in the Blueberry Claim Area;

3. The Province may not continue to authorize activities that breach the promises included in the Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights; and,
4. The parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected.

Recommendation 3: To avoid the risk of the “death by a thousand cuts” that occurred in Treaty 8 territory, the Draft Agreement should require the committee to undertake a comprehensive assessment of the cumulative effects of different development scenarios, and receive any information from Indigenous peoples respecting their Aboriginal and treaty rights, as well as Indigenous laws and authority, and all potential impacts on those rights, laws and authority under those scenarios (see below for recommendations respecting scenario analysis).

Additionally, while we recognize that the Ring of Fire is relatively undisturbed by industrial development, care must still be taken when identifying the temporal baseline of cumulative effects assessment, using a valued component (VC) or ecosystem-centred approach. Additionally, the IAA requires project assessments to consider the extent to which projects foster sustainability. For the regional assessment to result in authoritative guidance for future decisions that are truly sustainable, it should also establish ecological thresholds or limits.

Recommendation 4: Require the committee to identify baselines that are VC or ecosystem-centric, and establish ecological thresholds to guide future decisions.

Importantly, the Draft Agreement is silent on scenario identification and analysis. For the regional assessment to provide useful guidance for future decisions, it must identify and understand the environmental, social, economic and health implications of different development scenarios. It must also understand how Indigenous peoples in particular, as well as other people and interests, wish the region to look in the short, medium and long term. If the regional assessment does not identify a preferred vision of the future, any decision making that occurs for the region risks being unsustainable, contested and, as we note above, violating Indigenous peoples' rights and running contrary to their authority. Without such scenario analysis, there is also a greater risk that decisions based on the assessment will not align with the purposes of the IAA, particularly with respect to fostering sustainability, upholding Canada's environmental obligations and climate commitments, and respecting Indigenous rights.

Recommendation 5: Require the committee to identify different potential development scenarios, comparatively assess those scenarios, and identify the scenario which best achieves the purposes of the IAA (e.g., to foster sustainability, uphold Canada's environmental obligations and climate commitments, and respect Indigenous rights).

The committee should also be required to develop public participation and Indigenous engagement plans that accord with best practice. We note that the Draft Agreement requires the committee to ensure that the public has opportunities to meaningfully participate, but does not provide any definition or standards of what constitutes “meaningful” participation. To be meaningful, participation opportunities must occur on a spectrum that includes deliberative, in-person (or online if the pandemic does not permit in-person meetings) dialogue fora. Mutual learning should be fostered, and views and information must be genuinely considered and reflected in the report.

Recommendation 6: Require the committee to engage the public and Indigenous peoples on how they wish to engage, and prepare engagement plans based on that feedback. Additionally, the Agreement should set out minimum standards of meaningful engagement and require the committee to follow best practice.

Advisory supports

We support the use of advisory bodies, as they can be important means of fostering multi-interest dialogue and more deeply engaging key parties. However, we are concerned that the permissive language in the Draft Agreement will result in under-utilization of advisory supports, for example by only drawing on them on an ad hoc basis. Establishing one or more formal advisory groups for the duration of the regional assessment would better foster learning and relationships, and could lead to better-informed outcomes.

Recommendation 7: Task the committee with establishing at least one advisory group for the duration of the regional assessment, rather than simply seek advice on an ad hoc basis.

Committee report

The Draft Agreement contains relatively broad language that could permit the committee to include important information in its report: for example, the report “will describe the conduct, and document the results, of the Regional Assessment...” (s B2.1). Broad, permissive language can help equip the committee to reflect the circumstances of the region, the rights, views and laws of Indigenous peoples, and the views of participants. However, in order to align with best practices and better ensure that the regional assessment provides useful guidance for future decisions, the Agreement needs to be more prescriptive in places.

Recommendation 8: Require the committee to include in its report the following information:

- How the public and Indigenous peoples were engaged, information and views received, and how that information was considered and applied (or if not, why) in the assessment;
- Different plausible development scenarios identified, and the comparative evaluation of those scenarios using the factors listed in section 22 of the IAA;
- Identification of any no-go or preferred development zones; and
- The carbon sink services of the Hudson Bay Lowlands and the potential climate implications of development in the region on Canada’s ability to meet its climate target and commitments.

Goals and objectives

We are concerned that the goals and objectives of the regional assessment focus unduly on mining development and related activities, rather than the environmental conditions or valued components and what is required to safeguard them. The goal of “creating opportunities for sustainable economic development” presumes that development in the region is good, when in fact whether, where, what, at what pace and under what conditions development occurs should be questions the regional assessment asks, rather than assuming that sustainable economic development is possible or that development is desirable in the region.

Additionally, the goal and objectives do not (but in our view should) include a number of important objectives related to Indigenous rights and authority, informed decision making, and fostering sustainability.

Recommendation 9: The Agreement should include the following goals or objectives:

- To foster reconciliation, uphold Indigenous rights and authority, and promote multijurisdictional collaboration;
- To help ensure that federal and provincial decisions respecting the region are made in a way that respect Indigenous rights and authority, foster sustainability and respect ecological limits;
- Recognition of the need to avoid unintended cumulative effects;
- The climate importance of the region for Canada’s ability to meet its climate commitments and targets;
- To base the regional assessment and subsequent decisions in the region on best available science and Indigenous knowledge;
- To identify ecological thresholds or limits, and goals;
- Meaningful public engagement; and
- To ensure future decisions are made in an informed and precautionary manner that foster sustainability through the use of scenario analysis.

The Draft Agreement is also vague on how the regional assessment will inform impact assessments, and does not mention federal or provincial decision-making processes other than impact assessment. To the extent that it talks about implementation as a goal, section 1.2 (d) focuses on implementation through project assessments (although it gives mention to “other initiatives, if applicable”). Best practice suggests that in cooperation agreements, parties should establish an intention to negotiate a multi-jurisdictional agreement for the implementation of regional assessment outcomes in all relevant decision making in the region.

While the implementation agreement itself would come after the regional assessment and be informed by it, the parties should establish an intention to negotiate an implementation agreement within the goals set out in the Agreement, in order to give more meaningful and broad effect to the outcomes of the assessment. Consistent with our initial comments and recommendations, the intended implementation agreement should include Indigenous nations. The cooperation agreement should also set out each jurisdiction’s anticipated implementation mechanisms, i.e. what each jurisdiction plans to do with the outcomes of Regional Impact Assessments under its own authority (e.g. spatially apply the management objectives in a binding land use plan, etc.). This would help ensure the outcomes are implemented.

Recommendation 10: The Agreement should be more specific about how the parties intend to incorporate regional assessment into project assessments, and set out all other regulatory decision-making that the parties aim to enhance and improve by applying the regional assessment outcomes.

Recommendation 11: The Agreement should include an intention for the parties to negotiate a multi-jurisdictional agreement for the implementation of the assessment outcomes in decision making in the region.

Indigenous knowledge

The Draft Agreement makes repeated reference to the term “integration” to refer to the application of Indigenous knowledge and science (e.g., sections Ss 5.4 and B1.4). This term has been criticized by Indigenous peoples and experts for carrying colonial implications, and risks continuing the practice of subsuming Indigenous knowledge and worldviews within Western ones. In 2017 the EA Expert Panel recognized problems with the status quo of “weighing individual knowledge sources against each other,” and recommended using “an integrated approach that weaves all knowledge sources together.” The Environmental Planning and Assessment Caucus also cautions against use of the term ‘integration,’ warning that “Indigenous worldviews and legal orders are separate and distinct from western science and laws and must be recognized as such within IA.” Given this reality, attempts to ‘integrate’

Indigenous knowledge “may be construed as subordination” or as “forcing Indigenous legal orders and knowledge to *integrate* or *fit within* Western laws and systems of knowledge,” contrary to nation-to-nation relationships. Instead, the Caucus recommends using a ‘multiple evidence base’ approach that “recognizes and acknowledges the incommensurability of diverse knowledge systems and the often-asymmetric power relationships arising when connecting different branches of science with locally-based knowledge systems.”

Recommendation 12: In relation to Indigenous knowledge, replace the term “integrate” with one preferred by Indigenous peoples, and task the committee with using a multiple-evidence-based approach that gives full respect and weight to Indigenous knowledge.

Scope

Conceptual (i.e., focus)

We are concerned that the proposed scope of the regional assessment is focused on potential mining projects, rather than more broadly on the integrity and sustainability of the region. Additionally, it is unclear on what basis the decision to focus the regional assessment on mining activities was made. The IAA recognizes the importance of transparent, inclusive and participatory early planning, which should be adopted in regional assessments, too. We recognize that some initial planning has been occurring since the announcement of the regional assessment, but that planning appears to have been informal (for example, there was no call for submissions on key issues, as there would be in a project assessment) and records of negotiations or discussions between Ontario and Canada do not appear on the registry. It is also unclear whether early engagement has been meaningful, and it is premature to determine what the key issues and focus of the regional assessment ought to be before Indigenous peoples and the public have been meaningfully engaged. The committee should be tasked with identifying key issues to which particular attention ought to be paid.

Additionally, the Draft Agreement explicitly excludes two proposed road segment projects (Webequie and Marten Falls) that are currently undergoing impact assessments. If approved, these projects have the potential to induce considerable development in the Ring of Fire region and the rest of the Hudson Bay Lowlands. While the Draft Agreement does not prohibit the committee from assessing the impacts of those roads along with impacts of potential mining projects, it also does not require them to do so. The development-inducing potential of the road projects must be included in the regional assessment in order to fully understand the potential cumulative effects in the Ring of Fire and surrounding area. Relatedly, the scope should firmly put comprehensive cumulative effects assessment front and centre in the assessment.

Similarly, the scope ignores the considerable climate implications of development in the region. The Hudson Bay Lowlands is a vast peatland complex and considerable carbon sink. Removing these peatlands could derail Canada’s efforts to meet its climate targets and commitments. The IAA requires project assessments and decisions to consider the extent to which projects help or hinder Canada’s ability to meet its climate commitments and environmental obligations. While the IAA does not impose a similar requirement on regional assessments, if the regional assessment of the Ring of Fire is to inform project IAs then it must be used to gather and assess all such relevant information. The scope must therefore explicitly include the climate risks and implications of opening up the Ring of Fire to development and the critical carbon sink function of the region, including the implications of development on Canada’s ability to meet its climate commitments.

Recommendation 13: The Agreement should set out a broad scope and task the committee with identifying key assessment priorities and issues.

Recommendation 14: The Agreement should include issues of known importance in the scope, including: scenario identification and analysis; and the potential cumulative effects of the different scenarios, including the climate effects and to what extent different scenarios may help or hinder Canada’s ability to meet its climate commitments and international obligations.

Geographic

The Draft Agreement defines a small “Assessment Area” that is based on the presence of mineral deposits, rather than taking an ecosystem- or watershed-based approach. The scope appears to directly contradict the Agency’s own directly relevant guidance. The Impact Assessment Agency of Canada’s cumulative effects guidance recommends determining spatial boundaries on the basis of VCs (such as climate, or species) or ecosystems. Importantly, the guidance states that basing spatial boundaries on types of activities is “not recommended, because it may fail to encompass all environmental effects acting on the VC and may not fully consider the VC under study.”

While the Draft Agreement does require the committee to establish one or more study areas that would be broader than the assessment area, it does not require the committee to base these study areas on ecosystems or VCs. The study areas could thus exclude consideration of development induced by the proposed road projects, thereby neglecting important contributors to cumulative effects.

Recommendation 15: The committee should be involved in scoping the geographic boundary of the RA following public and Indigenous engagement, and the Agreement should specify that at a minimum, the scope include the road segment projects.

Timelines

We believe that 18 months is far too short to do a regional assessment that provides a comprehensive knowledge basis and informed guidance for sustainable decision making that respects Indigenous rights and authority, reflects the needs of Indigenous jurisdictions and participants (who may be particularly challenged to engage on short timelines during the ongoing pandemic).

Recommendation 16: The timelines should be negotiated with Indigenous peoples and reflect the magnitude of the regional undertaking (we suggest three years is an appropriate estimation), and enable a comment period of a minimum of at least two months on the draft report.

Costs

Finally, we are pleased to see the Draft Agreement commit to making Indigenous funding available, and are grateful for the funding provided to enable this set of comments and recommendations. However, we also recommend that the Agreement specify that public funding will be made available and in what amounts, in order to allow participants to prepare and plan for their engagement.

Recommendation 17: Commit to providing public participation funds, and be explicit about how much funding will be available for participants and Indigenous peoples.

Conclusion

As the first regional assessment to be conducted under the IAA, the Ring of Fire regional assessment has the potential to set a precedent for future such assessments. It is therefore critical that it reflect best practices, and in particular include as parties to the Agreement Indigenous nations that wish to be included. We are concerned that the Agreement is too narrow in its objectives and scope, and will occur on too rushed a timeline, for it to live up to expectations. A broader scope, more meaningful engagement, recognition and respect for Indigenous decision-making authority, independent committee

members with an appropriately resourced secretariat with knowledge and expertise on key matters like meaningful and respectful engagement, and a more reasonable timeline could considerably help this regional assessment become a model to follow in future regional assessments, in British Columbia and elsewhere.

Respectfully submitted by



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