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THE UNIVERSITY OF BRITISH COLUMBIA

# Independent Environmental Oversight

**A Report for the Giant Mine Remediation Environmental Assessment**

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Dr. Natasha Affolder, Katy Allen and Sascha Paruk  
Faculty of Law



## ACKNOWLEDGEMENTS

Environmental oversight bodies have yet to occupy a significant place in the published literature. These bodies often leave a light paper trail. We therefore are significantly indebted to the many individuals who shared their time and expertise on the design and functioning of oversight bodies in Canada, the United States, and Australia. We are also grateful to the Social Sciences and Humanities Research Council of Canada and the Law Foundation of British Columbia for the funding that supported this research. We thank colleagues and staff at the Faculty of Law and Liu Institute for Global Issues for their tremendous support and helpful assistance with this project.

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## SECTION 1: EXECUTIVE SUMMARY

Ours is the age of accountability. Commissions of inquiry, periodic reviews, inspection panels and complaints commissions are all proliferating to address accountability deficits. This report focuses on independent environmental oversight bodies. These bodies take multiple forms. The purpose of an independent oversight body is to provide a separate and vigilant set of eyes and ears. Critical to this watchdog role is the independence of the overseers. Independent oversight agencies thus arise as watchdogs over police complaints, child protection, to govern hazardous substances, in settings of nuclear safety, and to respond to environmental risks.

The aim of this report is to enrich the discussion surrounding an appropriate monitoring and oversight regime to govern the Giant Mine Remediation by providing an informed comparative analysis of diverse forms of independent oversight bodies. This analysis is based on a combination of sources: texts, published accounts, web-based sources, interviews and informal discussions with staff and stakeholders. This report situates existing examples of oversight agencies within a detailed discussion of the concept of independent oversight and the forces leading to the emergence of oversight institutions in many diverse settings. This report is one of the first to draw together some comparative insights from a wide variety of institutions. From these project-specific examples emerge valuable “lessons learned” and insights into emerging best practices in independent oversight.

This report seeks to raise awareness about independent oversight and to prompt further discussion on preferred approaches. Given the legal background of its authors, this report adopts a legal and institutional lens in assessing examples of oversight agencies and in explaining both the motivations for these agencies, and the challenges they face.

A key theme to emerge from this study is that independent oversight bodies fulfill multiple roles. The oversight bodies discussed in this report reveal a tension between two of these key roles: 1) serving as a conduit for communication between the public, project proponent and regulators, and 2) providing rigorous technical oversight of the monitoring process. The ability of an oversight agency to discharge these mandates will depend on a number of factors including its legal basis, the security of its tenure, the adequacy of its funding, its access to information, obligations on the regulator to respond to its recommendations, and the calibre of respect between regulator and oversight body. A further tension to be balanced is between securing independence of overseers, while ensuring that these “eyes and ears” have sufficient knowledge of the project and the community.

This report concludes by suggesting that many of the drivers that have led to the emergence of independent oversight bodies for other projects are present in the Giant Mine Remediation context. This report does not propose a specific model of oversight body for this project. Proposing a form of oversight body that addresses community concerns is ultimately a task for the affected community and participants in the Giant Mine Remediation Plan environmental assessment. What this report does do is provide insight, reflection and “lessons learned” from existing models and scholarly thinking on oversight to ensure that future models of oversight benefit from the experience of the past.

## SECTION 2: INTRODUCTION

Calls for independent oversight have emerged in diverse contexts where community fears and the perception of significant risks collide. Protecting the public interest and restoring public trust in areas of potential conflicts of interest are key drivers behind the creation of oversight agencies. We thus see independent oversight agencies arising as watchdogs over police complaints, child protection, to govern hazardous substances, and to respond to environmental risks. Increased monitoring and oversight are seen as particularly critical to deal with environmental risks which are not fully known or knowable.

In Canada, a number of recent reports have highlighted the inadequacies of monitoring and oversight of the Tar Sands.<sup>1</sup> The 2010 Report of the Auditor General of British Columbia on Oil and Gas Site Contamination Risks is subtitled “Improved oversight needed”.<sup>2</sup> In the United States, the Deepwater Horizon catastrophe has provided a catalyst for greater thinking about how to better incorporate independent oversight in offshore oil and gas regulation.<sup>3</sup> In Canada, developments in offshore oil and gas have also given rise to calls for independent oversight in both the safety<sup>4</sup> and environmental contexts.<sup>5</sup> The “material conflict between regulatory roles” which arises when regulators are charged with both maximizing economic gain from projects and regulating environmental protection and safety is a focus of concern in these reports.<sup>6</sup> Collectively, these reports, all of which have emerged in the last six months, suggest that outside review of a regulator can provide a number of useful functions including a check on capture, group-think and other limitations that can compromise the pursuit of the public interest. These expert publications equally reflect a belief that oversight plays an important function in protecting the public from environmental risks.

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<sup>1</sup> See Royal Society of Canada Expert Panel, “Environmental and Health Impacts of Canada’s Oil Sands Industry” (December 2010) [*RSC Oil Sands Report*]; and Oil Sands Advisory Panel, “A Foundation for the Future: Building an Environmental Monitoring System for the Oil Sands” (December 2010) A Report Submitted to the Minister of Environment. The Royal Society report noted that more monitoring on human contaminant exposures was needed to address concerns of surrounding communities and First Nations. Concerns about the adequacy of the Regional Aquatics Monitoring Program (RAMP) were also highlighted in this report. The Report concluded that RAMP, specifically, requires “ongoing external scientific oversight at a greater frequency than every five years, to demonstrate that it is using the best available monitoring methods with state-of-the-art detection” (at 281). The Report also pointed to the need to make this water monitoring data publicly accessible (at 281).

<sup>2</sup> Officer of the Auditor General of British Columbia, “Oil and Gas Site Contamination Risks: Improved oversight needed” (Victoria: Office of the Auditor General of British Columbia, February 2010).

<sup>3</sup> See e.g. Holly Doremus, “Through Another’s Eyes: Getting the Benefit of Outside Perspectives in Environmental Review” (2011) Boston College Environmental Affairs Law Review (forthcoming) [Doremus]; Alyson Flournoy *et al.*, “Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence” (Center for Progressive Reform White Paper No. 1007, 2010) [Center for Progressive Reform Report].

<sup>4</sup> Robert Wells, “Offshore Helicopter Safety Inquiry – Volume 1: Report and Recommendations” (2010) A Report Submitted to the Canada-Newfoundland & Labrador Offshore Petroleum Board.

<sup>5</sup> Angela Carter & Gail Fraser, “A Framework for Effective Environmental Regulation in Newfoundland and Labrador’s Offshore Oil and Gas Sector: Applying Lessons from the Offshore Helicopter Safety Inquiry” (20 January 2011) A Report Submitted to the Premier of Newfoundland & Labrador.

<sup>6</sup> W. David Angus & Grant Mitchell, “Facts Do Not Justify Banning Canada’s Current Offshore Drilling Operations: A Senate Review in the Wake of BP’s Deepwater Horizon Incident” Eighth Report of the Standing Senate Committee on Energy, the Environment and Natural Resources (August 2010) at 43 [Angus].

The Giant Mine Remediation project has already attracted numerous calls for independent oversight.<sup>7</sup> These calls are situated within public concerns of the accountability, safety, and the transparency of the long-term mine clean-up. The success of the remediation, and the task of engendering public confidence in the process, will not only be determined by the creation of an oversight agency. This report does not look at other critical issues such as the monitoring framework for the project or the choice of clean-up technologies adopted. While monitoring and oversight are interlinked, we strategically restrict ourselves to the issue of oversight in this report. To be effective, of course, oversight must complement a robust regime of monitoring and public participation.

## 2.1 AIMS AND STRUCTURE OF REPORT

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This report is, foremost, a discussion of the concept of independent oversight: its rationale and its application to projects that give rise to significant public concern. It includes a survey of oversight bodies: the reasons for their emergence, their forms, their responsibilities, and lessons to emerge from their experiences. There is a particular focus on environmental oversight of natural resource and remediation projects. This research seeks to examine emerging law and policy developments that serve as drivers for oversight bodies. It explores oversight agencies that have been created in a range of individual projects. From this discussion, best practices and “lessons learned” are gleaned to inform the discussion of an independent oversight body that can ensure public confidence over the remediation of the Giant Mine. The hope is that this research will aid the Giant Mine remediation as well as other future projects in establishing effective systems of oversight. This report seeks to raise awareness about independent oversight, and to prompt further discussion on preferred approaches. It is written with an appreciation that Indian and Northern Affairs Canada and the Mackenzie Valley Environmental Impact Review Board have both voiced a commitment to sustainability and to learning from best practices in other areas of environmental and social assessment.<sup>8</sup>

The remaining structure of the report is as follows:

Section 2.2 details the background and current state of Giant Mine as well as the remediation plan.

Section 2.3 describes the methodology used.

Section 3 introduces key concepts of the report, specifically “Oversight”, “Independence”, and “Accountability”. Though they are familiar terms, it is important that their denotations within this report

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<sup>7</sup> See e.g. letter from Chief Edward Sangris & Chief Fred Sangris, Yellowknives Dene First Nation dated 5 January 2009, on file with Mackenzie Valley Environmental Impact Review Board; letter from Gordon Van Tighem, Mayor of Yellowknife dated 10 October 2008, on file with Mackenzie Valley Environmental Impact Review Board. The need for strong and independent oversight was also raised by numerous speakers in the course of the Scoping Hearing on the Giant Mine Remediation Plan, held in Yellowknife on 22 & 23 July 2008. See Mackenzie Valley Environmental Impact Review Board, “Giant Mine Remediation Plan Scoping Hearing Transcript” (22 July 2008) at 65 [Scoping Hearing Transcript].

<sup>8</sup> See e.g. MVEIRB, Consilium & Gartner Lee Ltd., “Issues and Recommendations for Social and Environmental Impact Assessment in the Mackenzie Valley: Non-Technical Summary” (undated) [Social and Environmental Assessment]; Indian and Northern Affairs Canada, “A Citizens Guide to INAC’s Environmental Stewardship Role in the NWT” (Ottawa: INAC, 2009).

are understood. This section allows us to situate the specific case studies within an informed discussion of the guiding principles of accountability and public participation.

Section 4 looks at why independent oversight is being called for in a range of settings. It explicates the driving forces behind oversight, ranging from legal requirements to public opinion. As this report was written from a legal perspective, this section employs a decidedly legal paradigm. Instead of focusing purely on the intrinsic value of oversight, or the political motivations behind it, we discuss the drivers of reducing risk and liability, circumventing conflicts of interest, simplifying complexity, Aboriginal law and the developing concept of public participation law. This section explores how oversight has emerged to address deficits in public confidence.

Section 5 contains sixteen project-specific case studies. These case studies are grouped by region: Canada, US, and Australia. Each case study includes an overview of the project and a detailed description of its oversight mechanism. We also explain the motivation behind oversight at each project and insights to emerge from the experience of each oversight mechanism. The examples include both remediation case studies and natural resource projects. This report is attentive to the differences between natural resource development and remediation contexts. However the richness of recent experience with oversight in natural resource projects and the fact that issues of structuring effective oversight transcend specific project contexts justify the inclusion of these case studies in this report.

Section 6 concludes by offering some “Lessons Learned” from the case studies and discusses their application to the Giant Mine Remediation context.

Environmental oversight institutions are context-specific. But this report reveals that they respond to common concerns and often face similar challenges. Many oversight bodies provide mechanisms to ensure greater community involvement in monitoring activities or review of monitoring results. Independent environmental oversight agencies respond to community concerns about robust environmental protection and long-term and rigorous surveillance of environmental impacts. Oversight can be a means of inspiring the levels of public trust that are required to ensure critical public buy-in and project support.

## 2.2 THE GIANT MINE REMEDIATION

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Giant Mine is located in the Northwest Territories, five kilometres north of the centre of Yellowknife and within the city limits. The gold mine operated from 1948 until 1999. It was abandoned in 1999 and closed in 2005. Since then, the Department of Indian and Northern Affairs (“INAC”) and the Government of the Northwest Territories (“the Territorial Government”) have become responsible for management and remediation of the site.

INAC and the Territorial Government have jointly developed a remediation plan for the property. The plan seeks to address the current hazards posed by the site including 237,000 tonnes of arsenic trioxide, 14 million tonnes of tailings, 100 buildings (many contaminated with arsenic and asbestos), eight open pits, and 35 surface openings to the underground mine. The proposed remediation plan includes the preferred option of freezing the underground arsenic trioxide in place. This option poses the challenge of long-term monitoring and perpetual care. The Giant Mine Remediation Plan is currently undergoing Environmental Assessment and it is in the context of contributing to this Environmental Assessment that this report has been prepared. Specifically, this report responds to the



inclusion within the Terms of Reference of the Giant Mine Environmental Assessment discussion of “plans to engage with local communities in the development, implementation, and review of monitoring activities”.<sup>9</sup>

The mine site is in Akaitcho Dene claimed territory and is near the Yellowknives Dene First Nation (“Yellowknives Dene”) communities of N’dilo and Dettah. The mine is also within the land use area of the Tlicho, and is subject to the provisions of the Tlicho Agreement. These Aboriginal communities and the citizens of Yellowknife will be most affected by the Remediation Plan, as they are the groups which face the highest risk from the arsenic and other pollutants at Giant Mine. The Territorial Government and INAC have promised that these groups will “continue to be engaged in the design and implementation of the Remediation Project”.<sup>10</sup> A challenge for these groups is to effectively participate in the Environmental Assessment given current capacity levels and availability of personnel.<sup>11</sup>

A major concern for the affected communities has been the multiple roles played by the federal government. As expressed in one letter to INAC, community concerns centre on the multiple roles played by INAC as “proponent, regulator and inspector”.<sup>12</sup> The Minister of INAC is the federal Minister responsible under the *Mackenzie Valley Resource Management Act* (“the Act”),<sup>13</sup> and therefore is the party responsible for considering the recommendations made by the Mackenzie Valley Environmental Impact Review Board (“the Review Board”).<sup>14</sup> This Minister also approves any “Type A” water licenses. INAC inspectors are responsible for inspecting and enforcing any required regulatory authorizations under the *Northwest Territories Waters Act*. Additionally, the Minister of INAC is responsible for any *Indian Act*<sup>15</sup> requirements, such as crown consultation. Finally, INAC also has responsibilities to promote Northern economic development and capacity building.<sup>16</sup>

Overall, due to the unique risks posed by the arsenic trioxide dust, the multiple roles played by INAC, and the fact that the project will require monitoring forever, independent oversight may play a key role in ensuring the health and wellness of affected communities and the environment.

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<sup>9</sup> Mackenzie Valley Environmental Impact Review Board, “Terms of Reference for the Environmental Assessment of the Indian and Northern Affairs Canada Giant Mine Remediation Plan EA0809-001” (May 2009) s.3.6(1)(i).

<sup>10</sup> Indian and Northern Affairs Canada & Government of the Northwest Territories, “Giant Mine Remediation Project: Developer’s Assessment Report” (October 2010) at ES-10 [Developer’s Assessment Report].

<sup>11</sup> “We are completely unable to deal with this environmental assessment under our current capacity level.” Letter from Sheryl Grieve, Environment and Resource Manager, North Slave Métis Alliance to Vern Christensen, Executive Director, Mackenzie Valley Environmental Impact Review Board dated 18 January 2011, on file with Mackenzie Valley Environmental Impact Review Board [Grieve].

<sup>12</sup> Letter from Kevin O’Reilly, YDFN and Mayor of Yellowknife to Trish Marrihew-Mercredi, Department of Indian Affairs and Northern Development Canada dated 26 October 2009, on file with Mackenzie Valley Environmental Impact Review Board.

<sup>13</sup> *Mackenzie Valley Resource Management Act*, S.C. 1998, c.25 [MVRMA].

<sup>14</sup> Developer’s Assessment Report, *supra* note 10 at 1-8.

<sup>15</sup> *Indian Act*, R.S.C., 1985, c. I-5.

<sup>16</sup> Developer’s Assessment Report, *supra* note 10 at 1-9.



## 2.3 METHODOLOGY

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This report was developed using a variety of consultative and qualitative research methods. A significant reliance was made on secondary sources, both published and online. Websites are relied on heavily, as most oversight bodies utilize the internet to disseminate information. Where secondary literature was relied upon, we did not undertake original research to validate the findings of the published literature.

Documentation was supplemented by informal discussions with federal and provincial government experts, representatives of selected First Nations, recognized academic experts, industry practitioners, NGO members, and a range of oversight body personnel. As the objective of these discussions was to elicit candid information and perceptions of oversight bodies, these sources are not named in this report. A select number of in-depth interviews were carried out with individuals having specific and detailed knowledge of the oversight bodies that have emerged to govern the Northwest Territories' diamond mines. In each case, these interviews were based on signed forms of consent, protecting the confidentiality of the interviewee, and in compliance with the approval granted by the UBC Behavioural Research Ethics Board. Some oversight bodies have a much larger literature than others, both in terms of their own output and secondary analyses. Bodies with greater output and more analyses are discussed more thoroughly.

Due to our focus on legal and institutional aspects of oversight body design, a careful textual analysis of the constitutive documents of oversight agencies was made. This complemented a review of the Giant Mine Remediation Developer's Assessment Report<sup>17</sup> and records of community consultation and correspondence available on the Review Board's Giant Mine Remediation Project Registry.<sup>18</sup>

This report is not intended to be an exhaustive survey of oversight bodies. It provides a diverse cross-section of Canadian natural resource and remediation projects, along with relevant examples from the U.S. and Australia. As such, it allows for consideration of a wide variety of institutional forms, and an appreciation of common drivers.

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<sup>17</sup> Developer's Assessment Report, *supra* note 10.

<sup>18</sup> Available online: [http://www.reviewboard.ca/registry/project.php?project\\_id=69](http://www.reviewboard.ca/registry/project.php?project_id=69).

## SECTION 3: KEY CONCEPTS

This section introduces three key concepts: oversight, independence, and accountability. It defines the terms for the purposes of this report and demonstrates their importance. While much of the analysis draws on concerns that have emerged around natural resource development projects, the context of long-term remediation presents several similar issues – including the challenge of gaining and securing public confidence in regulators, and of providing careful surveillance over environmental monitoring results.

### 3.1 OVERSIGHT

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Oversight is the monitoring of any decision-maker or actor. On its own, oversight does not denote the power to affect decisions; it refers to the watching of choices and actions. Oversight bodies may be mandated to carry out inspection, evaluation and investigation.

Generally, the oversight bodies examined in this report involve community oversight of the proponent of a natural resource project or a regulatory authority. Though oversight does not necessarily effect change, the transparency it promotes is a means of balancing power and ensuring public confidence. If subject to oversight – that is, inspection, evaluation, or investigation – the actions and practices of decision-makers do not go unseen and cannot be made with the same level of impunity. To this end, it has been argued that independent oversight leads to higher standards of performance by regulators and agencies.<sup>19</sup>

Further, as natural resource projects (and clean-up operations) often span decades, environmental risk management must do the same. Even the most comprehensive environmental risk assessments can be flawed or become inadequate. Independent oversight of ongoing environmental risk management is a safeguard against unforeseen occurrences or shortcomings in the initial risk assessment. It is also a mechanism for addressing community fears and lack of trust in regulators.

An oversight body does not have an inherent interest in seeing the original environmental management system succeed, as it was not responsible for its approval and implementation. Independent oversight bodies are viewed as well suited to provide dispassionate evaluation of environmental management on an ongoing basis.

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<sup>19</sup> Lucia DiCicco, *Recommendations for the Establishment of an Independent Oversight Mechanism for the ICC* (The American Non-Governmental Organizations Coalition for the International Criminal Court, 28 July 2009).

## **3.2 INDEPENDENCE**

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### **3.2.1 Theoretical Independence and Oversight Bodies**

Independence is best described using a spectrum. Within this report, classifying a body as either independent or non-independent merely situates it closer to one end of the spectrum. A body that is on the fully independent end of the spectrum exists and functions without interference from outside sources, in particular the proponent and regulator. Multiple variables contribute to a body's independence.

Moreover, objective criteria often only relate to theoretical independence. They cannot determine how independently a body actually functions. Questions of independence cannot be determined in a vacuum. The same goes for independent oversight bodies: objectively assessing their organization cannot, alone, determine functional independence. Nevertheless, it is a sound starting point.

This report reveals the need for caution in approaching labels of independence. A number of bodies bearing the title of “independent” oversight agencies possess few indicators of independence.

### **3.2.2 Independence v. Neutrality**

Independence must be distinguished from “neutrality”. Neutrality typically denotes that an organization is not unilaterally influenced by anyone nor does it have an interest in the outcome. For our purposes, independence does not necessitate disinterest. An independent oversight body must be separated, functionally and financially, from the decision-makers – but it may have an interest in the outcome. Indeed, as the examples in this report reveal, it is valuable to have an oversight body composed of individuals with in-depth knowledge and interest in the relevant project.

### **3.2.3 Determinants of Independence**

There are numerous objective determinants of an oversight body's independence. The following are attributes that contribute to or detract from the independence of oversight bodies.

#### **3.2.3(a) Guaranteed Existence/Secure Tenure**

Guaranteed existence is crucial to independence. A body will be less independent if its existence is under threat. The case studies that follow exemplify oversight bodies from both ends of the spectrum. At one end are the bodies established by a legal instrument, whose existences are guaranteed for the lifetime of the projects (see Ekati, Diavik, and Stillwater case studies). At the other end are bodies that exist at the instance of the proponent, and which can be terminated at any time (see Athabasca Working Group case study).

Members of an oversight body must have some longevity, as well, for the body to be theoretically independent and to provide continuity of knowledge. If the members of an oversight body can be replaced at the whim of the overseen, the body loses independence.

### **3.2.3(b) Guaranteed Funding**

Guaranteed funding is closely associated with guaranteed existence; resources are inextricable from independent oversight. If a watchdog must stay in the good graces of the decision-maker to receive funding, oversight will be attenuated. Instead of crusading for, *e.g.*, effective environmental management, the benefactor's interests may become paramount.

The Laboratory for Energy-related Health Research Superfund site (see Section 5.2.4) demonstrates the perils of unstable funding. The oversight body attached to the project received intermittent grants from the United States Environmental Protection Agency ("EPA"). However, conditions-*precedent* were attached to each new grant. In 2009, the EPA attached conditions which the body feared would jeopardize its effectiveness. The oversight group refused to adhere to the conditions and disbanded shortly thereafter. The Voisey's Bay Environmental Monitoring Board (see Section 5.1.6) is another example of an oversight agency where insecurity around funding may threaten the board's ongoing existence. The Board commenced with a five year initial term, in 2002, to be renegotiated in 2007. The four parties have not been able to reach agreement on subsequent funding for the Board. Minimal funding is being provided by the province to keep the Board on "life support" but the future is uncertain.

### **3.2.3(c) Composition**

The composition of an oversight body is another objective determinant of independence. A permanent body with guaranteed funding will lose independence if it is staffed by the proponent. The ideal composition of an oversight body will depend on the subject matter of oversight, the body's function, and the needs of the surrounding communities of interest. For instance, oversight bodies which review, comment on, and provide recommendations for environmental mitigation plans should be technically proficient in environmental management. Without internal expertise such a body would have to rely on (potentially non-independent) outside opinions. Conversely, a body that functions as a conduit between the proponent and community should have members who can communicate effectively with both parties. This is particularly important if the community has a unique language, culture, and/or heritage. Ideally, members who facilitate communication should be trusted by all the interlocutors.

Many of the oversight bodies examined in this paper approach "composition" as a balancing act: the oversight body at Voisey's Bay nickel mine is composed of four community representatives and four government representatives (and one mutually agreed upon chair); the oversight body at Stillwater mine (see Section 5.2.1) is equal parts community and proponent representatives. The fact that oversight bodies include proponents and regulators does not render them "non-independent", but it does drive them nearer to that end of the spectrum. The more the overseen are able to influence oversight, the less independent oversight becomes.

### **3.2.3(d) Access to Information**

Bodies which act as conduits between stakeholders and bodies which monitor environmental management both need access to information in order to function. Without access to monitoring data a body cannot determine the state of environmental management; without knowledge of proponent actions and plans a body cannot apprise the public of the project's status. Bodies need access to information in order to "oversee". The information is, essentially, the subject of oversight.

Lack of access to information is often cited as the greatest impediment to effective citizen participation in oversight. Some of the oversight bodies examined in Section 5 were established by agreements which prescribe access to relevant information. The parties to the agreement are contractually obligated to, e.g., provide the oversight body with all information related to the agreement which they can reasonably produce. However, not all oversight bodies benefit from similar provisions. Those which do not are faced with obvious hurdles. If the body cannot access all relevant information oversight will be incomplete.

### 3.3 ACCOUNTABILITY

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Accountability is a word that has leapt to public prominence in recent years. Because it is used in so many disparate contexts, accountability can be a confusing and amorphous term. Simply put, accountability always refers to ensuring decision-makers are responsible for their choices. It is the type of choices and the manifestations of accountability regimes that shift.

Accountability concerns can be mapped across six questions:

- [1] *who* is liable or accountable [2] *to whom*;
- [3] *what* they are liable to be called to account for;
- [4] *through what processes* accountability is to be assured;
- [5] *by what standards* the putatively accountable behaviour is to be judged;
- [6] and, what the potential *effects* are of finding that those standards have been breached.<sup>20</sup>

The answers to these six questions permit the compartmentalization of systems of accountability. These questions also underlie the fact that different forms of accountability share a common goal: holding decision-makers responsible for their actions and effecting change when actions do not comport with standards.

Generally, the oversight bodies explored in Section 5 aim to hold the proponent and/or regulator accountable for the environmental effects of projects by identifying adverse environmental impacts. The accountability regimes are different from project to project, as oversight bodies are vested with different powers, leading to disparate outcomes when impacts are identified. When there is a contractual obligation upon the proponent/regulator to respond to recommendations made by oversight bodies, greater accountability is achieved. If the proponent or regulator is able to ignore adverse environmental impacts or shortcomings in environmental management without having to consider alternative options or illustrate why other options are inappropriate, the accountability system will be compromised.

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<sup>20</sup> Jerry L. Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance" in Michael W. Dowdle, ed., *Public Accountability, Designs, Dilemmas and Experiences* (UK: Cambridge University Press, 2006) 115 at 118.

## SECTION 4: DRIVERS

The formation of oversight bodies is driven by a variety of factors (“drivers”). This section elucidates a number of the drivers motivating the creation of environmental oversight bodies. These drivers are best understood within the context of recent regulatory scholarship that clarifies a number of additional benefits of external oversight, namely: 1) the fact that external oversight helps counter ‘mission agency creep’; that is, the tendency of agencies with a primary mission to focus on their mission to the exclusion of other issues; 2) reduction of the ‘rubber stamp syndrome’; the tendency to repeat approaches that have been used in the past without new thinking, and 3) the fact that external oversight can infuse new technological change into organizations, countering past performance syndrome.<sup>21</sup>

### 4.1 PUBLIC PARTICIPATION

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#### 4.1.1 Principled Rationale for Public Participation

Sustainable development has been a dominant global environmental policy discourse since the 1980s. One central aspect of sustainable development is the growing recognition of the importance of public participation in environmental decision making. Participation now occupies a central part in the evolving law of energy and natural resources.<sup>22</sup> The requirements of public participation in environmental decision making are now set out in an international treaty, the Aarhus Convention, signed in 1988. These requirements are: access to environmental information, participation by the public in decision-making procedures, and access to justice.<sup>23</sup> This treaty is now cited internationally as establishing best practices in public participation.

There is substantive empirical motivation for public participation. Scrutiny of the Canadian Environmental Impact Assessment system suggests that “public participation affects the quality of...[the] process, which in turn affects the quality of the decision”.<sup>24</sup> The Developer’s Assessment Report confirms that INAC and the Territorial Government are aware of the importance of public participation, particularly the meaningful involvement of Aboriginal people, as an ongoing element of monitoring and oversight.<sup>25</sup> This is particularly vital given the fact that the post-approval phases of projects (including ongoing monitoring and oversight) have been dubbed the “weakest stage in most

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<sup>21</sup> See Doremus, *supra* note 3.

<sup>22</sup> An excellent comparative analysis of public participation can be found in Donald Zillman, Alastair Lucas & George Pring, eds., *Human Rights in Natural Resource Development* (New York: Oxford University Press, 2002) [Zillman].

<sup>23</sup> United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted June 25, 1998 at Aarhus, Denmark, 38 I.L. M. 517 (1999).

<sup>24</sup> Barry Barton, “Underlying Concepts and Theoretical Issues in Public Participation in Resources Development” in Zillman, *supra* note 23, 77 at 101 [Barton].

<sup>25</sup> Developer’s Assessment Report, *supra* note 10 at 13-24.

jurisdictions where [Environmental Impact Assessment] is practiced”, and the Review Board does not buck the trend, despite the thoroughness of its assessments.<sup>26</sup> If governments and stakeholders want to improve environmental management, this trend must be altered. Writers on participation have specifically addressed “post-project analysis and monitoring” as elements for effective participation in environmental matters.<sup>27</sup>

A particular stream of developing public participation law stresses the need for arrangements to avoid damage to the interests of Indigenous peoples.<sup>28</sup> Indigenous rights and land claims provide a further justification for participation rights. In Canada, heightened sensitivity to the consultation and participation needs of Aboriginal people is not merely an expression of social responsibility or cultural sensitivity. It is ultimately a requirement of Canadian constitutional law.

## 4.1.2 Legal Requirements of Public Participation in Environmental Management

### 4.1.2(a) Regulatory Requirements

All proposed natural resource projects in Canada must meet regulatory requirements before they are approved. The substance of the regulatory requirements depends on the location of the project and the relevant authority. The *Mackenzie Valley Resource Management Act* (“*the Act*”), for instance, mandates certain follow-up activities.<sup>29</sup> In the context of Environmental Impact Assessments, follow-up is “the monitoring and evaluation of the impacts of a project...for management of, and communication about, the environmental performance of that project”.<sup>30</sup> While the *the Act* does not mandate creation of independent oversight bodies, such bodies are a component of follow-up; they aim to monitor and evaluate the impacts of projects in order to disseminate information and/or strengthen environmental management. Therefore, independent oversight bodies represent a means by which project proponents *can* comply with *the Act*.

Regulatory requirements can also be *ad hoc* conditions which arise on a project by project basis. The power of regulatory bodies to impose *ad hoc* preconditions was exercised in the case of the diamond mines in the Northwest Territories. Environmental Agreements – which incorporated independent oversight bodies – were mandated before project approval. These examples demonstrate the current trend in Canadian natural resource projects to go beyond minimum regulatory requirements.

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<sup>26</sup> Ciaran O’Faircheallaigh, *Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up and Environmental Management of Major Projects* (Calgary: University of Calgary, Canadian Institute of Resources Law, 2006) at 2 [*Environmental Agreements in Canada*].

<sup>27</sup> N.A.F. Popovic, “The Right to Participate in Decisions that Affect the Environment” (1993) *Pace Envtl. L. Rev.* 683.

<sup>28</sup> Barton, *supra* note 24 at 105.

<sup>29</sup> See generally *MVRMA*, *supra* note 13.

<sup>30</sup> Angus Morrison-Saunders & Jos Arts, “Introduction to EIA Follow-up” in Angus Morrison-Saunders & Jos Arts, eds., *Assessing Impact: Handbook of EIA and SEA Follow-up* (UK: Earthscan, 2004) 1 at 2-3 [Morrison-Saunders].



#### 4.1.2(b) Constitutional Requirements

The Constitution of Canada does not explicitly engender rights of participation for citizens in governmental decision-making.<sup>31</sup> However, it has been argued that, to be consistent with the *Charter*, persons deleteriously affected by regulatory decisions must have the opportunity to participate in the decision-making process.<sup>32</sup> Disallowing participation in such decisions potentially infringes the s.7 right to security of the person.<sup>33</sup>

Additionally, “[c]onsiderable consensus exists in *Charter* scholarship and case law that section seven protects a relatively wide range of personal interests, including those relating both to physical and psychological security and well-being”.<sup>34</sup> The psychological impacts of abandoned mines can be diffuse. Moreover, any constitutional and regulatory requirements for public participation endure into the follow-up stage. An independent oversight body which serves as an information conduit and dispute resolution mechanism between communities and the government is one way to ensure ongoing public participation.

#### 4.1.2(c) International Law Requirements

A growing body of international law supports the public participation requirements discussed in this section. Notably, Principle 10 of the 1992 *Rio Declaration on Environment and Development* (“*Rio Declaration*”) states that, “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level”.<sup>35</sup> Particular attention is drawn to access to information and opportunities for submissions as facets of public participation.<sup>36</sup> And heightened requirements of consultation and participation have been recognized in international law for developments affecting indigenous peoples.<sup>37</sup> The purpose of this section is not to elaborate on these general obligations of participation and consultation, but rather to draw attention to the precautionary principle.

The precautionary principle has become a pillar of both domestic and international environmental law. It forms the basis of a number of significant international treaties requirements. The precautionary principle equally animates numerous Canadian statutes in the environmental field and has been affirmed in a number of judgments by all levels of Canadian courts. The *Rio Declaration* enunciation of the precautionary principle is a well-accepted definition: “Where there are threats of

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<sup>31</sup> Alastair R. Lucas, “Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?” in Zillman, *supra* note 22 at 305.

<sup>32</sup> See Martha Jackman, “Cabinet and the Constitution: Participatory Rights and Charter Interests: *Manicom v. County Oxford*, The Case Comments” (1990) 35 McGill L. J. 943 [Jackman]; *Manicom et al. v. County Oxford et al.*, [1985] O.J. No. 2635, 52 O.R. (2d) 137.

<sup>33</sup> *Canada Charter of Rights and Freedoms*, s.7, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>34</sup> Jackman, *supra* note 32 at 945.

<sup>35</sup> *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) [*Rio Declaration*].

<sup>36</sup> Barton, *supra* note 24 at 83.

<sup>37</sup> For a discussion of these legal requirements see Gillian Triggs, “Indigenous Peoples and the Right to Consultation in Minerals and Energy Resource Development” in George Pring & Donald Zillman, eds., *PUBLIC PARTICIPATION IN THE MINERAL AND ENERGY RESOURCES INDUSTRY* (2002, Oxford University Press) 123.

serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.<sup>38</sup> A thoughtful consideration of the precautionary principle can be found in the Review Board’s *Issues and Recommendations for Social and Environmental Impact Assessment in the Mackenzie Valley*, concluding: “where evidence is insufficient, then good practice may allow for the careful use of the precautionary principle as the basis for making a decision, particularly where circumstances warrant proceeding with caution”.<sup>39</sup>

Informing the precautionary approach are two critical concepts.<sup>40</sup> First, that in order to prevent harm before it occurs, action may have to be taken absent full scientific proof that an activity causes harm. Second, and most relevant to the remediation context, that all harms are not equal. That is, where harm is irreversible, extra efforts may have to be taken to prevent the harm from occurring. Dealing with high risk situations such as toxic substances is exactly where the precautionary principle has gained traction. Toxic substances may impose highly unlikely risks, but risks that are catastrophic should they occur. The precautionary principle thus requires us to consider worst case analyses for low-probability environmental disasters and to take preventative measures. Independent oversight may be seen to be one such measure.

## 4.2 CONFLICTS OF INTEREST

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Motivations for independent oversight bodies often trace to concerns about conflicts of interest. When a conflict of interest is perceived, independent oversight is one way to quell fears. Examples can be found outside of natural resource projects. British Columbia’s Special Prosecutor system was motivated by conflict of interests concerns. The system removes charge approval from the Attorney General’s office if the decision *could* be influenced politically. Special prosecutors can be appointed where there is a potential for a perceived or actual improper influence in prosecutorial decision making. The key concern is the need to ensure public confidence in the administration of criminal justice.<sup>41</sup> This structure goes beyond oversight; it delegates decision-making to a politically isolated party.

The conflict of interest inherent in a single regulator holding responsibility for both project approval and environmental and safety functions has been highlighted by the Deepwater Horizon disaster and the multitude of reports that have been produced in its wake. In Canada, the Standing Senate Committee on Energy, the Environment and Natural Resources has recommended that the structure and role of the offshore petroleum Boards be re-examined to determine whether there may be a material conflict between regulatory roles.<sup>42</sup> It notes:

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<sup>38</sup> *Rio Declaration*, *supra* note 35, Principle 15.

<sup>39</sup> Social and Environmental Assessment, *supra* note 8.

<sup>40</sup> See Centre for Progressive Reform Report, *supra* note 3 at 43.

<sup>41</sup> Ministry of Attorney General, “Role of Special Prosecutors” (26 January 2009) Government of British Columbia.

<sup>42</sup> Angus, *supra* note 6 at 43.

The structure of the Atlantic offshore petroleum Boards is in contrast with that of the regulatory regime for offshore regions north of 60 degrees latitude, in which licensing (and hence value) and safety functions are performed by separate entities. The NEB provides the regulatory oversight and INAC takes care of bidding and leasing for offshore oil and gas projects. These roles are therefore separated.<sup>43</sup>

## 4.3 COMPLEXITY

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Another driver for independent oversight is complexity. Independent oversight bodies can act as a go-between for the public and the proponent. By including communication of complex scientific aspects of a project to the public in its mandate, an oversight body promotes greater transparency for and understanding by the affected community.

Even technically simple endeavours may be difficult to comprehend because of their scale. Daunting size and scope may prevent members of the community from fully understanding projects. An independent oversight body can point out key aspects or divide the project into manageable parts for explanation to community members.

Oversight bodies can also offer valuable translation services. While it can be argued that project leaders can also provide these services, the value of charging an independent body with the task of information provision and translation is that it brings greater trust in the information provided. At the Ekati diamond mine, for example, the Independent Environmental Monitoring Agency produces an annual report that examines how the proponent is adhering to its obligations under the Environmental Agreement. The report is produced in two versions – one "plain language" and the other "technical". The plain language report is a useful tool because it helps local community members understand complex scientific concepts.

Through this type of activity an oversight body can help reduce public confusion about projects. Other options for promoting community understanding include holding public meetings in diverse and remote locations, disseminating brochures, and providing repositories of information. Especially when a project includes actions that are novel or appear dangerous to the public, it is important that its complexities are explained by a trusted source in order to reduce myths and confusion.

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<sup>43</sup> *Ibid.* at 26.

## 4.4 RISK AND LIABILITY

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When a project creates the potential for harm to human health or the environment, an independent oversight body can help prevent harm or reduce a proponent's liability should harm occur.

If scientific monitoring, or review of the proponent's monitoring studies, is part of the independent oversight body's mandate, then the body may foresee harm before the proponent and impel preventive action. For example, Ekati's Independent Environmental Monitoring Agency has been positively cited for raising concerns with the proponent (BHP-Billiton) about the oxygen and phosphorus levels present at Kodiak Lake.<sup>44</sup>

Theoretically, an independent oversight body could reduce a proponent's liability in civil law suits. If the oversight body works to monitor environmental impacts, but fails to foresee or recognize such an impact, it is more likely that a court would see the event as an "inevitable accident" rather than negligence. An "inevitable accident" is a full defence at law to a charge of negligence—it means that no reasonable amount of care could have prevented the harm.<sup>45</sup> Additionally, if a regulatory offence charge is brought, for instance under the *Canadian Environmental Protection Act*,<sup>46</sup> a defence of due diligence could be invoked.<sup>47</sup> An oversight body would increase the likelihood of a successful due diligence defence, since the body would give weight to the argument that the proponent used adequate measures of care to prevent the harm. Further, the very act of creating an oversight body would be evidence of a high standard of care.

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<sup>44</sup> McLeod Institute, "IEMA Evaluation Report" (Calgary, March 2000) at 9 [*Evaluation Report*].

<sup>45</sup> *Rintoul v. X-Ray and Radium Industries Ltd.*, [1956] S.C.R. 674.

<sup>46</sup> *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33.

<sup>47</sup> If the offence is a strict liability offense, as per *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

## 4.5 ABORIGINAL LAW AND THE DUTY TO CONSULT

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Aboriginal law is an area that is constantly evolving. This is but one reason why it makes sense to adopt best practices with respect to Aboriginal rights; today's best practices may become tomorrow's legal requirements.<sup>48</sup>

Section 35 of the *Canada Act* 1982<sup>49</sup> constitutionally recognized and affirmed the rights of Aboriginal people. Aboriginal title (a form of land ownership) falls under this constitutional protection. Section 35 creates a duty to consult with Aboriginal peoples when the government (federal, provincial, or territorial) is contemplating actions that may adversely affect Aboriginal rights or title (as long as the government has real or constructive knowledge of that right or title).<sup>50</sup> This is the most salient aspect of Aboriginal law when actions such as mining, remediation of land, or other development is being contemplated. The duty to consult is not just a duty to notify the affected aboriginal groups; in some cases, it can mean a duty to accommodate Aboriginal interests.

The duty to consult is often analyzed on a spectrum. If the Aboriginal claim to right or title is strong, and the adverse effects of the proposed action are severe, the Crown is required to conduct thorough consultation and may be required to accommodate Aboriginal requests. The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*<sup>51</sup> elucidates this end of the spectrum:

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the aboriginal peoples, and the risk of non-compensable damage is high. In such cases consultation aimed at finding a satisfactory interim solution may be required and may entail, *inter alia*, the opportunity for aboriginals to make submissions for consideration; formal participation in the decision-making process; and written reasons to show that aboriginal concerns were considered. This list is neither mandatory nor exhaustive.<sup>52</sup>

Consultation is critical to the process of environmental assessment:

Crown consultation can take many forms. For example, project modifications may be required as part of environmental assessment or post-environmental assessment permitting processes. This could include route changes for linear projects, compensation for provable trapping losses, or programs to mitigate project effects on other traditional uses such as hunting or fishing.<sup>53</sup>

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<sup>48</sup> For a discussion of Canadian law on the duty to consult, see Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2009) at 24.

<sup>49</sup> *Canada Act*, *supra* note 33.

<sup>50</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at para. 44 (emphasis added).

<sup>53</sup> *Ibid.* (emphasis added).

INAC is aware of its duty to consult when contemplating actions that affect land, particularly when it comes to development in the Northwest Territories. In INAC's *Aboriginal Consultation and Accommodation Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*,<sup>54</sup> INAC identifies four steps of consultation: Pre-consultation Analysis and Planning, Consultation Process, Accommodation Implementation, and Monitoring and Follow-up. An independent oversight body that represents and responds to the needs of affected Aboriginal groups could contribute to the Crown fulfilling its duty to consult.

This section has illustrated the multiple motivations for environmental oversight bodies. From avoiding culpability for environmental harm to complying with regulatory requirements to engendering public confidence, there are numerous and disparate factors that may drive an actor to establish environmental oversight. The above drivers are not an exhaustive list, but highlight the most common and influential motivations. The case studies in the next section give concrete examples of oversight bodies motivated by these drivers. As the case studies will show, many drivers often coexist, overlap, and interplay at individual projects.

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<sup>54</sup> Government of Canada, "Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult" (February 2008).

### 5.1 CANADA

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#### 5.1.1 Ekati Diamond Mine & the Independent Environmental Monitoring Agency

##### Ekati Diamond Mine Overview

Ekati, Canada's first diamond mine, began operations in 1998.<sup>55</sup> Majority-owned by BHP-Billiton ("BHP"), the mine is located 310 kilometres northeast of Yellowknife, Northwest Territories, near Lac de Gras.

As Ekati was the first major mining project to be developed in the area in over a decade, regulatory and negotiation processes had to catch up with the expectations of local Aboriginal groups and non-governmental organizations. A comprehensive and clearly defined regulatory path for a project of this scope was lacking. As a result, a number of elements of project governance emerged through the negotiation of project-specific agreements. These included impact and benefit agreements, a socio-economic agreement and an Environmental Agreement, signed by BHP, the Government of Canada, and the Territorial Government ("the Agreement"). Once the negotiation of the Environmental Agreement began, the process quickly moved "well beyond what the government and BHP had ever anticipated."<sup>56</sup> This was particularly the case with respect to Aboriginal participation in the negotiations. One aspect of the negotiations which extended far beyond the Environmental Assessment Panel Report was the creation of the Independent Environmental Monitoring Agency ("the Monitoring Agency").<sup>57</sup>

##### The Independent Environmental Monitoring Agency

The Monitoring Agency is tasked with two major, and potentially disparate, functions of environmental oversight: (1) overseeing technical aspects of environmental management, and (2) disseminating information and acting as a mechanism for community participation.

On the technical side, the Monitoring Agency is charged with compiling and analyzing environmental data, with the purpose of reviewing and reporting on this data and providing recommendations on BHP's environmental monitoring programs, and government compliance reports.

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<sup>55</sup> InfoMine, "Ekati Mine" (2010), online: <http://www.infomine.com/minesite/minesite.asp?site=ekati>.

<sup>56</sup> Kevin O'Reilly, *The BHP Independent Environmental Monitoring Agency as a Management Tool* (Yellowknife: Canadian Arctic Resources Committee, 1998). See also William A. Ross, "The Independent Environmental Watchdog: A Canadian Experiment in EIA Follow-up" in Morrison-Saunders, *supra* note 30 at 179.

<sup>57</sup> William J. Couch, "Strategic Resolution of Policy, Environmental, and Socio-Economic Impacts in Canadian Arctic Diamond Mining: BHP's NWT Diamond Project" (2002) 20(4) *Impact Assessment and Project Appraisal* 265 at 275.



The Monitoring Agency has the additional obligation to observe and make recommendations related to the integration of traditional knowledge and the experience of the Aboriginal peoples in environmental programs and plans.<sup>58</sup> It is intended to serve as a watchdog on both the company and government regulators.<sup>59</sup>

On the communication side, the Monitoring Agency is responsible for bringing community concerns to the attention of the proponent and government, and for keeping the communities apprised of environmental management activities at the mine.<sup>60</sup> The Monitoring Agency goes beyond a liaison role, and is charged with facilitating direct communication between Aboriginal organizations and BHP.<sup>61</sup>

## FORM

### Composition

As required by the Environmental Agreement, the Monitoring Agency is composed of a seven-member board. One member is appointed by each of the four Aboriginal groups signatory to the Environmental Agreement's Implementation Protocol, and three are appointed by BHP, the Government of Canada, and the Territorial Government, jointly but in consultation with the Aboriginal parties. The only stipulation for membership is that "Directors [must be] independent of the appointing parties, and cannot be employees of government or BHP".<sup>62</sup> The board members are not tasked with representing the interest that appointed them, but rather share a common mandate.

### Funding

BHP is responsible for funding the Monitoring Agency until the mine site is reclaimed, although some initial start-up funds came from the governments. The Environmental Agreement set the Monitoring Agency's budget for the first two years and states that, thereafter, the budget is to be negotiated biennially by the Monitoring Agency and BHP. However, a recent mediation fixed the Monitoring Agency's budget permanently.

The budget started at \$450,000/ year and grew to \$600,000/year before it was finally resolved. Funding has posed a problem for the Monitoring Agency. Pursuant to the dispute resolution clause in the Environmental Agreement, two mediations have taken place based on differences of opinion with respect to the Monitoring Agency's independence and budget work plan. These mediations highlight the problem of contractual privity. Only the parties to the Environmental Agreement can invoke its dispute resolution provisions. The Monitoring Agency is not a party to the Agreement but became a party to the mediation as it was a key party to the dispute. As the parties to the Agreement must themselves fund any dispute resolution proceedings, it took a long time to get government parties to

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<sup>58</sup> *Environmental Agreement between Her Majesty the Queen in Right of Canada, Government of the Northwest Territories and BHP Diamonds Inc.* dated 6 January 1997, s.5.2(c)(vi) [*Ekati Environmental Agreement*].

<sup>59</sup> *Ibid.* at s.5.2(b).

<sup>60</sup> SENES Consultants, *External Review of the Independent Environmental Monitoring Agency* (March 2009) A Report Prepared for the Independent Environmental Monitoring Agency at 5-6 [*External Review*].

<sup>61</sup> *Ibid.* at 6.

<sup>62</sup> *Ibid.* at 5.

call for mediation. This reflects an accountability deficit in the Agreement, as the watchdog tasked with monitoring the company and the government is unable to effect dispute resolution.

### **Tasks/Powers**

The Monitoring Agency monitors and reviews design and results of environmental management plans, monitoring programs and other reports prepared by and for BHP and governmental agencies. Review of these reports promotes the task of identifying and evaluating environmental impacts and assessing the activities of regulatory agencies and their interaction with BHP. The Monitoring Agency further serves as a mechanism for facilitating interaction between BHP and Aboriginal groups and furthering the objective of integrating traditional knowledge into BHP's management plans.

One of the most important powers of the Monitoring Agency is its right to access information. BHP is required to submit an annual report to the Monitoring Agency demonstrating its compliance with the Environmental Agreement's provisions, along with "all supporting information and data from the environmental monitoring programs and all studies and research conducted in accordance with...[the] Agreement".<sup>63</sup> This plenary access to information allows the Monitoring Agency to thoroughly critique environmental management efforts at the site.

As mentioned above, the Monitoring Agency is entitled to make recommendations on all aspects of environmental management at Ekati. While the Monitoring Agency does not have the power to unilaterally enact recommendations, the Environmental Agreement stipulates that,

Canada, the [Territorial Government] and/or BHP, as the case may be, shall:

(i) give full and serious consideration to the reports and recommendations of the Monitoring Agency;

(ii) implement those recommendations of the Monitoring Agency that it or they consider appropriate; and

(iii) respond to the Monitoring Agency with its or their written reasons for not accepting the recommendations that are not deemed appropriate.<sup>64</sup>

The Environmental Agreement's "teeth" also come in the ability to draw upon the proponent's security deposit in the event of non-compliance with the Agreement and through the mechanism of Ministerial Reports whereby the company can be required to correct deficiencies.

## **DRIVERS**

### **Lack of Trust & Confidence in Environmental Assessment**

In the course of environmental assessment of the Ekati mine, Aboriginal groups expressed concern about the environmental impacts of the mine and lacked confidence that these impacts would be adequately addressed through the environmental assessment process. One area of particular concern was whether the many verbal commitments made by the governments and the proponent

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<sup>63</sup> *Ekati Environmental Agreement*, *supra* note 58, s.6.1.

<sup>64</sup> *Ibid.*, ss.5.5(b)(i),(ii),(iii).

would be legally entrenched and enforced. Other concerns emanated from the piecemeal regulatory approach to environmental impacts, as jurisdiction for environmental issues was split between numerous government agencies and varying levels of government. This exacerbated a historic lack of trust that governments would make environmental protection a priority, when they were also charged with attracting economic development to the region. An independent agency tasked with taking a holistic approach to environmental impacts, and one in which Aboriginal groups would play a role, could help address these community concerns.<sup>65</sup> The Monitoring Agency was thus explicitly set up as a watchdog on both BHP's environmental management and on government regulators' performance in fulfilling their environmental regulatory mandates. In the words of one community member: "[I] took comfort that an independent voice is looking after our interest to protect the land, being our watchdog".<sup>66</sup>

## Regulatory Requirements

The Environmental Agreement responded to community concerns over regulatory gaps and potential oversight deficiencies. While the Agreement was without explicit legal basis, the leverage for ensuring the negotiation of such an Agreement existed in the form of an unsigned water licence.<sup>67</sup>

## DISCUSSION

There have been two external, independent reviews of the Monitoring Agency over the past ten years (2000 and 2009). Both reviews found that the Monitoring Agency is fulfilling its mandate to a great extent, concluding "there is a high degree of satisfaction" with oversight among all parties.<sup>68</sup> In particular the Monitoring Agency has achieved broad success as a technical review body. It has aided in holding BHP accountable for its complex environmental management decisions; "[t]he Directors and staff are seen as very competent and...there is a sense of trust and confidence in the Agency".<sup>69</sup>

Specifically, the Monitoring Agency effected change in Ekati's wildlife monitoring. In 2004 the Monitoring Agency recommended a novel method of assessing wolverine population and range (using DNA sampling). The recommendations were implemented in 2005 and 2006. Results "showed that the technique is successful at producing reliable population and range estimates, to enable tracking of wolverine density and activity relative to mines".<sup>70</sup> However, BHP discontinued the program after 2006 and replaced it with cheaper "snow track counts". According to the Monitoring Agency and other researchers, the track counts were "not robust indicators of wolverine densities...and [had] limited value

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<sup>65</sup> For a more complete discussion of the emergence of the Monitoring Agency see Natasha A. Affolder, "Rethinking Environmental Contracting" (2010) 21 *Journal of Environmental Law and Practice* 155 at 161.

<sup>66</sup> *Evaluation Report*, *supra* note 44 at 12.

<sup>67</sup> Irene Sosa & Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada" (Toronto: Canadian Environmental Law Association, 2001) at 7 [Sosa & Keenan].

<sup>68</sup> *External Review*, *supra* note 60 at 6.

<sup>69</sup> *Ibid.*

<sup>70</sup> Independent Environmental Monitoring Agency, "Technical Annual Report 2007-08" (2008) at 28 [*Technical Report* 2008].

in determining mine-related effects on wolverine populations".<sup>71</sup> The Monitoring Agency continued to recommend the DNA sampling and it was reinstated in 2010.

Moreover, in 2007-08 the Monitoring Agency recommended changes to BHP's Air Quality Monitoring Program. The main concern was "the potential for significantly high levels of dust deposition...and the possible effects on water, vegetation and wildlife, particularly caribou".<sup>72</sup> Based on the description in Ekati's 2009 Environmental Impact Review, BHP incorporated the Monitoring Agency's recommended alterations.<sup>73</sup>

The Monitoring Agency has also critiqued BHP's Interim Closure and Reclamation Plan ("Closure Plan") – recognizing that the draft Closure Plan fails to identify the challenges posed by the substantial volumes of highly erodible and mobile extra-fine processed kimberlite in the Long Lake Containment Facility.<sup>74</sup> BHP has indicated that formation of the Closure Plan is an ongoing process. The regulator, the Wek'eezhii Land and Water Board, agreed with the position put forward by the Monitoring Agency on the need for more detailed research on extra-fine processed kimberlite.<sup>75</sup>

Areas of identified strength also include making information accessible. The Monitoring Agency maintains a publicly accessible library of materials regarding the environmental management of the mine. It also provides a web site that includes access to major documents and communication, and publishes brochures and annual reports.

The Monitoring Agency has a litany of responsibilities; success has not pervaded the entire gamut. The latest external review noted that people involved with the Monitoring Agency "recognised that there is room for improvement, primarily in the areas of community outreach, communications, and Traditional Knowledge integration".<sup>76</sup> These are the same shortcomings identified nine years earlier:

Public and Aboriginal Involvement Programs overall registered low on the customer satisfaction scale...stakeholders expressed general frustration with the lack of progress in integrating Traditional Knowledge and experience into environmental plans and programs...[T]he fact that the Agency has not been able to move the issue forward more quickly is often seen to be a failure to deliver on its mandate.<sup>77</sup>

This failure to facilitate the integration of TK has been a common problem for all three of the Northwest Territories' diamond mine oversight agencies. Part of the problem may be the absence of separate capacity funding that would allow Aboriginal groups to be more engaged with the operations and monitoring of the Monitoring Agency. Some have suggested that specific information and

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<sup>71</sup> Independent Environmental Monitoring Agency, "Technical Annual Report 2008-09," (2009) at 35 [*Technical Report 2009*].

<sup>72</sup> *Ibid.* at 31.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Technical Report 2008*, *supra* note 70 at 15.

<sup>75</sup> Wek'eezhii Land and Water Board, "Reasons for Decision – BHP's Interim Closure and Reclamation Plan," (10 December 2010).

<sup>76</sup> *External Review*, *supra* note 60 at 6.

<sup>77</sup> *Evaluation Report*, *supra* note 44 at 9.

recommendations need to be sought rather than bluntly prodding project proponents to incorporate TK.<sup>78</sup>

A final challenge for the Monitoring Agency has been to bridge its functions as community liaison and independent technical watchdog. For some, the Monitoring Agency has guarded its independence too rigorously, undermining its ability to advance solution-oriented agendas.<sup>79</sup> For others, this sort of rigorous independent technical oversight is exactly what they see as the Monitoring Agency's greatest contribution. The Monitoring Agency has recently increased its focus on communications by hiring a new staff person, reinstating publication of a newsletter and improving its website.<sup>80</sup>

## 5.1.2 Diavik Diamond Mine & the Environmental Monitoring Advisory Board

### Diavik Diamond Mine Overview

Diavik diamond mine is located in the Northwest Territories on a 20 square kilometre island in Lac de Gras.<sup>81</sup> The mine is an unincorporated joint venture between Diavik Diamond Mines Inc. (a Rio Tinto subsidiary) and Harry Winston Diamond Limited Partnership. Diamond extraction began in 2002.

The mine underwent environmental assessment under the *Canadian Environmental Assessment Act* in 1998-1999 as a comprehensive study. On recommendation from the environmental assessment, an environmental agreement was signed in March 2000. The Diavik Environmental Agreement ("the Agreement") is a legally binding contract.<sup>82</sup> The parties to the Agreement are the Government of Canada, the Territorial Government, Diavik Diamond Mines Inc. ("Diavik Inc."), and five Aboriginal groups (Lutsel K'e Dene Band, Yellowknives Dene First Nation, the Dogrib Treaty 11 Council, North Slave Métis Alliance and the Kitikmeot Inuit Association).

The purposes of the Agreement include ensuring that mitigation measures are appropriately implemented; providing for additional monitoring to verify the accuracy of environmental assessment and the effectiveness of mitigation projects; facilitating the use of holistic approaches; facilitating community involvement; and facilitating effective Aboriginal participation.<sup>83</sup> Article IV of the Agreement creates the Diavik Environmental Monitoring Advisory Board (Monitoring Board) as a "public watchdog of the regulatory process and implementation of the Environmental Agreement".<sup>84</sup>

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<sup>78</sup> *External Review*, supra note 60 at 9.

<sup>79</sup> *Evaluation Report*, supra note 44 at 14.

<sup>80</sup> Independent Environmental Monitoring Agency, "Technical Annual Report 2009-10" (2010) at i.

<sup>81</sup> Rio Tinto, "Canadian Diamonds: Diamonds of Distinction" (2010), online: [http://www.diavik.ca/ENG/ourproduct/index\\_ourproduct.asp](http://www.diavik.ca/ENG/ourproduct/index_ourproduct.asp).

<sup>82</sup> *Environmental Agreement between Her Majesty the Queen in Right of Canada, the Government of the Northwest Territories, Diavik Diamond Mines Inc. and Dogrib Treaty 11 Council et al.* dated 8 March 2000 [*Diavik Environmental Agreement*].

<sup>83</sup> *Ibid.*, s.1.1.

<sup>84</sup> *Ibid.*, Art. 4.

## **Environmental Monitoring Advisory Board**

### **FORM**

The Monitoring Board is a nine-member body that purports to operate at arm's length from Diavik Inc. and other parties to the Agreement. Although the Monitoring Board strives to both facilitate communication between the community, the governments, and Diavik Inc., as well as oversee environmental monitoring at the mine, it is generally considered stronger at the community liaison and communication role.<sup>85</sup>

### **Composition**

The Monitoring Board is composed of one representative from each of the parties to the Agreement, as well as one representative from the Government of Nunavut,<sup>86</sup> (totalling five Aboriginal representatives, three government representatives, and one Diavik Inc. representative). The Monitoring Board differs from Ekati's oversight body since board members are tasked with representing the appointing party. The Agreement does not preclude parties from appointing their own employees or members.<sup>87</sup> As a result, board members have traditionally been locally-based and skilled in community liaison and communication functions. This departs from the Ekati model where board members are frequently technical experts, resulting in a capacity to challenge the proponent on technical issues and to serve as strong technical advocates for heightened environmental management.

The presence of a member of Diavik Inc. on the board has been a point of contention for board members and the community: "According to one person who has sat on the Board, the presence of a Diavik employee tends to stifle debate and leads to a muting of criticism, especially given that many of the Board members are Yellowknife residents who know one another".<sup>88</sup>

### **Funding**

The Monitoring Board's budget for the first two years of operations was \$800,000, with Diavik Inc. providing \$600,000, the Government of Canada \$150,000, and the Territorial Government \$50,000. In its third year of operation, the Monitoring Board had to start negotiating its budget with Diavik Inc. Each budget operates for two years unless otherwise agreed. If a budget cannot be agreed upon, the Minister of INAC can assign the budget.<sup>89</sup>

Although the initial budget negotiations were amicable, Diavik Inc. and the Monitoring Board have more recently experienced substantial disagreement over budgets. According to the Monitoring Board's 2010 annual report, Diavik held back \$150,000 for 2010-2011 as they did with the fiscal year 2009-2010. The Monitoring Board "disagrees with this and sees it as compromising EMAB's [the

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<sup>85</sup> Environmental Agreements in Canada, *supra* note 26 at 35.

<sup>86</sup> *Ibid.* at 31.

<sup>87</sup> *Ibid.* at 32.

<sup>88</sup> *Ibid.* at 33.

<sup>89</sup> *Diavik Environmental Agreement*, *supra* note 82, s.4.8.

Board's] independence.”<sup>90</sup> The Board has asked the parties to the Environmental Agreement to initiate dispute resolution, something the Board cannot itself initiate as it is not a party to the Environmental Agreement. Attempts were made to resolve the dispute but it was referred to binding arbitration although the decision has not yet been publicly released. The budget for 2011-2012 is now a subject of another dispute.

Funding problems now seem to be systemic for each of the three oversight agencies that have been created for the Northwest Territories' diamond mines. Part of the problem is structural: requiring the “watched” to fund the watchdog creates a perception on the part of the company that the watchdog is accountable to them. The mining companies thus see themselves as funding agencies, a position which gives rise to budget approval rights, particularly as personnel change and corporate memory is lost.

### **Tasks**

The mandate of the Monitoring Board is established in Article 4.2 of the Agreement. It is (non-exhaustively) tasked to:

- serve as a public watchdog of the regulatory process and the implementation of the Agreement;
- review Environmental Plans and Programs, Annual Reports, Environmental Protection Measures, compliance or monitoring reports and other reports and data bearing on Environmental Quality and make recommendations about these reports;
- make recommendations on issues relating to access for purposes of wildlife harvesting;
- make recommendations respecting the participation of each of the Aboriginal Peoples and Affected Communities in training initiatives and monitoring programs bearing on Environmental Quality;
- make recommendations and facilitate implementation regarding the need for and design of traditional knowledge studies;
- facilitate programs to provide information to Affected Communities and the general public on matters bearing on Environmental Quality;
- report to the Parties and the public on the Advisory Board's activities and the achievement of its mandate;
- provide an accessible and public repository of environmental data, studies and reports relevant to the Advisory Board's mandate;
- provide a meaningful role for each of the Aboriginal Peoples in the review and implementation of environmental monitoring plans in respect of the Project.

### **Powers**

The Monitoring Board, like the other oversight bodies for Northwest Territories' diamond mines, is purely advisory. However, since the Aboriginal groups which have members on the Monitoring are parties to the Agreement, they have powers to force Diavik Inc. to comply with the terms of the Agreement.

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<sup>90</sup> Environmental Monitoring Advisory Board, *Annual Report 2009/2010* (Yellowknife: Environmental Monitoring Advisory Board, 2010) at 4 [2010 Annual Report].



## **Term**

The Monitoring Board will exist until the Agreement comes to an end, (*i.e.* when the site is fully closed and reclaimed).

## **DRIVERS**

The drivers for the oversight body are similar to those discussed for the surrounding Ekati and Snap Lake projects. In addition, the Aboriginal parties involved in negotiating the Ekati Environmental Agreement were determined to be more involved in the oversight of this second diamond mine and thus sought direct representation on the Monitoring Board.

### **Regulatory Requirements**

The main driver for the Monitoring Board's creation was the Environmental Assessment, which recommended that the Minister of INAC negotiate an Environmental Agreement, which, in turn, became the source of the Monitoring Board. Although an oversight body was not mandated specifically, the assessment concluded that an environmental agreement must be developed that establishes the appropriate responsibilities of the company and the federal, territorial and aboriginal governments in the development, review and modification of follow-up programs to mitigate the project's environmental effects.<sup>91</sup> The precedent of the Ekati Environmental Agreement served as impetus for the Diavik Environmental Agreement although the differences between the two agreements speak to a perception that greater engagement of Aboriginal communities and more robust community liaison roles should be adopted by the oversight agency created.

## **DISCUSSION**

Challenges for the Monitoring Board's effective operation have emerged from its lack of perceived independence and its inability to assure and control its funding. These two challenges are interlinked. The fact that the Monitoring Board does not have control over both the short and long term security of its funding has become a problem for the board. As stated in the Monitoring Board's 2009 report, "it is [the Monitoring Board's] position that we are accountable to all Parties equally, and that in order for us to be independent and to operate at arm's length as the Environmental Agreement envisions, we need to control our budget."<sup>92</sup> This includes the need to reallocate funds to projects in response to emerging issues.

Secondly, the presence of a member of Diavik Inc. on the board detracts from its perceived independence. Even if its actual independence is not compromised, community members feel as though the Diavik Inc. representative makes the Monitoring Board less robust. Since Aboriginal groups may have a vested interest in getting along with Diavik Inc. – to ensure continued employment and community benefits – the presence of the Diavik representative may make the Aboriginal board members less likely to voice disagreement with the company.

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<sup>91</sup> Canadian Environmental Assessment Agency, "Comprehensive Study Report: Diavik Diamonds Project" (June 1999) at xii.

<sup>92</sup> 2010 Annual Report, *supra* note 90 at 18.

## 5.1.3 Snap Lake Diamond Mine & the Environmental Monitoring Agency

### Snap Lake Overview

Snap Lake diamond mine is owned by De Beers Canada Mining Inc. (“De Beers”).<sup>93</sup> The mine is located on the shores of Snap Lake approximately 220 kilometres northeast of Yellowknife, Northwest Territories.<sup>94</sup> It is Canada’s first solely underground diamond mine; it began production in 2008.<sup>95</sup>

De Beers signed the Snap Lake Environmental Agreement (“the Agreement”) in 2004. Other parties to the Agreement were the Government of Canada, the Territorial Government, Dogrib Treaty 11 Council, Lutsel K’e Dene Band, Yellowknives Dene First Nation and the North Slave Métis Alliance. The Agreement created the Snap Lake Environmental Monitoring Agency (“Monitoring Agency”) whose purpose is to act as a “public watchdog” by ensuring De Beers upholds its environmental undertakings and that the project is properly regulated.<sup>96</sup>

The Agreement’s formation of the Monitoring Agency departs from the approach taken at the other Northwest Territories’ diamond mines (Ekati and Diavik) in that the Agreement anticipated the creation of a multi-project environmental monitoring agency to encompass all three diamond mines.<sup>97</sup> The Agreement stipulates that while the multi-project environmental monitoring agency (“multi-project agency”) is being established, activities on the mine site will be monitored by the Monitoring Agency.<sup>98</sup> However, while Terms of Reference for a multi-project agency have been discussed, this joint agency has not been formed, nor does its creation appear imminent. Therefore, the Monitoring Agency continues to operate as the oversight board for Snap Lake only, but without the security and adequacy of funding to robustly carry out such a role.

### Snap Lake Environmental Monitoring Agency

The Monitoring Agency’s main purpose is to ensure the environmental integrity of the Snap Lake area is being preserved in accordance with the terms in the Agreement, and to include the area’s Aboriginal groups in activities at the mine.

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<sup>93</sup> *Environmental Agreements in Canada*, *supra* note 26 at 45.

<sup>94</sup> De Beers, “About the Snap Lake Mine” (2009), online: [http://www.debeerscanada.com/files\\_3/snap-lake-mine.php](http://www.debeerscanada.com/files_3/snap-lake-mine.php).

<sup>95</sup> *Ibid.*

<sup>96</sup> The Snap Lake Environmental Monitoring Agency, “Introduction” (2010), online: <http://www.slema.ca/> [SLEMA Introduction].

<sup>97</sup> *Environmental Agreement between Her Majesty the Queen in Right of Canada, the Government of the Northwest Territories, De Beers Canada Mining Inc., Dogrib Treaty 11 Council et al.* dated 21 May 2004 [Snap Lake Environmental Agreement].

<sup>98</sup> *Ibid.*, s. 4.1(b).

## FORM

### Composition

The Monitoring Agency is governed by a Board made up of eight individuals from the four Aboriginal parties to the Agreement (referred to as the “Core Group” in the Agreement). The Core Group relies on information from Traditional Knowledge working groups and a Science and Technical Panel, and is supported by a Secretariat.

There are no members of government or De Beers on the Monitoring Agency. However, Article 4.10 of the Agreement creates a “Liaison Committee” consisting of members from each of these parties. The Liaison Committee is to meet at least quarterly and is tasked to discuss environmental matters at the mine (including the Monitoring Agency’s activities), facilitate communication by all parties with the community, and facilitate exchange of information between the parties.<sup>99</sup>

### Funding

For the first two years of the Monitoring Agency’s existence, the federal and territorial governments contributed \$100,000 and \$50,000 *per annum* respectively.<sup>100</sup> Thereafter, the governments no longer had any fiscal responsibilities to the Monitoring Agency. De Beers contributed \$400,000 to the Monitoring Agency in its first year and \$500,000 in its second year.

After the first two years, the Monitoring Agency had to negotiate its budget with De Beers annually: the Monitoring Agency submits a budget proposal (which should not exceed \$450,000 plus inflation) and De Beers and the Monitoring Agency must make best efforts to agree on the budget.<sup>101</sup> If they cannot agree within 60 days, the Minister of INAC intervenes. De Beers can also provide extra funding *ad hoc* for special projects by the Monitoring Agency.<sup>102</sup>

### Tasks

The responsibilities of the Monitoring Agency include:

- a) Reviewing and commenting on the design of monitoring and management plans and the results of these activities;
- b) Monitoring and encouraging the integration of traditional knowledge of the nearby Aboriginal peoples into the mine’s environmental plans;
- c) Acting as an intervener in regulatory processes directly related to environmental matters involving the Snap Lake Project and its cumulative effects;
- d) Bringing concerns of the Aboriginal peoples and the general public to De Beers Canada Mining Inc. and government;
- e) Keeping Aboriginal peoples and the public informed about Agency activities and findings; and

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<sup>99</sup> *Ibid.*, s.4.10(a).

<sup>100</sup> *Ibid.*, ss.4.11(d),(e).

<sup>101</sup> *Ibid.*, s.4.11(g).

<sup>102</sup> *Ibid.*, s.4.11(h).

- f) Writing an Annual Report with recommendations that require the response of De Beers Canada Mining Inc. and/or government.<sup>103</sup>

Recommendations are the Monitoring Agency's main power – De Beers is contractually obliged to respond to any recommendations made in the Monitoring Agency's annual report. Importantly, the members of the Monitoring Agency, the four aboriginal groups, can enforce the Agreement since they are parties to it. Although this is not a direct power given to the Monitoring Agency, the board is made up of stakeholders who hold the power. Since the commitments made by De Beers during the environmental assessment are attached to the Agreement, De Beers has substantial obligations. If De Beers deviates from any of its commitments in the Agreement, the Minister of INAC can draw upon De Beers' security deposits to remedy the deviation.

### **Term**

Since the Monitoring Agency was created by the Agreement, it will exist for the term of the Agreement (that is, until reclamation of the site is complete, if the Agreement remains unaltered).<sup>104</sup>

## **DRIVERS**

### **Aboriginal Law**

One driving force behind the creation of the Monitoring Agency was the fact that the mine was located in Aboriginal traditional territory. Snap Lake is located in Akaitcho territory.<sup>105</sup> The Monitoring Agency was envisaged as a mechanism for participation of Aboriginal groups including the Akaitcho in the environmental management of the mine.

### **Improved Environmental Management and Public Participation**

Since Snap Lake was preceded by two other diamond mines in the region, there was an expectation that an oversight mechanism akin to those created for the other mines would come into existence at Snap Lake. To achieve economies in monitoring activities and to acknowledge the importance of cumulative impacts, it was envisaged that a joint monitoring agency would emerge to replace the three project-specific institutions. As noted above, this has not occurred. However, there is informal cooperation amongst the three oversight bodies and their staff in a variety of areas including administration through to substantive issues such as wildlife monitoring program review.

### **Regulatory Requirements**

The Snap Lake Environmental Assessment by the Mackenzie Valley Environmental Impact Review Board stipulated that the Government of Canada was to take the lead in implementing a regionalized, multi-party response to the monitoring for and management of cumulative effects in the Slave Geological Province.<sup>106</sup> The Environmental Assessment report further clarified that De Beers,

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<sup>103</sup> *Ibid.*, s.4.2

<sup>104</sup> *Ibid.*, s.15.

<sup>105</sup> The contents of the Akaitcho First Nations Treaty 8 are still under renegotiation. The Akaitcho Interim Measures Agreement Implementation Office, "Northwest Territories Map," online: <http://www.akaitchoima.com/pdf/ILWs%20in%20Akaitcho%20Territory.pdf>.

<sup>106</sup> Mackenzie Valley Environmental Impact Review Board, "Report of Environmental Assessment and Reasons for Decision on the De Beers Canada Mining Inc. Snap Lake Diamond Project" (24 July 2003) at 169 [Snap Lake Environmental Assessment].

the Government of Canada and the Territorial Government were to conclude an Environmental Agreement prior to the issuance of a Production Water Licence, and that the Environmental Agreement was to be consistent with similar agreements signed at other mine sites in the area.<sup>107</sup>

## DISCUSSION

The Monitoring Agency has faced challenges as it was created as an interim agency that was not intended to take on a long-term watchdog role. Since the creation of a joint oversight agency to replace it is not on the immediate horizon, the Monitoring Agency is tasked with carrying out the oversight functions for the Snap Lake mine. It has not received the budgetary resources, nor does it have the security of an ongoing guaranteed budget, to fully carry out its multiple roles of policing government, policing the mine, and incorporating Aboriginal involvement in environmental monitoring. As a result, the Science and Technical Panel has not emerged and operated as anticipated by the Environmental Agreement. The existing Monitoring Agency has made its greatest contribution by focussing on Traditional Knowledge and Aboriginal involvement in environmental management.

### 5.1.4 Island Copper Mine & the Technical Environmental Advisory Committee

#### Island Copper Mine Overview

Island Copper Mine operated from 1971-1995.<sup>108</sup> The mine site is located near Rupert Inlet on the northern end of Vancouver Island and was owned by Utah Construction and Mining Ltd (“Utah”) (which was purchased by BHP in 1984).<sup>109</sup> The mine faced particular controversy: due to its unique location, traditional methods of tailings disposals were impossible. Utah used submarine tailings disposal, meaning that the fine particulate tailings were piped to the bottom of Rupert Inlet.

Although the submarine tailings disposal method was controversial and novel at the time, in retrospect, the environmental impacts were less severe than predicted and less harmful than traditional land disposal.<sup>110</sup> The open pit mine was flooded upon mine closure and a pit lake was formed. Over the lifespan of the project, the remediation program at Island Copper won five environmental awards.<sup>111</sup> The pit lake underwent monitoring and treatment until 2003-2004 and the government gave the area a clean bill of health.

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<sup>107</sup> *Ibid.*

<sup>108</sup> Patrick Moore, Clem Pelletier & Ian Horne, “The Environmental Impact of Submarine Tailings Disposal at the Island Copper Mine on Vancouver Island: A Case History in Environmental Policy” (Greenspirit: For a Sustainable Future, 2000).

<sup>109</sup> *Ibid.*

<sup>110</sup> George W. Poling *et al.*, *Underwater Tailing Placement at Island Copper Mine: A Success Story* (Littleton, Colorado: Society for Mining, Metallurgy, and Exploration, Inc., 2002) at 24 [Poling].

<sup>111</sup> BHP-Billiton, “BHP Environment Report 1998 - Case Studies - Island Copper reclamation” (1998).

## Technical Environmental Advisory Committee

### FORM

#### Composition

The independent advisory committee for Island Copper Mine was assembled via contract with the University of British Columbia (“UBC”) to administer eight to fifteen professors with specializations ranging from marine biology, geology, phytoplankton ecology, and others, to serve on the committee. Over the years, members of the committee have included professors from UBC, University of Victoria, Simon Fraser University, and from a consulting firm, Rescan Environmental Services.

UBC chose to terminate their contract for administration of the committee after false media reports that the agency was “condoning the ‘killing of Rupert Inlet’” lead to widespread criticism of the agency.<sup>112</sup> UBC and the provincial and federal governments commissioned the “Waldichuk-Buchanan” 1980 report that proved the allegations were false, and verified that the monitoring programs in place at the mine were adequate and effective.<sup>113</sup>

After termination of the original contract, the mining company contracted directly with independent professors and consultants to form a new advisory committee. The new arrangement created the Technical Environmental Advisory Committee (“Advisory Committee”), composed of four professors and one consultant.<sup>114</sup> The committee was so comprised until it was disbanded after monitoring ceased on-site.

#### Funding

Utah funded the oversight committee. Originally, Utah paid UBC for its service of providing the overseers, so payment would go through UBC treasury. Therefore, the committee members were not being remunerated for their oversight roles by Utah *per se*, but were instead paid by UBC. After the UBC contract was terminated, Utah paid each overseer directly.

#### Tasks

The original oversight committee and subsequent Advisory Committee advised BHP and the Government of British Columbia on monitoring activities at Island Copper Mine, especially with regards to the effects of submarine tailings disposal. They met biannually and visited the mine site at least once a year. The committee had a high level of input into the monitoring reports in the first five years of mining operation. The overseers basically controlled how monitoring was completed and reported. The Advisory Committee’s main goal was providing robust monitoring of environmental impacts—it did not provide a direct communications role to the communities around the mine.

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<sup>112</sup> Poling, *supra* note 110 at 25-26.

<sup>113</sup> *Ibid.* at 26.

<sup>114</sup> *Ibid.*

## **Powers**

The Advisory Committee technically only had advisory powers. However, especially due to the long-standing involvement of some of the overseers, the mining company and governments were receptive to their views.

## **Term**

The oversight body, first as the larger oversight committee comprised of UBC professors, and then as the 5-member Advisory Committee, existed for over thirty years.

## **DRIVERS**

### **Complexity/Novelty**

Submarine tailings disposal was a novel disposal method and thus posed the potential for unforeseen risks. The oversight body allowed monitoring to be tailored to concerns as they arose. Professors on the committee had wide ranging skills and were experts in their fields. As a result, the monitoring body had a scientific basis that provided a basis from which the public could be reassured that steps were being taken to ensure rigorous environmental management.

### **Regulatory Requirements**

There was a public hearing prior to Utah receiving a permit for the mine in 1971.<sup>115</sup> Despite the strong stance against the project (especially against submarine tailings disposal) at the hearing, Utah was successful in securing the permit.

One requirement of the permit was that Utah had “to retain an independent scientific advisory committee to assist in establishing a comprehensive monitoring program, outlining procedures for sampling and establishing reliable analytical results, and preparing assessment reports for submission to the Pollution Control Branch”.<sup>116</sup> If the monitoring showed more serious adverse impacts than predicted, Utah would have to immediately divert tailings to an emergency impound and create an alternative solution to tailings storage.<sup>117</sup>

The permit only required there to be an independent oversight committee for the first ten years of the mine’s life. After this time period expired, Utah opted to keep the committee, which lasted for over 30 years.

## **DISCUSSION**

The oversight body, both in its original form and as the Technical Environmental Advisory Committee, shows signs of being an effective watchdog. It was a model cited in the course of the Ekati environmental assessment as worth considering in establishing a monitoring agency for that mine. The success of the Advisory Committee appears to be due, in large part, to the highly regarded and skilled professionals it employed in a variety of fields. The experts signed off on each recommendation and

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<sup>115</sup> *Ibid.* at 24.

<sup>116</sup> *Ibid.* at 25.

<sup>117</sup> *Ibid.*



report produced by the committee. Additionally, there was a high level of continuity on the committee – several members were on the committee for its entire existence.

### 5.1.5 Saskatchewan Uranium Mines & the Athabasca Working Group

#### Saskatchewan Uranium Mines Overview

The Athabasca region of northern Saskatchewan is home to a collection of major uranium mining operations. Three of these mining operations – McArthur River, McLean Lake, and Rabbit Lake – account for roughly 25% of production worldwide.<sup>118</sup> McArthur River and Rabbit Lake are majority owned and operated by the Cameco Corporation, McLean Lake by Areva Resources Canada.

Reportedly, the world's largest, high-grade uranium deposit, McArthur River is an underground mine with over 750 employees located 620 kilometres north of Saskatoon;<sup>119</sup> slightly farther north at Rabbit Lake, Cameco employs upwards of 350 people in both open-pit and underground operations.<sup>120</sup> Just west of Rabbit Lake, McLean Lake is the smallest of the three in terms of production.<sup>121</sup>

Following unfavourable assessments of environmental management in the region, Cameco and Areva established the Athabasca Working Group ("Working Group") in 1993, an industry-community partnership. These two mining companies along with six of the seven Athabasca communities signed an Impact Management Agreement in 2001. The Impact Management Agreement addresses issues of environmental management, community benefits, as well as employment, training and business opportunities. There has been recent discussion around the need to revisit the terms of the Impact Management Agreement in coming months.<sup>122</sup>

#### Athabasca Working Group

In 1991, the governments of Canada and Saskatchewan created the Joint Federal-Provincial Panel on Uranium Mining Developments in Northern Saskatchewan (Joint Panel) in response to a multitude of new mine proposals. Over the next seven years the Joint Panel assessed the cumulative effects of the projects on the Northern Saskatchewan environment, communities, and peoples.<sup>123</sup> The final report of the Joint Panel in 1998 concluded that "the existing environmental protection program was inadequate to deal with the potential issues emerging from further uranium development".<sup>124</sup> The report instigated regulatory revisions from various government agencies, but also motivated Cameco

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<sup>118</sup> Jasmine Angie Birk, "The Relationship between Environmental Agreements and Environmental Impact Assessment Follow-Up in Saskatchewan's Uranium Industry" (Masters' Thesis, University of Saskatchewan, May 2009) at 16 [Birk].

<sup>119</sup> Cameco Resources, "McArthur River" (2010), online: [http://www.cameco.com/mining/mcarthur\\_river/](http://www.cameco.com/mining/mcarthur_river/).

<sup>120</sup> Cameco Resources, "Rabbit Lake" (2010), online: [http://www.cameco.com/mining/rabbit\\_lake/socio-economic\\_impact/](http://www.cameco.com/mining/rabbit_lake/socio-economic_impact/).

<sup>121</sup> InfoMine, "McLean Lake Overview" (2010) online: <http://www.infomine.com/minesite/minesite.asp?site=mcleanlake>.

<sup>122</sup> Athabasca Working Group, "AWG Annual Report 2009" (June 2010) at 2 [2009 AWG Annual Report].

<sup>123</sup> Graham F. Parson & Ron Barsi, "Uranium Mining in Northern Saskatchewan: A Public-Private Transition" in Gary McMahon & Felix Remy, eds., *Large Mines and the Community: Socioeconomic and Environmental Effects in Latin America, Canada, and Spain* (Ottawa: International Development Research Centre, 2001) 263 at 289.

<sup>124</sup> Birk, *supra* note 118 at 31-32.

and Areva to go beyond regulatory obligations and create the Athabasca Working Group within the context of improving northern community relations.<sup>125</sup>

## FORM

### Composition

The Working Group is composed of representatives from Cameco, Areva and seven Athabasca communities; Blake Lake Denesuline Nation, Fond du Lack Denesuline, Hatchet Lake Denesuline, Camsell Portage, Uranium City, Wollaston Lake, and Stony Rapids. As of 2004, each community had two representatives on the Working Group.<sup>126</sup>

### Funding

The Working Group's operation is funded by the owners of the McClean Lake, Rabbit Lake and Cigar Lake mines. Expenses associated with the Working Group that are currently funded include the Athabasca Community Coordinator position, the Assistant Athabasca Community Coordinator position, the Administration Coordinator position, studies by consultants, travel expenditures, and training costs associated with developing and implementing the Impact Management Agreement.<sup>127</sup> The community monitoring program, discussed below, is also funded by the mine operators. Its costs were \$53,371 in 2009.<sup>128</sup>

### Tasks/Powers

The Working Group is responsible for an annual report on Impact Management Agreement implementation. The Working Group is not tasked with optimizing the mines' impact mitigation strategies, but is responsible for making the public aware of the environmental state of the region. The Agreement established a community-based environmental monitoring program to give the Working Group a direct route to fulfilling this objective. Importantly, the monitoring program was developed at the behest of citizens who wanted to generate independent evidence that mining was not negatively impacting their ecosystem.<sup>129</sup>

The Working Group-directed monitoring program facilitates community collection of animal tissue, and air, water, and sediment samples. It then oversees the testing of samples by independent consultants. The program provides the Working Group with firsthand data to report back to the communities in lieu of relying purely on data from industry self-monitoring. This approach has reportedly led to an increased level of comfort from communities with the monitoring results.<sup>130</sup>

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<sup>125</sup> Athabasca Working Group, "AWG Annual Report 2004" (February 2005) at 1 [2004 AWG Annual Report].

<sup>126</sup> *Ibid.* at i.

<sup>127</sup> 2009 AWG Annual Report, *supra* note 122 at i.

<sup>128</sup> *Ibid.* at 24.

<sup>129</sup> Bram Noble & Jasmine Birk, "Comfort Monitoring? Environmental assessment follow-up under community–industry negotiated environmental agreements" (2011) 31 *Environ Impact Asses Rev* 17 [Noble & Birk].

<sup>130</sup> International Atomic Energy Agency, *Best Practice in Environmental Management of Uranium Mining* (Vienna: International Atomic Energy Agency, 2009) at 23.

While disseminating information to the public appears to be the main objective of the Working Group, it is not merely a one-way avenue of communication. The Working Group also ensures that the mining companies are aware of community issues.<sup>131</sup> The Working Group lacks legal authority to force change or mandate a response to issues of community concern. If the proponents fail to placate, or even respond to, community concerns, the Working Group has no obvious recourse.

## DRIVERS

### Legitimacy and Trust

Even though the Working Group was largely spurred by the recommendations of the Joint Panel's 1998 report, its creation was not a regulatory requirement.<sup>132</sup> Areva and Cameco went beyond regulatory obligations in order to "facilitate communication between the industry and community and address the concerns of Athabasca communities about the impacts of mining".<sup>133</sup> According to industry insiders, the companies hoped the Working Group, as part of a more comprehensive EIA follow-up scheme, would establish a base of trust between themselves and northern communities.<sup>134</sup>

However, another industry representative believes that "without the regulatory drivers...it's unclear whether the follow-up process would be done so comprehensively".<sup>135</sup> Consultants who worked with uranium proponents in the 1990s indicated that the industry matured throughout the decade, evincing "a felt responsibility to report to the public".<sup>136</sup> While public image played a part in this development, "overall awareness of corporate-social responsibility" is said to be a significant contributing cause as well.<sup>137</sup>

## DISCUSSION

Despite its uncertain legal foundations the Working Group has achieved a measure of success. Specifically, it has been integral in increasing dialogue and cooperation between the mining companies and northern communities, allowing citizens to bring issues directly to the proponents and integrate themselves in environmental management.<sup>138</sup> In turn, better communication has built trust between the parties, at least according to industry representatives.<sup>139</sup> Ensuring effective communication between the Athabasca Basin communities and the mining companies continues to be identified as the dominant need for the Working Group.<sup>140</sup>

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<sup>131</sup> Cameco Resources, "Policies and Initiatives" (2010), online: [http://www.cameco.com/responsibility/communities/policies\\_initiatives/awg/](http://www.cameco.com/responsibility/communities/policies_initiatives/awg/).

<sup>132</sup> *Ibid.*

<sup>133</sup> Birk, *supra* note 118 at 37.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.* at 34.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Noble & Birk, *supra* note 129 at 5.

<sup>139</sup> Birk, *supra* note 118 at 35.

<sup>140</sup> Athabasca Working Group, "AWG Annual Report 2008" (May 2009) at 32.

The Working Group's monitoring program has been essential to building capacity among northern communities, an indispensable first step in effective oversight. The educational aspects of the monitoring program helped fill "an information gap that was absolutely massive between communities, companies, and governments".<sup>141</sup> The communities wanted to oversee the monitoring of proximate environmental impacts; to do so, citizens needed to "understand how changes can occur in key species and valued ecosystems",<sup>142</sup> abilities engendered by the Working Group. Producing data independently legitimizes the results in the communities. This reality is not lost on the mining companies, who acknowledge that the Working Group's results "have greater merit and [are] more accepted in the community realm," as they "[know] the results have not been tampered with".<sup>143</sup>

Beyond building capacity and trust, the monitoring program produces scientifically "comprehensible...and trusted" data by following accepted protocol.<sup>144</sup> It is also an example of traditional knowledge and western science working together, as the program "utilize[s] and equally value[s]" both epistemologies.<sup>145</sup>

The modest success of the Working Group is tempered by certain potential shortcomings. The Working Group is not vested with any decision-making power and has "no legal authority".<sup>146</sup> Community participation in decision-making has been identified by community members as an area that needs vast improvement.<sup>147</sup> When the Working Group identifies issues their avenues of recourse are limited. At Wollaston Lake in 2003, the Working Group detected increased "uranium loads in sediments"<sup>148</sup> caused by Rabbit Lake effluents. At the time, the company was "looking into ways of reducing uranium in the effluent";<sup>149</sup> however, after moderate reductions in 2004-05, uranium levels increased drastically in 2007-08, "easily exceeding the federal 'probable effects level'".<sup>150</sup> The Working Group is empowered to do little besides identify the increase. There is no system of recommendation and response. The proponent may choose to address any given issue; if it does not, the Working Group has no contractual artillery with which to respond.

Even the areas identified as triumphs yield limitations. The scientifically "comprehensible" data produced by the monitoring program is only collected infrequently. Consequently, "it does not directly contribute to industry impact monitoring for the purposes of identifying unexpected impacts or verifying the effectiveness of impact mitigation measures".<sup>151</sup> The monitoring program would gain greater

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<sup>141</sup> Noble & Birk, *supra* note 129 at 5.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.* at 6-7.

<sup>144</sup> *Ibid.* at 6.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* at 3.

<sup>147</sup> *Ibid.* at 6.

<sup>148</sup> WISE Uranium Project, "Issues at Operating Uranium Mines and Mills – Canada" (2010), online: <http://www.wise-uranium.org/umopcdn.html>.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> Noble & Birk, *supra* note 129 at 7.

credibility over the long term if its results could be feed more concretely into environmental management practices.<sup>152</sup>

Increasing dialogue and cooperation has also posed challenging. Effecting citizen understanding of the Working Group’s monitoring results has been described as “one of the most difficult aspects of [the] program...[because] you’re often dealing with people who...have limited English and do not understand [the] graphs or numbers”.<sup>153</sup> Augmented strategies for dissemination are a priority for both industry and the communities.<sup>154</sup>

Turnover is another hurdle to effective dialogue. The “roll-over of members” and “lack of consistency in community members who participate in [Working Group] meetings” creates impermanent knowledge and undermines community-industry relationships. Even though the communities and industry are constantly referred to as collectives, it cannot be forgotten that individuals do the work; individuals spur the dialogue; individuals foster the relationship. If the people are ever-changing, the dialogue has no continuity and the relationship lacks foundation.

Concerns have also been voiced about the role of the Working Group in responding to disasters, particularly spill-related events. This concern was voiced by a number of Working Group community interviewees, noting that they had heard of spill events but had never been informed of them, and never heard of any monitoring or clean-up initiatives.<sup>155</sup> Addressing emergencies and ensuring effective communication in cases of disaster response are additional roles that can be usefully undertaken by oversight bodies.

## **5.1.6 Voisey’s Bay Nickel Mine & the Environmental Management Board**

### **Voisey’s Bay Nickel Mine Overview**

The Voisey's Bay nickel mine in northern Labrador began production in August 2005. Owned and operated by the Voisey's Bay Nickel Company (a subsidiary of Vale), the mine employs roughly 450 people and produces 110 million lbs. of nickel-in-concentrate per year.<sup>156</sup>

The mine resides in an area subject to Inuit and Innu land claims. In 2002, the governments of Canada and Newfoundland & Labrador signed an Environmental Management Agreement (“the Agreement”) with the Labrador Inuit Association and the Innu Nation in recognition of the claims. The accord states that the “parties are making the Agreement to establish the process that shall be followed in order to ensure effective, responsible, comprehensive and coordinated Environmental Management of the [mine]”.<sup>157</sup> Part four of the Agreement established an oversight agency known as the

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<sup>152</sup> *Ibid.* at 8.

<sup>153</sup> *Ibid.* at 5.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.* at 6.

<sup>156</sup> InfoMine, “Voisey’s Bay” (2007), online: <http://www.infomine.com/minesite/minesite.asp?site=voiseysbay>.

<sup>157</sup> *Environmental Management Agreement between the Labrador Inuit Association, the Innu Nation, the Government of Canada and the Government of Newfoundland & Labrador* dated 22 July 2002 at Preamble [Voisey’s Bay EMA].

“Environmental Management Board” (“Management Board”). Due to the lack of agreement about ongoing funding for the Board, it is currently operating in a reduced capacity.

### **Environmental Management Board**

The Management Board was designed to be a technically-fluent advisory committee. It aims to enhance environmental protection and ensure compliance with the Agreement and regulatory obligations. It does not have an information-dissemination or community-liaison mandate.

## **FORM**

### **Composition**

The Management Board consists of nine members. In addition to two representatives from each Agreement party, the Management Board is headed by a mutually agreed upon Chair who “shall be unbiased and free of any conflict of interest relative to [the mine]...and have relevant knowledge and expertise”.<sup>158</sup> The unilaterally appointed members serve three years terms, but can be removed at any time by the appointing party. The Management Board is given use of an administrative secretariat.

The Environmental Management Agreement also establishes a “Technical Environmental Review Committee” (“Technical Committee”) which is responsible to and operates under the direction of the Management Board. All parties to the Agreement are entitled to appoint members to the Technical Committee who can contribute relevant scientific and/or technical expertise.<sup>159</sup>

### **Funding**

The governments are responsible for all Management Board (and Technical Committee) funding; the Agreement specifically enumerates participation costs of the Aboriginal parties, as well as remuneration for the secretariat. For the first five years of the Agreement, the Management Board budget could not exceed \$450,000.<sup>160</sup> The Agreement, including its funding provisions, was to be reassessed at five year intervals and amended if “necessary or appropriate”.<sup>161</sup> As anticipated by the Agreement, the Board commenced with an initial five year term from 2002-2007. The four parties have not, however, been able to reach agreement on subsequent funding for the Board. Through the first term, costs were shared between the provincial and federal governments and \$60,000 per annum was provided to each of the two aboriginal parties. Some “life support” funding is currently being provided to keep the Board going in a reduced capacity, but the future of the Board remains uncertain. The Board used to host a public website which provided a record of its activities, but this has disappeared due to a lack of funding.

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<sup>158</sup> *Ibid.*, s.4.4.

<sup>159</sup> *Ibid.*, s.6.3.

<sup>160</sup> *Ibid.*, s.8.1.

<sup>161</sup> *Ibid.*, s.3.7.

## Tasks/Powers

The Management Board has a multifaceted mandate. Section 5.1 of the Agreement specifies that it is to advise the parties on, *inter alia*, permit applications, environmental protection plans, closure and development plans, compliance monitoring reports, marine management. Recommendations of the Management Board are to be submitted in writing and based on the unanimous opinion of board-members. If unanimity proves elusive, dissenting opinions are to be presented along with the majority.

Akin to other natural resource oversight bodies, the Management Board is required to compose an annual report describing the previous year's undertakings.<sup>162</sup> The report is subsequently made available to the public. While the Agreement does not vest the Management Board with any decision-making power, it obliges the relevant Minister to receive and "consider" the Management Board's recommendations before making any decisions on the mine's environmental management. If the Minister intends to disregard or vary the Management Board's recommendations, the Minister is required meet with the board before making a final decision and provide a written rationale for rejection or variance.<sup>163</sup>

## DRIVERS

### Aboriginal Rights and Title

Tension and lack of trust characterized the relationship between the Aboriginal population in and around Voisey's Bay and the Government of Canada. In the early 1990s the federal government permitted low level military flying exercises over remote parts of Labrador. The program was "bitterly contested" by some residents.<sup>164</sup> Others refused to participate in the program's environmental assessment, believing the process to be biased.<sup>165</sup>

The land claim of the Innu was recognized in 1996.<sup>166</sup> This altered the foundations of the relationship between the Innu and the federal government. The Innu's discontent with their land use was now legally buttressed by property rights and the government's duty to consult. The governments agreed that the (proposed) Voisey's Bay nickel mine would undergo a joint environmental assessment and review conducted by an independent panel ("the Panel"). The process was required to have public hearings with intervener funding.<sup>167</sup> The Environmental Management Agreement was largely an outcome of the assessment and review process. The assessment introduced a "contribution to sustainability" test on the proposed mine, which required the proponents to demonstrate a positive contribution to ecological and community sustainability before the mine would be approved.<sup>168</sup>

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<sup>162</sup> *Ibid.*, s.4.11.

<sup>163</sup> *Ibid.*, ss.5.10, 5.11.

<sup>164</sup> Robert B. Gibson, "Sustainability assessment and conflict resolution: Reaching agreement to proceed with the Voisey's Bay nickel mine" (2006) 14 *Journal of Cleaner Production* 334 at 336.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.* at 339.

<sup>168</sup> *Ibid.* at 339-340.

## DISCUSSION

A report for the Mackenzie Gas Project briefly discusses the Management Board, stating that, though the “input of the board is advisory in nature[, it] has generally been accepted.”<sup>169</sup> The greatest limitation of the Board seems to be its unsure future due to the absence of an agreement on funding.

Though the Environmental Management Agreement stipulates that the Agreement would continue until closure of the mine (unless terminated by all parties),<sup>170</sup> a financial arrangement to ensure ongoing funding of the Board is lacking. Transcripts from Newfoundland & Labrador’s Resource Committee’s 2010 proceedings indicate a perception on the part of that Committee that the Environmental Management Board no longer even exists.<sup>171</sup>

The Voisey’s Bay environmental assessment process, from which emerged the Environmental Management Agreement, is also notable for highlighting the issue of the gendered impacts of mining projects.<sup>172</sup> The independent panel conducting the environmental assessment stipulated that Vale’s Environmental Impact Assessment was to differentiate information “by ‘age, gender and aboriginal status and by community’”.<sup>173</sup> Moreover, Vale was to “explain how it...used feminist research to identify how the [mine] will affect women differently from men”.<sup>174</sup>

Vale’s Environmental Impact Statement “contained little analysis or insight into how the differential impacts [would] affect Inuit women”.<sup>175</sup> And the subsequent Environmental Management Agreement, and the Oversight Body it spawned, did not give particular attention to differential gender impacts. This represents a missed prospect for an institutional response to the nuanced issues of gender identified in course of the Voisey’s Bay environmental assessment.

### 5.1.7 Raglan Nickel and Copper Mine & the Raglan Committee

#### Raglan Mine Overview

Located in Nunavik, a remote region of northern Quebec, Raglan nickel and copper mine became operational in 1997; consisting of both underground and open-pit mines, the site spans nearly 70 kilometers and employs over 700 workers.<sup>176</sup>

Raglan mine is the subject of an Impact and Benefit Agreement (labeled the Raglan Agreement) between the mine proponent (Falconbridge at the time, currently Xstrata Nickel), the Makivik

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<sup>169</sup> Kevin O’Reilly, “A Review of Selected Environmental Management Issues for the Proposed Mackenzie Gas Project” (Alternatives North, April 2007) A Submission to the Mackenzie Gas Project Joint Review Panel at 35 [O’Reilly].

<sup>170</sup> *Voisey’s Bay EMA*, *supra* note 157, s.3.6.

<sup>171</sup> Newfoundland & Labrador, House of Assembly, *Resource Committee*, 46<sup>th</sup> Gen. Assembly, 4<sup>th</sup> sess. (3 May 2010).

<sup>172</sup> Linda Archibald & Mary Crnkovich, “If Gender Mattered: A Case Study of Inuit Women, LandClaims and the Voisey’s Bay Nickel Project,” *Status of Women Canada* (November 1999) at 8.

<sup>173</sup> *Ibid.* at 23.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.* at 23-24.

<sup>176</sup> InfoMine “Raglan Profile,” (2010), online: <http://www.infomine.com/minesite/minesite.asp?site=raglan>.



Corporation, and the nearby Inuit communities of Salluit and Kangiqsujuak. The Makivik Corporation is empowered by the *James Bay and Northern Quebec Act* to protect the regime of rights, interests and financial compensation provided in that Act and to oversee socioeconomic and political development of northern Quebec.<sup>177</sup> Concluded in 1995, the Raglan Agreement (“the Agreement”) allows the Inuit who are affected by Raglan’s activities to benefit from the mine economically, gain access to employment opportunities, and play a role in managing environmental impacts. The Raglan Agreement establishes an oversight body, the Raglan Committee, to oversee implementation of the agreement and assess lingering and novel environmental issues.

### **The Raglan Committee**

The Raglan Committee is composed of three mining company and three Inuit representatives. It is permanently charged with governing the environmental aspects of the Raglan Agreement.<sup>178</sup> Like the Independent Environmental Monitoring Agency at Ekati diamond mine, the Raglan Committee is designed to both facilitate communication between the proponent and the local communities, as well as to review environmental management at the mine.

## **FORM**

### **Composition**

The Raglan Committee consists of at least six members; as noted above, three are appointed by the proponent, currently Xstrata Nickel, and three are representatives of Inuit groups (one from each of the Inuit parties to the Raglan Agreement). The appointees may be removed at any time by the party that appointed them. The Agreement specifies that an independent third party representative may be appointed via mutual agreement among all parties. Once appointed, approval of all parties is also necessary for removal of the independent member.<sup>179</sup>

### **Tasks/Powers**

The Raglan Agreement specifies that the Committee shall “serve as the formal forum for communication between [the proponent] and the Inuit Parties...provide an efficient framework for cooperation regarding the Raglan Project and...the implementation of this Agreement and...carry out the functions vested in it by this Agreement”.<sup>180</sup> These functions include acting as a dispute resolution mechanism. Environmental monitoring reports are also to be submitted to the Committee for review on a regular basis.<sup>181</sup>

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<sup>177</sup> Makivik Corporation, “The Makivik Mandate” online: <http://www.makivik.org/>. See generally Robert Telewiak, “Keys to Building Successful Relationship with Inuit Communities at Raglan,” Prospectors and Developers Conference (13 March 2001) at 6 [Telewiak].

<sup>178</sup> *Building Sustainable Relationships: Aboriginal Engagement & Sustainability*, CCSR compendium of leadership practices based on the Building Sustainable Relationships Conference (Vancouver: Canadian Business for Social Responsibility, 8-9 February 2005) at viii [Aboriginal Engagement].

<sup>179</sup> *The Raglan Agreement between The Makivik Corporation et al. and Société Minière Raglan du Québec Ltée* dated 25 July 1995, s.8.3.2 [The Raglan Agreement].

<sup>180</sup> *Ibid.*, s.8.2(a),(b),(c).

<sup>181</sup> *Aboriginal Engagement*, *supra* note 178 at 68.

The Environmental Impact Assessment commissioned by Falconbridge prior to mine construction stipulated the mitigation measures to be undertaken. To amend or alter the agreed-upon strategies the proponent must consult with the Raglan Committee.<sup>182</sup> Similarly, if the proponent endeavours to exploit reserves alien to the Raglan Agreement they must complete secondary environmental assessments. The Committee is charged with preparing a summary of the impacts, mitigation measures, monitoring programs and their significance, as well as documenting the impacts resulting from new developments.<sup>183</sup> Consequently, the Raglan Committee plays a central role in overseeing development to which the Inuit groups have not previously assented.

Decisions of the Raglan Committee must be agreed upon by a majority of the members, including at least one proponent and one Inuit appointee. When functioning as a dispute resolution mechanism, however, decisions must be assented to by at least two proponent appointees and two Inuit appointees (including the Makivik representative).<sup>184</sup>

### **Funding**

The Raglan Agreement states that the proponent is responsible for all travel and accommodation expenses pursuant to the mandated meetings (at least two per year before construction of the mine, four per year during the first five years of mine-life, and two per year thereafter). However, other expenses and fees incurred by the members shall be borne by the Party which appointed such members.<sup>185</sup> The Agreement lacks a secure mechanism for guaranteed adequate funding beyond participation in meetings.

## **DRIVERS**

### **Regulatory Requirements & Aboriginal Land Claims**

Aboriginal rights played a critical role in establishing oversight at Raglan. In order to begin operations at Raglan, Falconbridge needed an Environmental Assessment Certificate from the Government of Quebec. Unresolved Inuit off-shore claims had the potential to disrupt shipping to and from Deception Bay, Raglan's only practical port. Resultantly, "Falconbridge knew that they needed Inuit support...regardless of whether the...property was technically within the jurisdiction of the *James Bay and Northern Quebec Act*".<sup>186</sup> This led to the creation of an Agreement-in-Principle between the Inuit groups and Falconbridge in 1993, and after two years of negotiation, the signing of the Raglan Agreement on February 28, 1995.<sup>187</sup>

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<sup>182</sup> Sosa & Keenan, *supra* note 65 at 28.

<sup>183</sup> *Ibid.* at 29.

<sup>184</sup> *The Raglan Agreement*, *supra* note 179, s.8.9.2.

<sup>185</sup> *Ibid.*, s.8.6.

<sup>186</sup> *Aboriginal Engagement*, *supra* note 178 at 72.

<sup>187</sup> *Ibid.* at 66.

## DISCUSSION

Makivik's program director, Robert Lanari, has stated that the "real weakness of the Raglan Committee is its lack of dedicated budget. Without independent funding, the Committee lack[s] independent capacity".<sup>188</sup>

There have been, and continue to be, other problems pertaining to the Agreement. The Makivik Corporation has voiced concerns over the stockpiling of tailings at the mine site. Currently, tailings are "dry-stacked" and covered; permafrost then freezes the tailings, preventing the spread of contaminants. But it is unclear whether rising temperatures increase the risk of contaminant-leaching to unacceptable levels. Makivik and Falconbridge sponsored research to look into whether rising air and ground temperatures could increase the risk of acid leaching from the tailings.<sup>189</sup> This is the type of process the Raglan Committee could participate in directly if it had the benefit of a dedicated budget. As it is, the Committee must rely on the proponent and Inuit organization, abrogating the effectiveness and independence of oversight.

### 5.1.8 Sydney Tar Ponds & the Remediation Monitoring Oversight Board

#### Sydney Tar Ponds Overview

The Sydney Tar Ponds is a contaminated waste site in the Cape Breton Regional Municipality (formerly the town of Sydney). A nearby steel mill contaminated the soil with dangerous hydrocarbons and heavy metals for over a century.<sup>190</sup> The federal and provincial governments ratified a cost-share agreement for remediation of the site in 2007, which stipulates that Nova Scotia will pay \$160 million of the total cost of the remediation (\$400 million) with the Government of Canada paying the remainder.<sup>191</sup>

The remediation plan calls for incineration of some hazardous materials and permanent solidification and burying of others. The provincial government created the Sydney Tar Ponds Agency ("the Agency") to manage the remediation. There is a 15-member Community Liaison Committee ("Liaison Committee") which "represents organizations with significant track records in such fields as business, the construction industry, environment, health, municipal government, organized labour, post-secondary education, recreation, religion, and service clubs."<sup>192</sup> The Liaison Committee meets with the Agency once a month for discussions about project plans and activities. The Liaison Committee's terms of reference make clear that it is not a watchdog group; its main purpose is to facilitate two-way communication between the Agency and the community.<sup>193</sup>

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<sup>188</sup> *Ibid.* at 71.

<sup>189</sup> *Ibid.* at 69.

<sup>190</sup> Joint Review Panel, "Environmental Assessment Report: Sydney Tar Ponds and Coke Oven Sites Remediation Project" (2006) at 1 [*Tar Ponds Environmental Assessment*].

<sup>191</sup> CBC News, "INDEPTH: TAR PONDS, Tar ponds timeline" (29 January 2007) online: <http://www.cbc.ca/news/background/tarponds/timeline.html>.

<sup>192</sup> Sydney Tar Ponds Agency, "Community Liaison Committee," online: <http://www.tarpondscleanup.ca/index.php?sid=3&cid=8>.

<sup>193</sup> Sydney Tar Ponds Cleanup Project Community Liaison Committee, "Terms of Reference" (2007) [STP Terms of Reference].

The Sydney Tar Ponds remediation plan underwent Environmental Assessment in 2006. The assessment recommended the establishment of a Remediation Monitoring Board:

The Panel recommends that PWGSC [Public Works and Government Services Canada] and NSEL [Nova Scotia Environment and Labour], before construction begins, appoint an independent three member monitoring oversight board with a formal mandate tied in to the Federal-Provincial Regulatory Plan. The monitoring oversight board would act in a formal technical review capacity and to ensure the general public that the Project is proceeding within its approved guidelines.<sup>194</sup>

In the Joint Panel Review Recommendations and Implementation Synopsis, the provincial and federal governments responded to the recommendation. The Government of Canada denied the recommendation, stating that, although oversight and informing the public are important, it believed that there were mechanisms already in place that would suffice. The Government of Nova Scotia replied: “the Minister of Environment and Labour will establish a Monitoring Oversight Board to monitor [the Ministry’s] regulatory management of the project”.<sup>195</sup>

### **Remediation Monitoring Oversight Board**

The three-member Remediation Monitoring Oversight Board (“Oversight Board”) for the Sydney Tar Ponds is charged with monitoring and reporting on how Nova Scotia Environment and Labour (“the Ministry”) is performing as the environmental regulator of the remediation.<sup>196</sup>

## **FORM**

### **Composition**

The Oversight Board is a three-member board that makes annual reports to the Ministry. The Minister of Environment & Labour’s appointees to the board include Sinclair Dewis, Edwin MacLellan and Colin Hines. Mr. Dewis, the chair of the committee, is a retired employee from Environment Canada with 35 years of service. Mr. MacLellan is an engineering professor at Cape Breton University. Mr. Hines is a Principal with Atlantic Environmental Training & On-Site Services Inc”.<sup>197</sup> Each board member is appointed for a two year term by the Minister.

### **Funding**

There is no funding guarantee. The Ministry pays the board members’ *per diems* and travelling costs out of their annual budget.

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<sup>194</sup> *Tar Ponds Environmental Assessment*, *supra* note 198 at Recommendation #53.

<sup>195</sup> Public Works and Government Services Canada, “Sydney Tar Ponds and Coke Ovens Remediation Project: Joint Review Panel Recommendations and Implementation Synopsis” (December 2009) at 18.

<sup>196</sup> Sydney Tar Ponds Agency, “Remediation Monitoring Oversight Board,” online: <http://www.tarpondscleanup.ca/index.php?sid=4&cid=33>.

<sup>197</sup> Government of Nova Scotia, “Remediation of the Sydney Tar Ponds and Coke Ovens Sites” (2009) online: <http://www.gov.ns.ca/nse/ea/tarponds.asp>.

## Tasks

The purpose of the Oversight Board is to “ensure public confidence that the remediation is being appropriately regulated by Nova Scotia Environment and is proceeding within approved regulatory guidelines, permits and approvals”.<sup>198</sup>

The key responsibilities of the Oversight Board include: reviewing project permits and approvals issued by Nova Scotia Environment, reviewing any project regulatory issues that arise, providing the public with the opportunity to provide feedback on regulatory issues, and reporting annually to the Minister on regulatory management issues.<sup>199</sup> The Oversight Board is required to meet biannually. However, in the past two years they have reportedly met at least eight times.

## Powers

The Oversight Board is purely advisory. The Oversight Board’s main power is to provide advice and recommendations in an annual report. The Oversight Board meets with the Minister and/or senior Ministry staff to discuss the report each year. The Minister is obligated to make the report public and reply to the Oversight Board’s advice and recommendations.

## Term

The environmental assessment recommendation to form an Oversight Board included the suggestion that at the completion of the construction phase of the project, “the role of the board would be re-evaluated and would thereafter be tied into the mandate of the Tar Ponds and Coke Ovens Remediation Maintenance and Monitoring Act”.<sup>200</sup> In the section of the Terms of Reference regarding board member appointment, it is stated that the Minister must make appointments every two years “until such time as the Project is complete or the Minister considers the role of [the Oversight Board] to no longer be necessary”.<sup>201</sup> Therefore, the term of the Oversight Board could be until the remediation is finished or anytime before then if so desired by the Minister.

The Ministry is not contractually obliged to support the Oversight Board. The Oversight Board exists based on the environmental assessment recommendation, letters of appointment to each board member, and the Oversight Board’s terms of reference.

## DRIVERS

### Complexity

The environmental assessment stated that oversight was necessary for this remediation project due to the nature of the regulatory challenges posed by the project. These included:

- The novelty of the remediation technologies involved.

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<sup>198</sup> The Remediation Monitoring Oversight Board, “Sydney Tar Ponds and Coke Ovens Sites Remediation Project Second Annual Report to the Minister, Nova Scotia Environment” (17 May 2009) at 5.

<sup>199</sup> Government of Nova Scotia, “Response to the Joint Panel Review Environmental Assessment: Sydney Tar Ponds and Coke Ovens Remediation Project” (2007), Appendix E [Environmental Assessment Response].

<sup>200</sup> *Tar Ponds Environmental Assessment*, *supra* note 190 at 138.

<sup>201</sup> Environmental Assessment Response, *supra* note 199, Appendix E.

- The fact that the Nova Scotia Ministry would be regulating a project taking place on federal lands, which is not usually the case.
- The fact that the Project is the largest remediation project in Nova Scotia.
- The political pressures that could be placed on both the Sydney Tar Ponds Agency and the Ministry to get the job done in a timely fashion.
- The lack of public confidence due to the history of the site.
- The likelihood of perpetual management of the site.
- The concern that if the land is sold to private owners after remediation, the Cape Breton Regional Municipality may not be able to properly control subsequent land use.<sup>202</sup>

## **Regulatory Requirements**

The Oversight Board was formed as a recommendation from the joint review panel for the environmental assessment of the Tar Ponds.

## **Conflicts of Interest**

The project is very high profile and has received extensive public and media attention. This has led to a great deal of pressure on the Ministry and its partners to ensure the project is done right, on time and within budget. The Oversight Board helps ensure that these demands are met without sacrificing environmental integrity.

## **DISCUSSION**

The Oversight Board appears to have created a space for the exchange of information and candid conversations about what is and is not working in an otherwise politically charged atmosphere. The Oversight Board has come to be viewed in this way as an “honest broker”.

The largest deficiency with the Oversight Board is its questionable independence. There is no formal contract or legislation asserting its existence—theoretically, if the Oversight Board wished to make a serious critical report of the Agency or Ministry, the Ministry could terminate the Oversight Board.

### **5.1.9 Deloro Mine & the Public Liaison Committee**

#### **Deloro Mine Overview**

The Deloro Mine has been used for a variety of industrial purposes.<sup>203</sup> It was originally a gold mine and operated as such from 1866 – 1903; the ore was high in arsenic, and there are accounts of the arsenic by-products being released directly into the air.<sup>204</sup> The site was later a silver and cobalt smelting operation, and also became a chemical production site (mainly manufacturing arsenic

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<sup>202</sup> *Tar Ponds Environmental Assessment*, *supra* note 190 at 131-132.

<sup>203</sup> Ontario Ministry of Environment, “Deloro Mine Site Cleanup Project” (Last modified 21 October 2008), online: <http://www.ene.gov.on.ca/envision/deloro/index.htm> [Ont. Ministry of Environment].

<sup>204</sup> Louise Livingstone, “Deloro Minesite Cleanup, The Community and The Media,” NOAMI Workshop on Best Practices for Orphaned and Abandoned Mines (2006).

pesticides).<sup>205</sup> It was eventually abandoned by Erickson Construction in 1979 after an order for clean-up by the Ontario Ministry of Energy and Environment (now the Ontario Ministry of Environment). The site then became the responsibility of Ministry of Environment.

The environmental degradation at Deloro mine is significant, as a result, the residents of the town of Deloro have suffered negative health impacts.<sup>206</sup> The main pollutant of concern is arsenic. According a report by the National Orphaned/Abandoned Mines Initiative (“NOAMI”), “contamination in Deloro has been prevalent for a long time. Children used to play on arsenic piles. It was expressed that some community members have ‘blinders on’, as they don’t want to admit that they brought up their children in contamination that could harm them”.<sup>207</sup> Several lawsuits have arisen from the negative human health impacts of the mine. One example of these impacts was discovered when a 1974 study found the incidence of lung disease and cancer was 119% higher in the county surrounding Deloro than the provincial average.<sup>208</sup> The lawsuits thus far have been unsuccessful; partly because the Ministry of Environment (“the Ministry”) was not involved at the site at the time of major pollution, and partly because, when the Ministry was involved, it exercised due diligence.<sup>209</sup>

The main contaminants of concern for the remediation of Deloro by the Ministry of Environment are arsenic, cobalt, copper, nickel, and low levels of radioactive waste.<sup>210</sup> Although the amount of arsenic leaching into groundwater has been decreased by 80% since the Ministry took over the site, there remains a significant amount of heavy metals and other hazardous materials to be cleaned up. The Ministry has spent approximately \$30 million dollars thus far, and the estimated cost to complete the remediation is another \$20 million dollars.<sup>211</sup>

The Ministry created a Public Liaison Committee (“Liaison Committee”) in Deloro in 1997 to help facilitate communication between the government and community members, as well as to aide in receiving feedback on government plans and reports.<sup>212</sup> There are two other committees of importance: the Technical Liaison Committee and the Ministry of Environment Technical Committee, both of which are comprised of members from a variety of government departments.

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<sup>205</sup> National Orphaned/Abandoned Mines Initiative, “Lessons Learned on Community Involvement in the Remediation of Orphaned and Abandoned Mines: Case Studies and Analysis” (February 2003) [*Lessons Learned*].

<sup>206</sup> *Ibid.* at 5.

<sup>207</sup> *Ibid.* at 6.

<sup>208</sup> *Ibid.* at 5.

<sup>209</sup> *Ibid.* at 6.

<sup>210</sup> Ont. Ministry of Environment, *supra* note 203.

<sup>211</sup> *Ibid.*

<sup>212</sup> Holly R.J. Palen *et al.*, “Community-Based Processes in the Context of Contaminated Sites: Lessons from the Joint Action Group for Environmental Clean-Up of the Muggah Creek Watershed” (Dalhousie University, School for Resource and Environmental Studies, 2004) A Report for Environment Canada at 12.

## **Public Liaison Committee**

The Government of Ontario labels all three aforementioned committees as “project liaison committees”.<sup>213</sup> For the purposes of this report, only the Public Liaison Committee will be examined, since it is the only committee which is focused on public participation. The Ministry does not identify any of the committees as “independent oversight”. Rather, they exist to allow the ministry to share information, and to provide a mechanism for consulting with stakeholders on some of the key issues and strategies related to the cleanup. The Public Liaison Committee provides a platform for community members to review the Ministry’s plans for Deloro and raise concerns when necessary; thereby fulfilling an oversight role to a degree.

### **FORM**

The Public Liaison Committee meets at least quarterly to discuss proposals and presentations regarding the remediation plan. Certain representatives from community groups are invited to be a part of the committee, but anyone can attend meetings. There are no terms of reference for the Liaison Committee.

### **Composition**

There are no strict requirements for membership in the Public Liaison Committee. Twelve stakeholder groups have been invited by the Ministry to be part of the Public Liaison Committee.<sup>214</sup> The Ministry appoints a consultant to help facilitate the Liaison Committee, and also a chair person who is usually a staff member from the Ministry. The involvement by the Ministry has compromised the independence of the Liaison Committee, according to some: “At another meeting, media and a range of community members addressed the chair with their concerns about the lack of accountability. It was subsequently decided that future conflicts of this nature would be resolved by appointing a chair at that meeting, so that the Ministry staff person will not have to chair a conflict in which he is implicated”.<sup>215</sup>

### **Funding**

The Ministry funds the Liaison Committee consultant at approximately \$10,000 per meeting. Liaison Committee members are not paid, although municipal officials usually attend meetings as a part of their jobs.<sup>216</sup> There is no agreement that solidifies the existence of Liaison Committee or the funding for meetings.

### **Tasks**

The purpose of the Liaison Committee is to give community members an opportunity to voice opinions and concerns about the remediation plan. However, it is difficult to ascertain an exact mandate for the group. The members have previously expressed their concern that the committee lacks a clearly

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<sup>213</sup> Ont. Ministry of Environment, *supra* note 203.

<sup>214</sup> Ont. Ministry of Environment, *supra* note 203.

<sup>215</sup> *Lessons Learned*, *supra* note 205 at 8.

<sup>216</sup> *Ibid.*



defined mandate; thus its power is greatly reduced.<sup>217</sup> Some community representatives have expressed that the Liaison Committee feels like a way of placating the community, and concerns are never taken early enough or seriously enough to impact the remediation plan. “Many past and present members consider that the primary objective of PLC is to allay public fear – a publicity gesture aimed to decrease the explosive potential of the situation”.<sup>218</sup> Government representatives state that community input is considered at every stage of the plan.<sup>219</sup>

There is anecdotal evidence of actions taken due to the Liaison Committee’s requests. For instance, the Ministry gave the municipality of Marmora and Lake a grant to install new asphalt on the roads in the town of Deloro to accommodate the addition of heavy trucks and machines that will be used during the construction phase of remediation. The Liaison Committee requested that new sidewalks be included in the plan—the request was accepted.<sup>220</sup> Another example occurred when the Ministry conducted a Health Risk Study in Deloro in 1998. Due to Liaison Committee input, off-site contamination was included in the study.<sup>221</sup>

### **Powers**

The Liaison Committee is purely advisory—their suggestions regarding Ministry plans and proposals are relayed to the Ministry of Environment, but there is no process for guaranteeing these decisions or comments are heard. Decisions at Liaison Committee meetings are made by general consensus rather than formalized votes. Some members have expressed that no decisions are actually made.<sup>222</sup> The lack of a formalized process at the meetings clearly reduces the community members’ confidence in their ability to impact the Deloro mine remediation.

### **Term**

There is no set term for the Liaison Committee. It has been speculated that the Committee’s actions will be reduced once the remediation plan begins on the ground.<sup>223</sup>

## **DRIVERS**

### **Community Concern**

The residents of Deloro have lived next to a toxic site for decades. The instances of negative human health impacts in the area due to radioactive and heavy metal waste were documented long

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<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> Ontario Ministry of Environment, “Deloro Mine Site Cleanup Project: Update May 2009” at 7, online: <http://www.harvesthastings.ca/files/food/DeloroUpdate-May09.pdf>.

<sup>221</sup> *Lessons Learned, supra* note 205 at 10.

<sup>222</sup> *Ibid.* at 8.

<sup>223</sup> *Ibid.* at 11.

before the government took any steps to mitigate these effects.<sup>224</sup> Community members have voiced concern, and initiated lawsuits, to ensure proper remediation of the site.

### **Conflicts of Interest**

It is clearly vital to the residents of Deloro that the government clean-up the mine site. However, the Ministry of Environment seems to be involved at all levels of the project – proponent, funder, and regulator. The Ministry is also heavily involved with all of the project liaison committees, including the Liaison Committee.

### **Risk and Liability**

Several lawsuits have stemmed from the contamination caused by Deloro mine. In 2000, a \$55 million class action lawsuit was commenced by a Deloro resident and property owner, Brenda Brett, and a Deloro property owner, C. Thomas Wells, against the Ministry of Environment, Ministry of Health, Ministry of Mines and Northern Development, the Attorney General of Canada, Canada Eldor Inc., the Atomic Energy Control Board, and BOC Canada Ltd. The action seeks damages and injunctions to ensure that Deloro is properly remediated and no further contamination occurs. The proposed class would include owners and occupants, dead or alive, of Deloro and owners and occupants of downstream communities, such as Moira Lake, since 1961. The action is ongoing; however, it is currently inactive. So far, none of the defendants have filed a Statement of Defence and no further action has been taken by the plaintiffs. No motions have been made to certify the action as a class action. It is possible that the plaintiffs are waiting for the outcome of site remediation, though this is speculation.

In a different case, Sylvia Galloway sued the Government of Ontario, Atomic Energy of Canada Ltd., Eldorado Nuclear, and the two companies that owned the abandoned mine for the untimely death of her husband due to cancer caused by radiation exposure.

In 1964, Ted bought a house next to the land once owned by the Deloro Smelting and Refining Company. The plant had shut down three years earlier. Nobody told the family that the discarded black rock littering the field next to their bungalow was radioactive. Ted Galloway died of lung cancer 12 years later. A coroner's inquest decided that radiation was at least partially to blame.<sup>225</sup>

Ms. Galloway sought compensation for the loss of her husband and the pollution that rendered her property worthless. After several years, she settled for \$70,000 and signed a waiver absolving the defendants of any liability.<sup>226</sup>

## **DISCUSSION**

The main goal of the Public Liaison Committee is to facilitate communication between the residents of Deloro and the Ministry of Environment, as represented by the Technical Committee. However, since the Liaison Committee does not have an explicit legal source its goals are ambivalent.

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<sup>224</sup> *Ibid.* at 6.

<sup>225</sup> Mike Blanchfield, "A Legacy of Neglect" *Ottawa Citizen* (28 June 1998).

<sup>226</sup> *Ibid.*

According to NOAMI's "Lessons Learned" report, in which public participation at Deloro was explored, citizens are concerned that their opinions are not taken into account by the Ministry in forming the remediation plan. It is unclear that the Liaison Committee is alleviating community fears.

Improved environmental management is not a specific goal of the Liaison Committee. One of the NOAMI recommendations is to provide funding to citizens to allow them the capacity to understand technical information and, perhaps, independently verify the results. This recommendation was aimed towards health reports; the citizens of Deloro have been very sceptical of the Ministry of Environment's published health reports about the contamination of soil and water around the mine. This scepticism is based on conflicting messages (for instance, Ministry reports that there are no adverse health effects from the mine, yet advisories to Deloro residents not to drink the water) as well as questions as to the methodology used in the sampling.

### 5.1.10 Faro Mine & the Community Liaison Committee

#### Faro Mine Overview

Faro mine is located 200 km northeast from the City of Whitehorse in the Yukon.<sup>227</sup> The mine is in the traditional territory of the Kaska Nation and the traditional territory of the Selkirk First Nation is downstream of the site.<sup>228</sup> The mine opened in 1969 and quickly became Canada's largest operating lead/zinc mine.<sup>229</sup> It operated until 1998 when then-owner, Anvil Range Mining Corporation, went into receivership.<sup>230</sup> The mine left behind over 70 million tons of ore tailings which are piled in a giant reservoir – these tailings pose a risk to the environment, since acid-leaching in the rocks can deposit lead and zinc into groundwater.<sup>231</sup> There are also three open pits and millions of tons of waste rock.<sup>232</sup> Lead contamination has been found in the local aquatic and wildlife ecosystems.<sup>233</sup> The socio-economic repercussions of the mine's closure have also been significant, and the town of Faro, which once housed 2,500 people, currently has approximately 400 residents.<sup>234</sup>

The overall cost for the remediation of Faro mine has been projected at \$700 million over the next four decades, as well as a subsequent \$4 million per year for maintenance, which could be necessary for 500 years.<sup>235</sup> The federal government will pay the costs of the project, since the mine opened and operated while Ottawa still governed land use in the Yukon (which is now the territory's

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<sup>227</sup> Faro Mine Closure Office, "Faro Mine: Location," online: <http://faromineclosure.yk.ca/mine/location.html>.

<sup>228</sup> *Ibid.*

<sup>229</sup> Faro Mine Closure Office, "Faro Mine: History," online: <http://faromineclosure.yk.ca/mine/history.html>.

<sup>230</sup> *Ibid.*

<sup>231</sup> Jeremy Warren, "Faro mine an 'expensive lesson' for government and business" *Yukon News* (30 July 2008).

<sup>232</sup> Ellie Marcotte, Kathlene Suza, & Stephen Mead, "Faro Mine Closure – a community perspective," A Presentation of the National Orphaned/Abandoned Mines Initiative [Marcotte].

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> Chuck Tobin, "Plans for abandoned mine called bitter-sweet" *Whitehorse Daily Star* (12 February 2009).

jurisdiction as per the Devolution Agreement signed in 2004).<sup>236</sup> The reclamation plan is set to begin in 2013.<sup>237</sup> The government acknowledged the need for closure and reclamation at the site in 2003, and subsequently formed a socio-economic agreement between INAC, the Yukon Government, the Ross River Dena Council (members of the Kaska Nation) and Selkirk First Nation.<sup>238</sup> The exact contents of this contract are unknown. There is a body known as the Faro Mine Oversight Committee active at the site, but, as will be discussed below, it does not occupy an independent oversight role.

### **Faro Mine “Oversight Committee”**

The title “Oversight Committee” can be misleading. The Faro Mine Oversight Committee (“Oversight Committee”) is composed of representatives from the Government of Canada, the Yukon Government, Selkirk First Nation, and the Ross River Dena Council (the Liard Nation will also be included in further actions at the mine). The committee does not oversee monitoring or provide any community communication. Rather, the Oversight Committee for the Faro Mine Closure project was put in place to guide the selection of closure alternatives. The affected governments will be deciding in the future what sort of governance will be needed once the remediation is underway. The Oversight Committee does not function as a watchdog agency and exemplifies the complex terminology surrounding “oversight”.

Despite the lack of independent oversight function, the Oversight Committee provides affected Aboriginal groups a role in the formation of the remediation plan, which is important in the context of Canadian Aboriginal law. In a presentation on the mine clean-up, the opportunity for governments to work directly with Aboriginal groups in developing options was identified as a positive outcome, as this allowed both trust and a sense of joint undertaking to develop which would permit the project clean-up to move ahead.<sup>239</sup>

### **Faro Mine Community Liaison Committee**

#### **FORM**

A requirement of the water license issued to the proponent, Anvil Range Mining Co., in 1990 when the mine was still operative, was to form a “Technical Advisory Committee”.<sup>240</sup> When the court-appointed interim receiver (Deloitte & Touche) sought to renew the water license in 2004, the Yukon Water Board did not renew the requirement of a Technical Advisory Committee. Even though INAC, the Government of Yukon, and the town of Faro all requested its renewal, and Deloitte & Touche was willing to acquiesce to the request, the Water Board felt that:

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<sup>236</sup> Chuck Tobin, “Company agrees to maintain Faro mine site” *Whitehorse Daily Star* (29 July 2008).

<sup>237</sup> Faro Mine Closure Office, “Faro Mine: Background,” online: <http://faromineclosure.yk.ca/project/background.html> [Faro Mine Background].

<sup>238</sup> Yukon, Legislative Assembly, *Hansard*, No. 182 (30 March 2006) (Hon. Mr. Fentie).

<sup>239</sup> Lou Spagnuolo & Michael Nahir, “Canadian Abandoned Mines: Indian and Northern Affairs Program Update and Case Study” (presented at MineClosure 2010: 5<sup>th</sup> International Conference on Mine Closure, 23-26 November 2010, Chile).

<sup>240</sup> Yukon Water Board, *Reasons for Water Use Licence QZ03-059*, applied for by Deloitte and Touche Inc. 2004 at 6.

The requirement for a TAC [Technical Advisory Committee] was included in licence IN89-002, which was issued in 1990. In more recent decisions, the Board recognized that inclusion of such a requirement is problematic, since the Board does not have jurisdiction to require a third party to participate in a committee. Additionally, there is a potential that committees similar to TAC could, if formally entrenched in a water use licence, give the mistaken impression that the TAC has some authority, or a level of influence, that is beyond the level afforded other interested parties.<sup>241</sup>

Although the Board “strongly recommended” that Deloitte & Touche continue communications with parties affected by the mine, they no longer required a committee to be formed.<sup>242</sup> Deloitte & Touche did follow this recommendation, and formed a new body called the Community Liaison Committee (“the Committee”) in 2004.<sup>243</sup> At this time, the mine was closed but plans for remediation were not yet started.

### **Composition**

Members of the Committee included: the Department of Fisheries and Oceans, the Department of Indian Affairs and Northern Development, Environment Canada, Faro Mine Closure Planning Office, Selkirk First Nation, Selkirk Renewable Resources Council, Ross River Dena Council, Town of Faro, Type II Mines Office, Yukon Government, Yukon Conservation Society, and Yukon Salmon Committee.<sup>244</sup>

### **Tasks**

The Committee met and toured the mine site annually, and its members were distributed any information of interest about activities at the mine throughout the year.<sup>245</sup> During the Committee meetings, Deloitte & Touche made presentations about the mine and its environmental impacts.<sup>246</sup>

### **Powers**

The Committee had no powers. It was mainly a tool for dissemination of information.

### **Term**

The Committee existed from 1990-2009 (as the original “Technical Advisory Committee” and then as the Community Liaison Committee) when Deloitte & Touche ceased site management. When the Government of Yukon took over costs of mine site management and awarded Denison Environmental Services with the care and maintenance contract for the site, the Committee was

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<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> Deloitte & Touche Inc. (acting as Court Appointed Interim Receiver for Anvil Range Mining Corporation), *Anvil Range Mine Complex, 2005 Annual Environmental Report, Water Licence QZ03-059* (28 February 2006) at 135.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Deloitte & Touche Inc., *Meeting Minutes - Community Liaison Committee* (6 July 2005).

disbanded.<sup>247</sup> Denison Environmental Services' quarterly reports show no existence of any oversight or communications bodies at Faro mine.

## DRIVERS

### Regulatory Requirements

The original water license requirement was the catalyst for the formation of a committee consisting of affected stakeholders, but it was Deloitte & Touche's choice to continue this idea with the Committee. It is likely that the Committee was a useful tool for disseminating information between territorial and federal government agencies, the town of Faro, and the First Nations, and since its costs appear to have been minimal (the only cost was the annual meeting), it was advantageous for the managers of the site to continue its existence.

### Complexity

Faro mine is often cited along with Giant mine as being among the largest and most contaminated abandoned mines in Canada. These two projects are viewed as unique within the INAC contaminated sites program due to their nature, size, and proximity to populated areas. Further, the remediation plans for both the Faro and Giant sites envisage containment of contaminants rather than contaminant destruction or removal.<sup>248</sup> These factors all explain the identified community need for information about the Faro remediation.

## DISCUSSION

The Faro Mine remediation has led to the creation of multiple committees to address public concerns. The "Oversight Committee" is a body put in place to guide the selection of closure alternatives. It is not an independent oversight body, as its name might suggest. The "Oversight Committee" provided an opportunity for the federal and territorial governments to enter into a joint agreement with the Ross River Dena Council and the Selkirk First Nation to provide senior leadership and direction in jointly developing a closure and remediation plan. Public engagement was facilitated through community offices in Pelly Crossing & Ross River and a community liaison officer in Faro who was funded the governments to coordinate community input into the planning process, seek technical advice from the Closure Office and Government departments and to participate in community meetings and workshops.

The Community Liaison Committee was created in 2004 to respond to the gap that emerged once the Technical Advisory Committee was discontinued. The Liaison Committee was not legally required and, as a result, when mine site management was taken over by a new service provider in 2009, it was discontinued. This reflects the lack of stability of oversight bodies that are created at the discretion of a project proponent and lack a legally required existence.

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<sup>247</sup> Faro Mine Background, *supra* note 237.

<sup>248</sup> Tracy Ma, Stefan Reinecke & Michael Nahir, *Improving the Sustainability Performance of Abandoned Mine Site Remediation Projects Through Energy Use and GHG Emissions Reductions*, online: [http://www.stratos-sts.com/documents/Ma\\_Reinecke\\_RPIC\\_Paper\\_2010\\_Oct\\_30.pdf](http://www.stratos-sts.com/documents/Ma_Reinecke_RPIC_Paper_2010_Oct_30.pdf).

Beyond these specific committees, the Faro Mine experience yields insights into wider challenges faced by communities seeking to effectively participate in remediation projects. For the Ross River Dena Council, these challenges include i) time – communities and closure processes can operate with different understandings of time; ii) project complexity – this can be an impediment to community understanding of what is involved; iii) lack of continuity – community engagement comes in flurries. In downtimes, it can be hard to build on knowledge and continue the momentum; and iv) multiple levels of knowledge – achieving a balance between traditional and scientific knowledge can be difficult as can melding what the community knows vs. what it is being told.<sup>249</sup> Comments by the Selkirk First Nation reveal the difficulty in using meetings as one-stop initiatives for dealing with community issues. This is because it is difficult to ensure public attendance at meetings, it is challenging to schedule meetings when many community members can attend, and because community members may not speak-up in public settings. The complexity of remediation projects can have a silencing effect on community members. Individuals may not speak up and voice their opinions and concerns because they are not sure they fully understand the complexities posed by large scale clean-up projects.<sup>250</sup>

## 5.2 UNITED STATES

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### 5.2.1 Stillwater Platinum/Palladium Mines & the Stillwater Oversight Committees

#### Stillwater & East Boulder Platinum/Palladium Mines Overview

Stillwater mine, originally owned and operated by the Stillwater Mining Company, has been producing platinum group metals since 1986. Located in the Beartooth Mountains of Nye, Montana, it yields over 400,000 ounces of palladium and platinum per year.<sup>251</sup> East Boulder mine, in nearby Sweetgrass County, began operations in 2002. Another Stillwater Mining Company venture originally, East Boulder produced 136,000 ounces of platinum group metals in 2009.<sup>252</sup>

Mid-90s proposals for the East Boulder mine raised environmental concerns among local citizens and environmental groups. Unresponsive regulatory agencies spurred community groups to sue the government in order to prevent development. Fearful of delays, Stillwater Mining Company went beyond regulatory requirements and signed a Good Neighbor Agreement (“the Agreement”) with the concerned groups, namely the Northern Plains Resource Council, Cottonwood Resource Council, and Stillwater Protective Association. The Good Neighbor Agreement is a legally binding agreement

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<sup>249</sup> Marcotte, *supra* note 232.

<sup>250</sup> *Ibid.*

<sup>251</sup> Stillwater Mining Company, “Stillwater Mine” (2009), online: <http://www.stillwatermining.com/stillWMine.html>.

<sup>252</sup> Stillwater Mining Company, “Stillwater Mining Company Announces Full Year 2009 Production and Pricing Statistics,” Press Release (MarketWire, 12 January 2010), online: <http://www.marketwire.com/press-release/Stillwater-Mining-Company-Announces-Full-Year-2009-Production-and-Pricing-Statistics-NYSE-SWC-1184400.htm>.

pertaining to both Stillwater and East Boulder mines. The Agreement provides a variety of mechanisms for the protection of land, water, and community participation that exceed regulatory requirements, and gives unprecedented community access to information on mining operations and environmental management.<sup>253</sup> For example, through the Agreement the company commits to establishing a water quality program for the mines that is supplemental to federal and state requirements. This includes providing funding and opportunities for community participation in the program. The agreement further establishes clear and enforceable water quality standards that trigger emergency environmental audits and remedial actions. In return for these contractual commitments, the community groups dropped their legal action against the Stillwater Mining Company.

In 2003, Stillwater Mining Company shareholders voted to sell 51% of the company to Russian conglomerate Norilsk Nickel. As the Agreement is linked to the mine site and transfers with mine site ownership, the contractual obligations of the Agreement passed to Norilsk upon the sale. The contractual provision in the agreement (section 16.1) specifying that the Agreement shall bind all “successors, partners, subsidiaries, affiliates, and assigns” of the company has proved vitally important to the continuity of obligations post-sale. The Agreement was amended in 2005 to indicate completed obligations and to better reflect ongoing practices.

The Agreement establishes an oversight body at each mine, the Stillwater Oversight Committee and the East Boulder Oversight Committee. The Oversight Committees have different members, but identical forms and functions. A third body, known as the Responsible Mining Practices and Technology Committee (“Technology Committee”) is active at both sites.

## **The Stillwater and East Boulder Oversight Committees**

### **FORM**

#### **Composition**

Both oversight committees have four voting members. The East Boulder Oversight Committee is comprised of two proponent appointees and two appointees agreed upon by the Cottonwood Resource Council and Northern Plains Resource Council.<sup>254</sup> The Stillwater Oversight Committee includes Stillwater Protective Agency appointees in lieu of Cottonwood Resource Council appointees.

The Responsible Mining Practices and Technology Committee has six members: three from the proponent and one from the Cottonwood Resource Council, Stillwater Protective Agency, and Northern Plains Resource Council.

#### **Funding**

The oversight committees and the Technology Committee are funded by the proponent.<sup>255</sup> The Agreement does not set the budgets, but it is extremely detailed in its enumeration of the specific

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<sup>253</sup> Douglas S. Kenney, Miriam Stohs & Jessica Chavez, "Evaluating the Use of Good Neighbor Agreements for Environmental and Community Protection" (Colorado: Natural Resources Law Center, University of Colorado School of Law, 2004) at 32 [Kenney].

<sup>254</sup> *Stillwater Good Neighbor Agreement between Stillwater Mining Company, Northern Plains Resource Council, Stillwater Protective Agency, and Cottonwood Resource Council* dated 8 May 2000, ss.7.0.1, 7.0.2 [*Stillwater GNA*].

<sup>255</sup> *Ibid.*, ss.7.0, 8.0.



funding obligations. This includes a commitment on the part of the company to fund environmental audits, emergency environmental audits, reclamation plan and bond evaluations, tailings and waste rock projects, a long term fisheries monitoring program, and supplemental ground water studies, as required by the Agreement.<sup>256</sup> A number of oversight agencies have run into problems when unforeseen events require a shifting of budget line items. This is specifically anticipated by the Agreement which grants the Oversight Agency the right to reallocate its funding between line items:

s.4.1.7. The relevant Oversight Committee may reallocate any of the above funds and make any appropriate adjustments to expenditure limits to complete other Third Party projects, reports, studies or audits contemplated under this Section 4 or to similarly complete any other projects, reports, studies, or audits required by this Agreement for which the actual Third Party or other costs incurred by SMC [the company] exceed those amounts for which SMC's Funding Obligation is expressly limited under the Agreement.<sup>257</sup>

### **Tasks/Powers**

The oversight committees are tasked to monitor “all aspects of [Agreement] implementation, resolve any new issues that may arise, and keep lines of communication open among all parties”.<sup>258</sup> In order to function as both a technical watchdog and a conduit of information, the oversight committees are vested with stipulated rights. These include broad rights of access to information from the proponent, as well as citizen-sampling, mine access, and mine inspection rights.<sup>259</sup>

The oversight committees also function as dispute resolution mechanisms. The agreement contains very detailed language outlining dispute resolution procedures.<sup>260</sup> For example, if the proponent and community groups cannot agree on a Technology Committee budget, the issue could be submitted to one of the oversight committees. All decisions of the oversight committees are to be made by majority vote. A structure of four voting members, equally aligned with opposing parties, creates the possibility of deadlock. In the event that the committees, functioning within their regular mandate or as a dispute resolution mechanism, cannot reach a majority decision, the matter may be submitted to a three-person arbitration panel.<sup>261</sup>

The Technology Committee's rights and decision-making procedures are akin to those of the oversight committees. But the Technology Committee has a different scope. Whereas the oversight committees focus on implementing the Agreement, the Technology Committee “identifies, investigates and recommends innovative methods to reduce waste and increase environmental protections in the areas affected by the mines”.<sup>262</sup> The Technology Committee is tasked with continual improvement of the technological and environmental management mechanisms set forth in the Agreement. The

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<sup>256</sup> *Ibid.*, s. 4.1.

<sup>257</sup> *Ibid.*, s. 4.1.7.

<sup>258</sup> Kenney, *supra* note 253 at 33.

<sup>259</sup> *Stillwater GNA*, *supra* note 254, s.7.6

<sup>260</sup> *Ibid.*, s.7.5.6.

<sup>261</sup> *Ibid.*, Appendix D, s.1.3. One arbiter is selected by the community groups, one by the proponent, and the last by the other two arbiters.

<sup>262</sup> Kenney, *supra* note 253 at 33.

company is required to designate a team of its employees and consultants to form a New Technologies Team. The Team is to be made available to the Technology Committee and to identify, research, develop, and implement New Technologies and Practices.<sup>263</sup> “New Technologies and Practices” are defined terms in the Agreement. They include best available technologies, state-of-the-art and developing technologies.<sup>264</sup>

## DRIVERS

### Perceived Regulatory Failures

The main motivation for the Agreement, and the oversight committees therein, was community concern over lax regulation. Montana had a “history of inadequate enforcement and erosion of state environmental laws”.<sup>265</sup> When the Stillwater expansion was expeditiously approved by regulatory agencies the Stillwater Protective Agency filed a lawsuit against the Montana Department of Environmental Quality, challenging the approval of the Environmental Impact Statement.<sup>266</sup> The Stillwater Mining Company recognized the potential for irreversible reputational damage to its corporate reputation, as well as financial loss from a court battle, and agreed to meet with members of the concerned groups. Meetings, in turn, became negotiations, which eventually spawned the Agreement. To satisfy the communities that adequate environmental management was taking place, the concerned groups were given a role in implementation and monitoring.

### Financial Benefits for the Proponent

The Stillwater Mining Company was a small publicly traded company eager to market itself as environmentally responsible. It had a strong environmental record. The company needed to raise money in the capital markets and wanted to attract green fund investors. Both litigation and community opposition would pose hurdles to this approach to financing. Negotiating an agreement with community groups could quell community concerns about the project and create positive energy about the supra-regulatory commitments that the company was willing to make.

## DISCUSSION

The Stillwater Good Neighbor Agreement has been described as the “Cadillac” of Good Neighbor Agreements.<sup>267</sup> It is applauded for its unusual sophistication in terms of its scope and complexity, and for the strength of community group resources committed to the implementation of the Agreement.<sup>268</sup> Yet, the Agreement has not managed to avoid all pitfalls. In 2003 a dispute arose over the frequency of biological monitoring on the East Boulder River. The community groups argued annual monitoring was necessary, whereas the Stillwater Mining Company believed every three years would suffice. Instead of utilizing the dispute resolution mechanisms built into the Agreement, the well-

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<sup>263</sup> Stillwater GNA, *supra* note 254, s.8.6.

<sup>264</sup> *Ibid.* at Appendix A (s.1.28).

<sup>265</sup> Kenney, *supra* note 253 at 32.

<sup>266</sup> *Ibid.* at 64.

<sup>267</sup> *Ibid.* at iii.

<sup>268</sup> *Ibid.* at 14.

resourced community groups undertook the monitoring themselves. Maintaining an amicable relationship with the proponent has practical benefits, but this scenario demonstrates that even the most robust agreements do not enforce themselves.

On a more theoretical scale, while the Agreement “undoubtedly offers some useful insights about what future Good Neighbor Agreements should look like...it likely presents a model that is unrealistic for groups with lesser resources”.<sup>269</sup> The community groups’ spoke loudly and carried a significant bankroll. The Stillwater Mining Company viewed their discontent as a credible threat and agreed to bargain. Moreover, once at the table, the communities fielded a formidable negotiating team. Less empowered community groups in the same situation may be hard-pressed to negotiate an agreement of equal strength. Therefore, it may not set a precedent which other companies (and communities) will easily follow.

In the years immediately after the Agreement came into effect, the Stillwater Mining Company encountered financial difficulties which put environmental concerns on the backburner. The community groups, with their guaranteed oversight rights, ensured that the company’s environmental obligations were not forgotten. In calmer financial seas, the community groups have lauded the mining company’s environmental management, nominating the company for “the Bureau of Land Management’s Hard Rock Mining Award...[which] recognizes environmentally sound mineral development operations...and acknowledges successful partnering efforts to ensure a safe and productive hardrock mining industry”.<sup>270</sup> This demonstrates a growing trust between previously adversarial stakeholders. In the words of Bruce Gilbert, director of environmental and governmental affairs at Stillwater, “having a third party (to monitor compliance) is essential to building trust and accountability” between potential opponents.<sup>271</sup> “There’s nothing under the table” he elaborates, “They [the citizens’ groups] get involved in the discussions even before we submit them to the agencies. We’re just providing them information up front instead of making them dig for it.”<sup>272</sup>

The Agreement has survived a decade of significant change (including a major recession, sale of the mine to a Russian firm and a significant drop in the price of precious metals). Its longevity can be explained in part by its legally binding nature and the fact that it binds all successors and assigns to the original company. But its long term impact can also be explained by the relationships that have been forged through this Agreement and the expectations it has created. “People on all sides have tried to put themselves in the other person’s shoes” explains Norm Tjeltveit, a committee member and chair of the Stillwater Protective Association, “To me, that has done nothing but enhance other’s points of view.”<sup>273</sup>

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<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.* at 40.

<sup>271</sup> T.J. Gilles, “Good Neighbor Agreement Makes Good Neighbors” *The Billings Outpost* (25 November 2010).

<sup>272</sup> Linda Halstead-Acharya, “From Conflict to Cooperation: Stillwater Accord Endures” *Billings Gazette* (26 May 2010).

<sup>273</sup> *Ibid.*

## 5.2.2 Idaho National Laboratory & the Department of Environmental Quality's Oversight Program

### The Department of Environmental Quality Overview

The Idaho Department of Environmental Quality (“the Department”) is a Government of Idaho regulatory agency. It is responsible for ensuring compliance with state regulations and laws.<sup>274</sup> The Department became a stand-alone entity (separated from the Idaho Department of Health and Welfare's Division of Environmental Quality) in 2000.<sup>275</sup> The Department manages a wide range of environmental tasks, including: overseeing sites that generate pollution, air and water quality monitoring, contaminated sites remediation, and providing education and outreach about environmental issues to businesses, local government, and citizens.<sup>276</sup> The Department was formed pursuant to the *Idaho Environmental Protection and Health Act* (“the Act”).<sup>277</sup>

One task of the Department is to oversee the Idaho National Laboratory, which is a federal Department of Energy laboratory.<sup>278</sup> To serve this purpose, the Department has created a specific oversight program (“the Oversight Body”), examined here.

### Idaho National Laboratory Overview

The Department of Energy started operating Idaho National Laboratory in 1949, when the United States and Soviet Union were vying for nuclear supremacy.<sup>279</sup> Decades of nuclear testing on the 2,300 km<sup>2</sup> Idaho National Laboratory grounds left the site significantly polluted. The Idaho National Laboratory has had noteworthy scientific breakthroughs, including the world's first conversion of nuclear power to useable amounts of electricity in 1951.<sup>280</sup> However, activities at the site have resulted in significant contamination. This was revealed to citizens when the veil of secrecy around the weapons technology program at the site was lifted in the 1980s. As the extent of contamination from a half century of nuclear research and weapons production came to light, states including Idaho demanded that the Department of Energy and other federal agencies be held to the same environmental standards that would apply to private industry.<sup>281</sup>

In response to pressure on the Department of Energy, the Secretary of Energy proposed a non-regulatory oversight role for states hosting Department of Energy facilities. In 1989, a comprehensive

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<sup>274</sup> Idaho Department of Environmental Quality, “About Us: What Does DEQ Do?” (2000-2011), online: [http://www.deq.idaho.gov/about/deq\\_purpose.cfm](http://www.deq.idaho.gov/about/deq_purpose.cfm) [*DEQ About Us*].

<sup>275</sup> Idaho Department of Environmental Quality, “2001 Annual Report” (2001), online: [http://www.deq.idaho.gov/about/publications\\_deq/annual\\_01.pdf](http://www.deq.idaho.gov/about/publications_deq/annual_01.pdf).

<sup>276</sup> *DEQ About Us*, *supra* note 274.

<sup>277</sup> *Idaho Environmental Protection and Health Act*, I.C. §39-101 [*Idaho Environmental Protection Act*].

<sup>278</sup> Idaho Department of Environmental Quality, “About Us: DEQ's INL Oversight Program” (2000-2011), online: [http://www.deq.idaho.gov/inl\\_oversight/about/overview.cfm](http://www.deq.idaho.gov/inl_oversight/about/overview.cfm) [*DEQ's INL Oversight Program*].

<sup>279</sup> *Ibid.*

<sup>280</sup> Idaho National Laboratory, “INL History” (2010), online: [https://inlportal.inl.gov/portal/server.pt/community/inl\\_history/482](https://inlportal.inl.gov/portal/server.pt/community/inl_history/482).

<sup>281</sup> *DEQ's INL Oversight Program*, *supra* note 278.

oversight program was established for the Idaho National Laboratory by the Idaho Legislature. An agreement was subsequently signed between Idaho and the Department of Energy to provide funding for independent environmental oversight and monitoring of this facility.<sup>282</sup>

## **The Oversight Program**

### **FORM**

The source of the Department's Oversight program is partially legislated in *the Act*, but more important is the Environmental Oversight and Monitoring Agreement ("the Agreement"), between the Department of Energy and the Department of Environmental Quality which originated in 2000 and was renewed in 2010.<sup>283</sup> The Department of Energy has funded a number of similar oversight programs in other states, including New Mexico<sup>284</sup>, Tennessee<sup>285</sup> and Nevada.<sup>286</sup>

The Agreement provides that the state will have "an independent, impartial, and qualified oversight program within the [Department]".<sup>287</sup> The program must: "assess the potential impacts of present and future [Department of Energy] activities in Idaho;...assure the citizens of Idaho that all present and future [Department of Energy] activities in Idaho are protective of the health and safety of Idahoans and the environment; and ... communicate the findings to the citizens of Idaho in a manner which provides them the opportunity to evaluate potential impacts of present and future [Department of Energy] activities in Idaho".<sup>288</sup>

Overall, the Agreement ensures that the state will have federal funding and access to information in order to monitor and oversee Department of Energy activities in Idaho (namely, the Idaho National Laboratory).

### **Composition**

There are nine members listed as staff for the Oversight Body: an Idaho National Laboratory coordinator, two program managers, two health physicists, three environmental scientists, and one public information specialist.<sup>289</sup>

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<sup>282</sup> *Ibid.*

<sup>283</sup> *Environmental Oversight and Monitoring Agreement between the United States Department of Energy and the State of Idaho* dated September 2010 [*Idaho Oversight Agreement*].

<sup>284</sup> *Agreement-In-Principle between the United States Department of Energy and the State of New Mexico for Environmental Oversight and Monitoring* dated 2005.

<sup>285</sup> *Agreement between the United States Department of Energy and the State of Tennessee* dated June 2006 [*Tennessee Oversight Agreement*].

<sup>286</sup> *Agreement In Principle between the Department of Energy and the State of Nevada* dated June 1999.

<sup>287</sup> *Idaho Oversight Agreement*, *supra* note 283.

<sup>288</sup> *Ibid.*, s.4(d).

<sup>289</sup> Idaho Department of Environmental Quality, "About DEQ's INL Oversight Program: Staff List" (2000-2011), online: [http://www.deq.idaho.gov/inl\\_oversight/about/staff.cfm](http://www.deq.idaho.gov/inl_oversight/about/staff.cfm).

## Funding

Paragraph 4(k) of the Agreement stipulates that the Department of Environmental Quality will receive a federal grant in order to achieve oversight and monitoring goals set out in the Agreement. The grant gives approximately \$1.7 million per year for the duration of the Agreement (which lasts until 2015).<sup>290</sup> The amount of the grant can be reviewed on a year-to-year basis; any changes in the funding will be based on the Department of Energy's budget, the state's submittal of proposed work, and the previous year's expenditures.

## Tasks

The oversight program includes environmental surveillance, impact assessment, emergency planning and response, public information, and administration. The Oversight Body publishes a wealth of documents, including annual and quarterly reports as well as newsletters and posters.<sup>291</sup>

Environmental surveillance is done to supplement and verify information coming from the Idaho National Laboratory. The surveillance activities include ongoing sampling programs for air, water, soil and milk.<sup>292</sup> The Oversight Body's employees also assess the impacts of Idaho National Laboratory by reviewing activities and conducting on-site inspections. Due to the significant public concerns surrounding nuclear waste, much attention is devoted to providing public information on environmental and health impact assessment.<sup>293</sup>

Another component of the oversight program is emergency planning and response; plans are made in case of emergencies involving radioactive materials. The Oversight Body helps local and state emergency workers plan for such emergencies and aims to improve inter-departmental coordination. They also conduct exercises to test the emergency response plans.<sup>294</sup>

Providing information to the public may be the most vital role that the Oversight Body plays. The oversight program website states that the Oversight Body was created "because legislators felt people in Idaho didn't know enough about the Idaho National Laboratory and did not trust the information they received". Public information is generated through all of the Oversight Body's projects, and public access to information through websites and new technological tools appears to be a priority of the program.<sup>295</sup>

## Term and Legal Basis

The current Agreement expires in 2015.<sup>296</sup> In addition to its contractual basis under the Agreement, the Oversight program is rooted in legislation. *The Idaho Environmental Protection and*

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<sup>290</sup> *Idaho Oversight Agreement*, *supra* note 283, s.7.

<sup>291</sup> Idaho Department of Environmental Quality "INL Oversight Program Library" (2000-2011), online: [http://www.deq.idaho.gov/inl\\_oversight/library.cfm](http://www.deq.idaho.gov/inl_oversight/library.cfm).

<sup>292</sup> *DEQ's INL Oversight Program*, *supra* note 278.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Idaho Oversight Agreement*, *supra* note 283, s.6.

*Health Act* at § 39-105 grants the director of the Department the power to establish and operate “a network of environmental monitoring stations, independent of the United States department of energy, within and around the facilities of the Idaho national laboratory to provide authoritative auditing and analysis of emissions, discharges or releases of pollutants to the environment, including the air, water and soil from such facilities.”<sup>297</sup> This section of *the Act* also grants the Director the duty to monitor the Agreement.

## DRIVERS

### Conflict of Interest

The Department of Energy has been the subject of significant criticism due to its track record of land-use planning. This criticism traces to the Department’s tendency to focus on its missions “to the exclusion of local concerns”<sup>298</sup> (a phenomenon known as ‘mission creep’). Moreover, local authorities are rarely able to impose conditions on Department of Energy operations. The Department, according to commentators, has adopted the approach that it has “no duty to interact to any significant extent with the local jurisdictions that host them...requests [are seen as] bothersome distractions”.<sup>299</sup> This creates an unworkable power structure in which the body responsible for environmental management is unresponsive to local environmental concerns.

By the end of the Cold War, it became apparent that the Department of Energy’s activities at the Idaho National Laboratory had polluted and contaminated local lands.<sup>300</sup> Citizens of Idaho were disappointed that the federal government had put military goals ahead of long-term environmental health. It was the Department of Energy’s poor public image, in large part, which led to creation of the Oversight Body. The Secretary of Energy attempted to remediate its image by alleviating the conflict of interest inherent in the *status quo*. As the Oversight Body’s website states:

Congress eventually passed legislation making federal agencies subject to Superfund cleanup requirements, as well as clean air and hazardous waste laws. However, DOE remained largely self-regulating when it came to nuclear materials and wastes. In response to continued calls to improve DOE’s public image, the Secretary of Energy proposed a non-regulatory oversight role for states that hosted DOE facilities.<sup>301</sup>

### Complexity/Potential for Disaster

The health and environmental threats posed by living or working near radioactive materials create significant public anxiety and a demand for independent verification of the risks posed by such materials. The Oversight Body provides a parallel track of data through monitoring, and devotes significant resources to explaining its findings to the public.

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<sup>297</sup> *Idaho Environmental Protection Act*, *supra* note 277.

<sup>298</sup> Karen W. Lowrie & Michael R. Greenberg, “Can David and Goliath Get Along? Federal Land in Local Places” (2001) 28(6) *Environmental Management* 703 at 709 [Lowrie].

<sup>299</sup> *Ibid.*

<sup>300</sup> *DEQ’s INL Oversight Program*, *supra* note 278.

<sup>301</sup> *Ibid.*

One of the most prevalent concerns at any nuclear-related site is the potential for catastrophe. Nuclear accidents, such as Three Mile Island, create widespread apprehension toward nuclear power. Independent oversight at nuclear-related sites has an important role to play in devising and strengthening emergency response plans. The Oversight Body at the Idaho National Laboratory works with other state agencies and local governments involved in the planning and response to emergencies involving radioactive materials.<sup>302</sup>

## DISCUSSION

The uniqueness of this example warrants comment. Since the Oversight program is under the direction of an Idaho State Department, some may question if the Oversight Body is “independent”, since it is just one level of government overseeing another. However, there is no obvious conflict of interest in this arrangement. The state of Idaho and the Department of Energy have different goals at the Idaho National Laboratory. The Department of Energy uses the lab to “[meet] the nation's environmental, energy, nuclear technology, and national security needs”.<sup>303</sup> The state is committed to decreasing any environmental risk arising from the site. Therefore, barring political interference, the state may be well placed to ensure that the Department of Energy is properly designing and implementing environmental monitoring, impacts analysis, emergency planning and public education. Additionally, the legacy of mistrust and suspicion of the Department of Energy by the state authorities<sup>304</sup> suggests that the state will be a vigilant watchdog and not merely a rubber stamp on Department of Energy activities.

The confidence and robust monitoring created by such oversight is especially important due to the nuclear nature of the Idaho National Laboratory. Any time a site has the potential to cause widespread harm, independent oversight and monitoring can serve as an extra layer of protection in emergency preparedness.

Moreover, the Department of Energy has recognized that nuclear monitoring and cleanup strategies require “a high level of public involvement”.<sup>305</sup> Incorporating a broad range of stakeholders ensures that local concerns – which may not be shared by the authorities – are not overlooked or undervalued. While the oversight program is operated by the state of Idaho, it aims to apprise the public of site activities and incorporate public concerns into the project. Having public education as a primary focus promotes intelligible feedback from those most affected by the site. The broad access to information engendered by the Oversight Body is key to achieving meaningful public participation at the site.

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<sup>302</sup> *Ibid.*

<sup>303</sup> Idaho National Laboratory, “INL Today” (2010), online: [https://inlportal.inl.gov/portal/server.pt/community/inl\\_today/483](https://inlportal.inl.gov/portal/server.pt/community/inl_today/483).

<sup>304</sup> Lowrie, *supra* note 298 at 710.

<sup>305</sup> Christina H. Drew *et al.* “Nuclear Waste Transportation: Case Studies of Identifying Stakeholder Risk Information Needs” (2003) 111(3) Environmental Health Perspectives 263 at 265.



## 5.2.3 Frontier Fertilizer Superfund Site & Superfund Oversight Group

### Frontier Fertilizer Superfund Site Overview

Formerly a pesticide and fertilizer distribution plant (1972-1987), the Frontier Fertilizer site in Davis, California was placed on the U.S. Environmental Protection Agency's National Priorities List in 1994. The handling and dumping of chemicals on site – specifically ethylene dibromide, 1,2-dichloropropane, and 1,2-dibromo-3-chloropronate – led to contamination of groundwater and subsurface soil. The potential for contaminants to spread to drinking water necessitated site remediation. The remediation commenced in 1994 under the aegis of Superfund laws.<sup>306</sup>

Established in 1980 with the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (“*the Act*”), Superfund is a contaminated-site clean-up program operated by the Environmental Protection Agency (“EPA”). *The Act* stipulates that, if the party responsible for site-contamination can be identified, it is responsible for the costs of remediation. However, if the responsible party cannot fund the clean-up, the EPA foots the bill with money from the Senate Appropriations Committee.

Superfund was reauthorized in 1986 with amendments requiring public participation at all sites: “the EPA must provide citizens with notice, an opportunity to submit written and oral comments, [and any] final clean-up plan must be accompanied by...responses to publicly received comments”.<sup>307</sup> Beyond the minimum statutory requirements, there are further public participation initiatives within the Superfund program. Technical Assistance Grants (“Grants”) are designed to facilitate public participation throughout the life-cycle of remediations. Grants are renewable endowments (of up to \$50,000) given to affected community groups. They enable community groups to “procure independent technical advisors to help...interpret and comment on site related information and decisions”.<sup>308</sup> Only one community group at a time may receive a Grant at a Superfund site. At Frontier Fertilizer the Grant was awarded to the Frontier Fertilizer Superfund Oversight Group (“Oversight Group”).

### Frontier Fertilizer Superfund Oversight Group

#### FORM

To be eligible for a Grant, a community group must be registered as a non-profit. The EPA explains that “[i]ncorporation protects individual group members from potentially serious personal liability”, and establishes structure to ease problems arising from turnover.<sup>309</sup>

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<sup>306</sup> Environmental Protection Agency, “Frontier Fertilizer: Description and History” (2011) online: <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/7508188dd3c99a2a8825742600743735/5419531d36ef028888257007005e9466!OpenDocument>.

<sup>307</sup> Deoohn Ferris, “Communities of Color and Hazardous Waste Cleanup,” (1993-1994) 21 Fordham Urb L. J. 671.

<sup>308</sup> Environmental Protection Agency, “Final Rule on Technical Assistance Grant Program” (2 October 2000) 65(191) Federal Register 58850 at 58859 [*Final Rule*].

<sup>309</sup> *Ibid.* at 58853.

## Composition

Every body receiving a Grant, the Oversight Group included, enlists the services of a technical expert. To ensure independent advice, the technical expert must not work for the federal or state government or a potentially responsible party. As of 2009, the Oversight Group retained one technical advisor from HydroFocus, Inc., a hydrologic and water-quality consulting firm. Beyond the technical advisor, the Oversight Group also has a five-member Board of Directors.

But membership in a Grant-group is not confined to experts and the Board. In fact, there is no ostensible upper bound, and the EPA stipulates almost no restrictions for members; the exception being that individuals who have a “significant or controlling interest” in a party who is potentially responsible for site contamination may not join.<sup>310</sup>

## Funding

The Oversight Group is funded by Technical Assistance Grants from the EPA. It has received roughly \$140,000 to date.<sup>311</sup> Grants are renewable to advance the stated goal of facilitating public participation at all stages of remedial action;<sup>312</sup> but, renewals are not guaranteed. A group must reapply when it has exhausted a Grant, and must continue to meet the prerequisites for recipients.

In an effort to ensure independence, Grants are not available to any group which has received, or will receive, funding from a party that is potentially responsible for site contamination.

[The] prohibition on PRP [Potentially Responsible Party] assistance exists because [the EPA does] not believe it is possible to determine when such assistance is given conditionally and, therefore, a group which accepts such assistance may appear to have a conflict of interest undermining its purpose of providing independent technical advice to the affected community.<sup>313</sup>

## Tasks/Powers

The Oversight Group defines its purpose as understanding and monitoring contamination and clean-up activities, analyzing potential impacts on the community, informing the local public of the site’s progress, and ensuring that community concerns are resolved.<sup>314</sup> To further these ends, the Oversight Group’s technical advisor participates in the EPA’s site-related meetings and reports back to the Group. The Oversight Group publishes annual newsletters which document current activities and future proposals of the proponent, as well as actions of the Oversight Group. This fulfills the requirement that Grant-groups must disseminate information to the affected community.<sup>315</sup> The newsletter also enumerates the recommendations made by the Oversight Group to the EPA.

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<sup>310</sup> *Ibid.* at 58852.

<sup>311</sup> Frontier Fertilizer Superfund Oversight Group, “Background” (2009) online: <http://www.dcn.davis.ca.us/go/pnieberg/homepage.htm> [*Background*].

<sup>312</sup> *Final Rule*, *supra* note 308 at 58852.

<sup>313</sup> *Ibid.* at 58851.

<sup>314</sup> *Background*, *supra* note 311.

<sup>315</sup> *Final Rule*, *supra* note 308 at 58853.

The Oversight Group, like all Grant-groups, is not a monitoring or investigative body. Neither the Oversight Group, nor its technical advisor, are entitled to independently monitor environmental impacts at the Frontier Fertilizer site. And, like many oversight bodies, the Oversight Group has no decision-making power. Moreover, the EPA is not required to respond to recommendations of the Oversight Group.

Because funding is discretionary and conditional, Grant-groups effectively exist at the whim of the EPA. Though public participation is a requirement for Superfund sites as of the 1986 amendments to *the Act*, the Grant program itself is merely an EPA initiative. There is no legal foundation establishing a base of rights which Grant-groups can assert against the EPA or responsible parties.

## DRIVERS

### Regulatory Requirements

As mentioned, public participation is required at all EPA Superfund sites since the 1986 amendments to *the Act*. Though establishing a Grant-group is not mandated at any Superfund site, such groups can be seen as a form of regulatory compliance. The regulatory motivations should not diminish the EPA's commitment to effective environmental management, though. The agency has internalized principles of environmental justice and equality.<sup>316</sup> Public participation programs, like Technical Assistance Grants, promote equality in site-specific environmental management by providing a forum for affected voices.

### Community Activism

The Oversight Group owes its existence, foremost, to the awareness and drive of the citizens of Davis, California. This community (dubbed the second most educated city in America<sup>317</sup>) was vocal in its concerns about the hazardous waste site in their neighbourhood.<sup>318</sup> The formation of the Oversight Group is a reflection of this community concern and the willingness of community members to take on an oversight role.

## DISCUSSION

The Oversight Group, despite its tenuous rights and foundation, has been able to enhance the Frontier Fertilizer site remediation. In 2006, the EPA submitted the "Final Remedy" for public comment. The Oversight Group saw potential problems in what was supposed to be a comprehensive solution. Specifically, the Oversight Group worried that proposed thermal treatment of contaminants would create hazardous by-products. The EPA agreed to do further testing to ensure the thermal heating would not create unexpected dangers.<sup>319</sup>

The Oversight Group has also been integral in creating a sense of community ownership of the clean-up. In the early years, the locals did not feel involved in the process. Due to the efforts of the

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<sup>316</sup> *Ibid.* at 58858.

<sup>317</sup> CNN Money Magazine, "Best Places to Live" (2006), online: <http://money.cnn.com/magazines/moneymag/bplive/2006/top25s/educated.html>.

<sup>318</sup> *Background*, *supra* note 311.

<sup>319</sup> *Ibid.*

Oversight Group, and the EPA's willingness to work with the body, community perceptions shifted. "The community is very appreciative of [Oversight Group's] activities and feels well represented".<sup>320</sup> Lingering issues remain, but the Oversight Group is seen as a benevolent and somewhat-effective community advocate.

The Oversight Group's limited power and lack of recourse has led to its concerns being unappealed at times. Its recommendations for the Final Remedy went beyond increased thermal testing; the Oversight Group was also discontent with the dearth of scientific evidence supporting the EPA's plan to use fermentation waste to decompose hazardous materials, and the lack of performance criteria for the plan as a whole.<sup>321</sup> The EPA's subsequent Record of Decision addressed many of the Oversight Group's concerns, but left others unanswered. Assurances were made that all concerns would be addressed "either in the design phase or during implementation of the final action".<sup>322</sup> But without responses to specific issues, it is unclear how the EPA plans to do so or whether they will follow through.

2008 brought preparations for a department store on the Frontier Fertilizer site. A contractor detected contaminants in an area previously thought uncontaminated. Worried that neighbourhoods to the north of the site could be at risk, the Oversight Group requested further testing to determine the source and extent of the contaminants. The EPA assumed the contaminants had migrated from the original areas and declined the Oversight Group's request for further testing. Only when "the issue appeared before the Davis City Council [who] voted unanimously to support the Oversight Group" and lobbied the EPA to comply was the testing completed.<sup>323</sup> While this demonstrates the effects of broad public dissatisfaction, it also displays the Oversight Group's lack of clout and recourse. On its own, it struggles to effect change in the remediation.

## **5.2.4 Laboratory for Energy Related–Health Research Superfund Site & the UC-Davis South-Campus Superfund Oversight Committee**

### **Laboratory for Energy Related-Health Research Superfund Site Overview**

A one-time radiobiology testing facility operated by the U.S. Department of Energy, the Laboratory for Energy-Related Health Research at the University of California-Davis (UC-Davis) was placed on Superfund's National Priorities List in 1994. The clean-up project is headed by the two potentially-responsible parties: the Department of Energy and UC-Davis.

As a result of radiation experiments by the Department of Energy, much of the soil and groundwater on the 15-acre site became contaminated with chemical and radioactive waste. Additionally, the site contains three inactive landfills which accumulated waste from the UC-Davis

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<sup>320</sup> Environmental Protection Agency, "Frontier Fertilizer Superfund Site Community Involvement Plan" (May 2008), online: [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/ba77786d9f2bcd77882574810067dafb/\\$FILE/frontier\\_CIP.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/ba77786d9f2bcd77882574810067dafb/$FILE/frontier_CIP.pdf).

<sup>321</sup> *Background*, *supra* note 311.

<sup>322</sup> *Ibid.*

<sup>323</sup> Frontier Fertilizer Superfund Oversight Group, "Meanwhile, Back at the Ranch: Newsletter of the FFSOG" (2008- 2009) at 1, online: <http://www.dcn.davis.ca.us/go/pnieberg/newsletter.htm>.

campus. The primary threat to health is from drinking solvent-contaminated water.<sup>324</sup> The community is also concerned about runoff into Putah Creek, which is used for fishing and swimming, as well as irrigation by local farmers.

Rehabilitation of the site is mainly funded and directed by the Department of Energy and UC-Davis. But, the 1986 Amendments to the *Comprehensive Environmental Response, Compensation and Liability Act* are applicable. As discussed in the Frontier Fertilizer case study, the 1986 amendments made public participation a requirement at all Superfund sites. As a Superfund site, the EPA's public participation initiatives are available to the local communities. In 1995 a Technical Assistance Grant was given to the UC-Davis South-Campus Superfund Oversight Committee ("Oversight Committee") to facilitate community involvement in, and understanding of, the clean-up project. The EPA continued to fund the Oversight Committee via Technical Assistance Grants until 2009. The Oversight Committee disbanded shortly after its funding was discontinued.

### **UC Davis South-Campus Superfund Oversight Committee**

#### **FORM**

The prerequisites for Technical Assistance Grants ("Grants") discussed in the Frontier Fertilizer case study are applicable here as well. The mandated powers and tasks, along with limitations thereon, were identical for the Frontier Fertilizer Superfund Oversight Group and UC-Davis South-Campus Oversight Committee, as they were subject to identical rules and regulations.

#### **Composition**

The Grants from the EPA to the Oversight Committee were used to procure "an independent technical advisor to review the site investigation/remediation documents and on-going activities for the public and from the public's perspective".<sup>325</sup> The Oversight Committee acquired the services of G. Fred Lee, "an internationally recognized landfill and Superfund investigation and remediation expert".<sup>326</sup>

Julie Roth was the long-serving Executive Director of the Oversight Committee. Prior to her role as Executive Director, Roth was a concerned community member with "no knowledge or experience in the Superfund remediation process or in administering an [oversight body]",<sup>327</sup> evincing the prominent roles for the public available through Superfund initiatives.

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<sup>324</sup> Environmental Protection Agency, "LEHR/Old Campus Landfill: Contaminants and Risks" (2010), online: <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba3252368428825742600743733/2c55091813dfe5c788257007005e9407!OpenDocument>.

<sup>325</sup> Davis South-Campus Superfund Oversight Committee, "What Was DSCSOC?" online: <http://www.gfredlee.com/DSCSOC/DSCSOC.htm> [What was DSCSOC?].

<sup>326</sup> Letter from Julie Roth, Executive Director Davis South-Campus Superfund Oversight Group to G. Fred Lee, Technical Advisory Davis South-Campus Superfund Oversight Group dated 18 March 2010, online: [http://www.gfredlee.com/DSCSOC/2010/DSCSOC\\_Release.pdf](http://www.gfredlee.com/DSCSOC/2010/DSCSOC_Release.pdf) [Roth March 18].

<sup>327</sup> *Ibid.*

## Funding

The Oversight Committee received funding in the form of Technical Assistance Grants from 1994-2009. In 2009, however, the EPA Region 9 Community Involvement department imposed novel conditions on the group's Grant renewal. Specifically, the Oversight Committee was required to outline the activities it would undertake with the new Grant money and their durations. The Oversight Committee refused to do so. The Department of Energy and UC-Davis had yet to define their future activities at the site, making it impossible for the Oversight Committee, a group tasked to monitor and scrutinize site progress, to predict its future course of action. The Oversight Committee maintained that conjecture on future activities "would not be a good-faith representation of the public interests".<sup>328</sup> Providing uninformed proposals could have bound the Oversight Committee to impertinent and costly activities, "and could also [have] constrain[ed] and prevent[ed] DSCSOC from undertaking...unforeseen work that should be conducted".<sup>329</sup> As a result of non-compliance with EPA Region 9's conditions the Grant was not renewed in 2009 and the group disbanded shortly thereafter, as it could no longer retain the services of its technical advisor.<sup>330</sup>

## Tasks/Powers

The Oversight Committee's technical advisor had the right to participate in proponent meetings and to be apprised of all ongoing and proposed action at the site. The technical advisor communicated his findings to the Oversight Committee members in a comprehensible fashion.

The Oversight Committee was also entitled to comment on proposed rehabilitation measures; however, there was no obligation for the proponents to resolve or placate community concerns. The Oversight Committee was limited to presenting its concerns to the responsible parties in the hope that they would consider them.<sup>331</sup> This impotence can be traced to the lack of legal foundation for Technical Assistance Grant-groups.

## DRIVERS

According to the Oversight Committee, it "was formed out of the concern that...the [Department of Energy and UC-Davis] were not adequately and reliably investigating the public health and environmental quality risks posed by the materials at the site".<sup>332</sup>

If the site had not been part of the Superfund program, though, there may have been no recourse for the concerned citizens. Only with the involvement of the EPA did the promise of meaningful community involvement arise. Before the EPA became involved "there was a significant

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<sup>328</sup> Letter from Julie Roth, Executive Director Davis South-Campus Superfund Oversight Group to G. Fred Lee, Technical Advisory Davis South-Campus Superfund Oversight Group dated 14 May 2010, online: [http://www.gfredlee.com/DSCSOC/2010/DSCSOC\\_USEPA\\_Final.pdf](http://www.gfredlee.com/DSCSOC/2010/DSCSOC_USEPA_Final.pdf).

<sup>329</sup> *Ibid.*

<sup>330</sup> Roth March 18, *supra* note 326.

<sup>331</sup> Davis South-Campus Superfund Oversight Committee, "History of UCD/DOE LEHR Site," online: <http://www.gfredlee.com/dscsoc/history.htm> [*History*].

<sup>332</sup> "What Was DSCSOC?" *supra* note 325.

attempt by [UC-Davis and the Department of Energy] to preclude the public from becoming involved in site investigation and remediation”.<sup>333</sup>

The main driver, however, was community action. Even when the site became part of Superfund, public participation did not immediately flow. The technical advisor suggests that “[i]f [we] had not taken an aggressive stance...toward becoming involved in...meetings, it is quite likely that the public would have been excluded from the decision-making processes involved with the LEHR site investigation and remediation”.<sup>334</sup>

## DISCUSSION

Despite its tenuous foundations and strained relationship with the Department of Energy and UC-Davis, the Oversight Committee had modest success influencing the remediation. The technical advisor’s recommendations resulted in the paving of a stormwater ditch through a landfill site, and safeguards against mercury runoff into Putah Creek.<sup>335</sup> Moreover, his admonitions led to a more thorough investigation of the former sewage treatment plant, and influenced the Department of Energy’s decision to “conduct removal actions instead of monitoring”.<sup>336</sup>

Additionally, communication between the technical advisor and the Oversight Committee members was successful. The Oversight Committee felt sufficiently informed and educated on technical matters to participate in the decision making process.<sup>337</sup> To the extent that an informed community was the goal, the Oversight Committee’s success appears more than modest.

Notwithstanding occasional victories during its 15-year life span, frustration was the zeitgeist of the Oversight Committee’s tenure. The group maintained that the investigation of environmental impacts was insufficient, effective monitoring programs were never implemented, and waste continued to be mismanaged up until the group disbanded. It proved exceedingly difficult to convince the Department of Energy and UC-Davis, “two powerful institutions, to effectively address the public’s concern”.<sup>338</sup> As a result, “[t]hey’ll be pumping and treating...for a very long time”.<sup>339</sup>

The Oversight Committee faults regulators, to an extent, stating “there have been no fines, penalties, or sanctions issued for the creation of the mess or for wasteful investigation”.<sup>340</sup> But one can infer that its dissatisfaction is rooted elsewhere; the experience of the Oversight Committee stands in stark contrast to that of the Frontier Fertilizer Oversight Group, despite being created by the same instrument and subject to identical rules. The uncommon denominator between the Laboratory for Energy-related Health Research and Frontier Fertilizer is the proponent of the remediation. The EPA is

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<sup>333</sup> G. Fred Lee, “Review of ‘Final Community Relations Plan’” (June 1996), online: <http://www.gfredlee.com/DSCSOC/1996/comrel.htm>.

<sup>334</sup> *Ibid.*

<sup>335</sup> Roth March 18, *supra* note 326.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> Matt Weiser, “UC Davis may have solved mystery of chemical contamination,” *Sacramento Bee* (6 February 2010) B1.

<sup>339</sup> *Ibid.*

<sup>340</sup> *History*, *supra* note 331.

the proponent of the Frontier Fertilizer remediation, whereas the Oversight Committee was trying to convince institutions that it felt were inflexible and insufficiently environmentally aware. Without a base of legal rights, convincing the Department of Energy to expend more funds on the remediation usually proved an impossible sell.

## 5.2.5 The Alyeska Pipeline Marine Terminal in Valdez & Prince William Sound Regional Citizens' Advisory Council

### **Background: the Exxon Valdez Oil Spill**

The Prince William Sound Regional Citizens' Advisory Council (“Advisory Council”) was created in response to the 1989 Exxon Valdez Oil Spill.<sup>341</sup> The Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska shortly after departing from Valdez, Alaska. At the time, the oil spill was the largest ever in US waters; the spill area covered 11,000 square miles.<sup>342</sup> The cleanup effort after the spill was fraught with inefficiency: the Alyeska spill response barge was out of service at the time of the incident, and stormy conditions rendered traditional dispersants useless.<sup>343</sup> The ecosystems of the area are still recovering from the environmental catastrophe. Scientists have estimated mass mortalities of sea otters, harbor seals, as well as unprecedented numbers of seabird deaths.<sup>344</sup> ExxonMobil assumed responsibility for the disaster—their resulting liabilities totalled 1 billion dollars paid to the state and federal governments, 300 million dollars in private settlements, and 2.2 billion dollars for the cost of cleanup efforts in Prince William Sound.<sup>345</sup>

### **The Prince William Sound Regional Citizens’ Advisory Council**

The Advisory Council is the result of two legal texts: *the Oil Pollution Act* (“*the Act*”) of 1990 and a private agreement between the Advisory Committee and Alyeska Pipeline Service, the corporation owned by several oil companies (including BP and Exxon) that runs the trans-Alaska pipeline and the Valdez terminal.<sup>346</sup> There are numerous similarities between the agreement and *the Act* because many of the drafters of the agreement subsequently helped draft the legislation. In March of 1990, about one year after the oil spill, the agreement was signed between the Advisory Council and Alyeska. The agreement stipulated that the Council shall: have access to Alyeska’s information (at the same level as the EPA) as well as Alyeska sites, be funded for as long as oil flows through the pipeline, and be fully independent from Alyeska.

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<sup>341</sup> PWSRCAC, “History of PWSRCAC and the Exxon Valdez Oil Spill” (1998-2011) online: <http://www.pwsrcac.org/about/history.html>.

<sup>342</sup> Cutler Cleveland, “Exxon Valdez Oil Spill” in Cutler Cleveland, ed., *Encyclopedia of Earth* (Washington DC: Environmental Information Coalition, National Council for Science and the Environment, 2010).

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> Prince William Sound Regional Citizens’ Advisory Council, “Introduction” (1998-2011), online: <http://www.pwsrcac.org/about/index.html> [*PWSRCAC: Introduction*].



*The Act* was Congress' reaction to the Exxon Valdez Oil Spill. Congress recognized that a main cause of the oil spill was complacency by the oil industry and government regulators. Title five of *The Act* requires the establishment of citizens' councils for Prince William Sound and Cook Inlet in order to build trust and communication between the public, government, and oil companies, as well as ensure independent environmental oversight of oil terminals and tankers in the area. *The Act* stipulates that an existing committee can be deemed to fulfill the oversight requirement, so long as they meet certain mandate and representative requirements. The Advisory Council pre-dated *the Act* but was certified to fulfill the role stipulated.

It should be noted that another citizen's advisory council was created after *the Act* came into effect—the Cook Inlet Regional Citizens Advisory Board. This Board serves the same purpose as the Advisory Council for the area of Cook Inlet, which was also affected by the oil spill.<sup>347</sup>

## FORM

Pursuant to the agreement with Alyeska, the Advisory Council is a non-profit organization.<sup>348</sup> The coast guard re-certifies the council annually once it ensures compliance by the Advisory Council with the mandate set out in the Act. The Advisory Council's 19 members include representatives from communities, aquaculture, commercial fishing, Alaska Native peoples, and environmental, recreation, and tourism groups.<sup>349</sup> Independence is a major concern for the Advisory Council. The Recitals to the agreement with Alyeska clarify that the Council is only willing to participate in the citizens' advisory process if it participates on a permanent basis and on the conditions that it be "truly independent from Alyeska" and be provided with "a permanent source of adequate funding."<sup>350</sup>

### Composition

The Advisory Council is composed of 19 voting members who are appointed by the Governor of Alaska from a list of nominees for each stakeholder group listed in the contract.<sup>351</sup> There are also non-voting members, most of whom are federal or state entities.<sup>352</sup> No representatives from oil companies may sit on the board. However, Alyeska appoints one person to be the liaison to the President of Alyeska.<sup>353</sup>

The Council has several standing committees composed of Board members, volunteer citizens, and technical experts. These committees give advice and recommendations to the Board, which ultimately decides on recommendations for Alyeska. Some examples of standing committees are: the

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<sup>347</sup> Cook Inlet Regional Citizens Advisory Council, "About Us," online: [http://www.circac.org/joomla/index.php?option=com\\_content&view=article&id=1&Itemid=9](http://www.circac.org/joomla/index.php?option=com_content&view=article&id=1&Itemid=9) [*Cook Inlet: About Us*].

<sup>348</sup> *Contract between Regional Citizens Advisory Committee and Alyeska Pipeline Service Company* dated 8 February 1990, s.1.2 [*Advisory Committee Agreement*].

<sup>349</sup> *PWSRCAC: Introduction*, *supra* note 346.

<sup>350</sup> *Advisory Committee Agreement*, *supra* note 348 at 2.

<sup>351</sup> *PWSRCAC: Introduction*, *supra* note 346.

<sup>352</sup> Prince William Sound Regional Citizens' Advisory Council, "Bylaws of Prince William Sound Regional Citizens Advisory Council, Inc." (21 January 2010), ss.2.2.1, 2.2.2.

<sup>353</sup> *Ibid.*, ss.1.2, 4.2.

Oil Spill Prevention and Response Committee, the Scientific Advisory Committee, and the Terminal Operations and Environmental Monitoring Committee.<sup>354</sup>

## Funding

The Advisory Council is assured funding through the agreement with Alyeska.<sup>355</sup> The agreement provides for a \$2,000,000 annual budget, plus inflation. The budget is reviewable every three years. If a new amount is not agreed upon, then an arbitrator may adjudicate the matter, but cannot alter the previous budget by more than 50%. In 2008, the Advisory Council's budget was U.S. \$2,947,106.71.<sup>356</sup> The assured budget is intended to guarantee the Advisory Council's independence from political or industry pressures.<sup>357</sup>

## Tasks

The agreement enumerates the services that the Advisory Council must provide to Alyeska and the public.<sup>358</sup> These services include reviewing and monitoring oil spill response and prevention plans as well as environmental protection capabilities. The Council is specifically tasked with providing local and regional input into various forms of monitoring and assessment of the consequences of any oil related accidents and environmental impacts in or near Prince William Sound. It is also charged with providing public information. The Advisory Council is authorized to conduct its own scientific research and to review the scientific work undertaken for terminal and oil tanker operators or government.<sup>359</sup>

## Powers

The Advisory Council is not regulatory in nature—it is advisory.<sup>360</sup> Once the Advisory Council has made a recommendation to Alyeska, the company must give a complete response within a reasonable amount of time.<sup>361</sup> In order to fulfill its mandate, the Advisory Council is granted access to Alyeska records and documents as well as access to facilities. Where this includes access to confidential information, a separate confidentiality agreement may be negotiated between the parties.<sup>362</sup>

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<sup>354</sup> Prince William Sound Regional Citizens' Advisory Council, "Committees Introduction" (1998-2011), online: <http://www.pwsrca.org/about/commintro.html>.

<sup>355</sup> Prince William Sound Regional Citizens Advisory Council, "Background Briefing Paper: Role of Statutorily Established Citizen Oversight Councils in the Conduct of Oversight of Oil Transportation Operations, Facilities and Procedures" (September 2006) [*Background Briefing*].

<sup>356</sup> *Advisory Committee Agreement*, *supra* note 348 at 2007 Addendum.

<sup>357</sup> *Background Briefing*, *supra* note 355.

<sup>358</sup> *Advisory Committee Agreement*, *supra* note 348, s.2.1

<sup>359</sup> *Background Briefing*, *supra* note 355.

<sup>360</sup> *Advisory Committee Agreement*, *supra* note 348, s.2.1(h).

<sup>361</sup> *Ibid.*, s.4.4.

<sup>362</sup> *Ibid.*, s.4.1

## Term

The agreement provides that it shall endure “so long as oil continues to flow through the Trans Alaska Pipeline PC System...and thereafter until the Owners' obligation to remove improvements and equipment from the Terminal premises is complete...”<sup>363</sup> The Advisory Council can terminate the agreement with 90 days notice to Alyeska. Alyeska cannot itself terminate the contract, unless an independent arbitrator has declared that the Advisory Council is not fulfilling its mandate, and even then, the Advisory Council is allowed time to rectify its actions.

## DRIVERS

### Lack of Trust & Community Concern

The 1990 Alaska Oil Spill Commission Report, while discussing the Exxon spill, states, “success bred complacency; complacency bred neglect; neglect increased the risk until the right combination of errors led to disaster”.<sup>364</sup> The community was outraged by the spill, and their trust in government regulation of the industry was shaken. By allowing the community to independently oversee Alyeska's actions, greater checks were put in place than existed before the spill.

### Regulations

Although the Advisory Council was formed prior to the *Oil Pollution Act*, *the Act* would have forced the formation of a similar body if the Advisory Council had not existed. The Government of Alaska was greatly concerned by the wide-ranging environmental and economic impacts of the Exxon Valdez oil spill and the state's constituency voiced a commitment to preventing future disasters.

### Risk and Liability

Oil spills have catastrophic effects. The Advisory Council seeks to decrease the likelihood of spill events since it reviews safety plans for the tankers and pipelines in Prince Williams Sound. Additionally, should a spill occur, the Council is versed in oil spill responses; not only have they made Alyeska's oil response plans more robust through reviews and recommendations, but the members themselves would be capable responders in the event of another spill.

## DISCUSSION

The Advisory Council has experienced success in both setting and reaching ambitious goals. There are several reasons behind this success. Firstly, the Advisory Council is well funded and can cover many areas of oversight, from community communications to complex scientific monitoring oversight. Secondly, the Advisory Council's legal foundations, the agreement and *the Act*, ensure that it remains independent and stable. Thirdly, the Government of Alaska and the oil companies both have a vested interest in ensuring oil is the state's major export; therefore, all parties involved want to avoid future spills which could jeopardize the industry.

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<sup>363</sup> *Ibid.*, s.3.1.

<sup>364</sup> *Cook Inlet: About Us*, *supra* note 347.

The Advisory Council has developed wide ranging topics from environmental oversight (discussed below) to broader fields of community assistance. For instance, after the Exxon Valdez spill, studies showed that the residents in the area were showing increased signs of depression and domestic violence. The Advisory Council created a program to help communities with social and economic damages from the oil spill—including a “coping with technological disasters” handbook for community members.

Environmental management of Prince William Sound has been advanced through the Advisory Council’s work. For example, the Advisory Council investigated a wide range of problems for loading and shipping oil. One study focused on invasive species travelling in ballast water. An air-quality study lead by the Advisory Council prompted government regulators to require Alyeska to install vapour control systems in order to reduce the amount of hydrocarbons being released into the air at the terminal.<sup>365</sup> The board has also made strides in preventing future oil spills. For instance, they ensured that double-hull tankers became mandatory after the Exxon Valdez spill. They were also involved in setting up near-shore response plans to provide cleanup tools to fisheries all along the shoreline.

Additionally, the Advisory Council established an iceberg-detection system in Prince William Sound, which was one reason they were honoured by the Pacific States/British Columbia Oil Spill Task Force for the second time with the “Legacy Award”.<sup>366</sup> The Legacy Award is awarded to “industry, non-profit or public agency organizations and individuals, or to team efforts” for “projects, accomplishments, or leadership that demonstrates innovation, management commitment, and improvements in oil spill prevention, preparedness, or response resulting in enhanced environmental protection”.<sup>367</sup> Overall, the Advisory Council appears to be achieving its goals of preventing complacency in oil industry regulation and assuring the community of Prince William Sound that somebody is watching.

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<sup>365</sup> A Baker Jennings Film, “A Noble Experiment: The Story of the Prince William Sound Regional Citizens' Advisory Council” (2000), online: <http://video.google.com/videoplay?docid=39275729294009273#>.

<sup>366</sup> PWSRCAC, “Council is once again honored by U.S.-Canadian oil spill group for work in Sound” *The Observer* (September 2003).

<sup>367</sup> The Pacific States – British Columbia Oil Spill Task Force, “Legacy Award Honor Roll” (2003), online: <http://www.oilspilltaskforce.org/legacy.htm>.

## 5.3 AUSTRALIA

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### 5.3.1 Argyle Mine & the Traditional Owner Relationship Committee

#### Argyle Mine Overview

The Argyle Diamond Mine is located in Western Australia in the East Kimberly region. It is the largest producer of diamonds in the world by volume. Argyle Diamonds is owned by Rio Tinto Limited. Mining on site was commenced in 1985.<sup>368</sup>

Argyle, the Traditional Owners of the mine site, and the Kimberly Land Council are all parties to the Argyle Diamond Mine Participation Agreement: Management Plan Agreement (“the Agreement”), signed in 2004.<sup>369</sup> The purpose of the legally binding Agreement is to set out how Argyle and the Traditional Owners will manage their ongoing, day-to-day relationship.<sup>370</sup> Part of this Agreement includes a commitment by Argyle to provide the Traditional Owners with a percentage of the profits of the mine through ongoing payments. Clause 4 of the Agreement creates the Traditional Owner Relationship Committee (“Relationship Committee”).

#### Traditional Owner Relationship Committee

The Relationship Committee is a 30-member body that facilitates communication between the proponent, Argyle, and the Traditional Owners. The Relationship Committee gives the Traditional Owners a way to make recommendations and requests to Argyle about environmental, development, and employment practices.

#### FORM

##### Composition

The Relationship Committee is comprised of four representatives from Argyle and 26 from Traditional Owner families.<sup>371</sup> It is also supported by an administrative secretariat (the Secretariat). Members may remain on the Committee indefinitely. However, Argyle or the Traditional Owner families can replace their representatives at will and the Relationship Committee can vote out members who are not fulfilling their responsibilities.<sup>372</sup> The Relationship Committee has two co-chairs (one from Argyle and one Traditional Owner representative) and one deputy chair appointed by the Traditional Owners.

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<sup>368</sup> Rio Tinto, “Argyle Diamond Mine: World Class Diamonds” (2009), online: [http://www.argylediamonds.com.au/index\\_whoare.html](http://www.argylediamonds.com.au/index_whoare.html).

<sup>369</sup> *Argyle Diamond Mine Participation Agreement: Management Plan Agreement between Argyle Diamond Mines Ltd. and Traditional Owners* dated 1 January 2004 [Management Plan Agreement].

<sup>370</sup> *Ibid.*, Recital D.

<sup>371</sup> *Ibid.*, s.4.3.

<sup>372</sup> *Ibid.*, ss.4.11-4.14.

The Traditional Owners must choose one man and one woman to fulfill the roles of co-chair and deputy chair. The co-chairs head meetings and act as the Relationship Committee's main representatives.

### **Funding**

Argyle provides funding for the Secretariat. The annual budget is set out in Schedule 5 of the agreement. The budget covers the costs of: general administration, consultants or expert fees necessary for the Relationship Committee to fulfill its tasks, training for members, and payment to members for attendance at meetings.<sup>373</sup> The annual budget is prescribed exactly for the years 2004-2024 based on certain enumerated assumptions. The budget for the secretariat in 2004 was \$35,691.30; in 2010 it is \$98,144.97; and in 2024 it will grow to \$146,447.94.

### **Tasks**

The Relationship Committee meets every three months. All Traditional Owners are permitted to attend meetings even if they are not members. The Relationship Committee has many purposes stemming from clause 4.6 of the Agreement: to foster and create positive relationships between the parties, to monitor the Management Plans set out in the contract, to suggest changes to the plans when necessary, to create annual reports commenting on the successes and failures of each Management Plan, and to help guide Argyle and the Traditional Owners in matters of employment opportunities.<sup>374</sup>

### **Powers**

Decisions of the Relationship Committee are made by consensus vote. Each co-chair casts one vote based on their constituency's decision. If the votes do not match deliberations continue. The Agreement can be amended so long as all members of the committee sign onto the amendment.

Management plan topics include: training and employment, cross-culture training, land access, land management, decommissioning, business development, and Devil Springs (which is a significant site for the Traditional Owners). Environmental provisions are contained in the land management plan. Traditional Owners can submit suggestions to Argyle about environmental management proposals, which Argyle must include in their annual Environmental Report. Argyle must also give reasons in those reports for why they did or did not implement recommendations. Under the Agreement, Traditional Owners are ensured annual inspection rights of land and water management and participation in planning and closing and decommissioning options.

Traditional Owners on the Relationship Committee are able to make their opinions and recommendations known to Argyle. But they cannot force acceptance of these recommendations.

### **Term**

The Relationship Committee will exist until mine closure is complete.

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<sup>373</sup> *Ibid.*, s.4.56.

<sup>374</sup> *Ibid.*

## DRIVERS

### Aboriginal Law

A major concern for Aboriginal Australians is the displacement or destruction of their culture, which often occurs through mining operations in or near places of cultural significance.<sup>375</sup> Legislation introduced in the 1960s and 70s purporting to help preserve Aboriginal heritage did little to that effect; control over significant sites was placed solely in the hands of non-Indigenous bureaucrats and led to the destruction of key sites. This occurred at Argyle in the 1980s: “the Argyle diamond mine in Western Australia completely destroyed a Barramundi dreaming site that was of regional importance and of special significance to aboriginal women, an event that had lasting and serious implications for its custodians”.<sup>376</sup>

The situation has improved slightly for Aboriginals since that time. The Australian High Court’s 1992 case, *Mabo v Queensland (No 2)*,<sup>377</sup> is comparable to the Supreme Court of Canada’s 1997 case *Delgamuukw v. British Columbia* in that the court recognized Native Title to land had survived colonization and still existed if it had not been extinguished by a valid act of government and the claimants maintained ties to the lands.<sup>378</sup> This decision prompted the Australian government to enact the Native Title Act in 1993. This act gave Aboriginal landowners the “Right to Negotiate”, meaning they could negotiate with mining proponents who were interested in working on their land.<sup>379</sup> This legislation was very influential—over half of Aboriginal-mining proponent agreements have been signed since 1998.

Another important factor for companies who form agreements with Aboriginal peoples is the need to secure a social license to operate. Mining companies are increasingly aware of the substantial operational and financial risks associated with the failure to gain Aboriginal consent.<sup>380</sup> The most significant driver for the Argyle Management Plan Agreement (and therefore the Relationship Committee) was to include Aboriginal peoples who hold Traditional Rights in the area.

### Risk and Liability

The Management Plan Agreement was motivated, in part, by critiques of the 1980 Impact and Benefits Agreement between Argyle and the Traditional Owners. The Impact Benefits Agreement was criticized for being exclusionary of some Traditional Owners.<sup>381</sup> By recognizing more Traditional Owners in the Management Plan Agreement (along with its sister agreement, the Indigenous Land Use Agreement), Argyle protected itself from potential lawsuits should other Traditional Owners gain title rights in the area.

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<sup>375</sup> Ciaran O’Faircheallaigh, “Negotiating Cultural Heritage? Aboriginal—Mining Company Agreements in Australia” (2008) 39(1) *Development and Change* 25 at 29 [*Cultural Heritage*].

<sup>376</sup> *Ibid.*

<sup>377</sup> *Mabo and Others v. Queensland (No. 2)*, (1992) 175 CLR 1, [1992] HCA 23.

<sup>378</sup> *Cultural Heritage*, *supra* note 375 at 34.

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

<sup>381</sup> Australian Human Rights Commission, “Native Title Report 2006, Chapter 5: The Argyle Participation Agreement” (2006).

Another driver behind the Agreement (and the Relationship Committee) was that Argyle was set to shift from open-pit to underground mining.<sup>382</sup> This would add 15 years or more to the life of the mine. Traditional owners were consulted and agreed to extend mining operations to include underground mining, because of the benefits to their communities.

## **DISCUSSION**

The Relationship Committee was not created to be an environmental watchdog *per se*: most of the management plans in the Agreement involve employee practices and logistical plans. However, some monitoring is prescribed by the Agreement. Another positive aspect of the Relationship Committee is its guaranteed funding. The Agreement itself sets forth these obligations in a uniquely drafted way; preceding each legal provision is a “plain language version” of what the provision states.

The Relationship Committee cannot affect the management plans unless Argyle agrees to this through a vote in a Relationship Committee meeting. Argyle also cannot change the management plans without the consent of the Traditional Owners. This is a unique situation; a number of oversight committees are purely advisory in nature.

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<sup>382</sup> Rio Tinto Argyle Mine, “Underground Mining” (2009), online: [http://www.argylediamonds.com.au/underground\\_mining.html](http://www.argylediamonds.com.au/underground_mining.html).



## SECTION 6: CONCLUSION AND LESSONS LEARNED

In this conclusion, we synthesize the analysis of the published literature on oversight and the case studies discussed in this report through a series of “lessons learned” from the experiences of environmental oversight agencies to date. We highlight insights from the lessons which are relevant to Giant Mine.

This section offers only preliminary comments on the oversight regime proposed in the Developer’s Assessment Report (“Developer’s Report”), as many specifics of the regime have not been determined. For example, the Developer’s Report states that mechanisms for addressing public complaints and resolving disputes will be identified through Environmental Management Systems;<sup>383</sup> details about the monitoring program are to be developed and implemented in partnership with representatives of local Aboriginal communities, regulators and other interested parties.<sup>384</sup> The Developer’s Report also suggests that internal audits will take place and be submitted to the Giant Mine Oversight Committee (a body whose exact purpose and function remains to be elucidated, but which, as discussed below appears to lack the hallmarks of independence). External audits have been proposed, yet the frequency, powers, scope and identity of the auditor are not set out. Nor is it clarified whether the results of external audits will be made public.

More details of the proposed oversight regime will no doubt soon emerge in response to the Review Board’s Information Request #27:

1. Please describe any plans being considered for establishing an independent monitoring agency for the duration of the Giant Mine Remediation Project, specifying who might participate, and in what capacity.
2. How might such agency be engaged in any future examination of emerging technologies (per IR#19 above)?<sup>385</sup>

To assist in the process of considering an appropriate form of oversight that would answer the calls of the community for transparency, participation, communication, access to information and technical oversight, we identify below a number of best practices as well as challenges to be addressed. These insights are intended to further thinking and discussion around the most appropriate form of oversight in the Giant Mine Remediation context.

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<sup>383</sup> *Developer’s Assessment Report*, *supra* note 10 at 13-21.

<sup>384</sup> *Ibid.* at 11-18.

<sup>385</sup> Mackenzie Valley Environmental Impact Review Board, “Round One Information Requests to Indian and Northern Affairs Canada, EA 0809-02: Giant Mine Remediation Project” (9 February 2011).

## **Lesson #1: Independent oversight agencies have numerous potential drivers, many of which are relevant to Giant Mine.**

Independent oversight agencies are created to respond to situations of perceived and actual conflicts of interest, community mistrust, complexity, high risk and potential liability.

These varied motivations for oversight are all issues in the Giant Mine Remediation: the perception of conflicts of interest and risk are evident from the Scoping Hearing transcripts.<sup>386</sup> The complexity of the project is apparent from the Developer's Report. The fact that credible oversight may be necessary to gain public support in such contexts was highlighted in the recent Royal Society of Canada Tar Sands Report.<sup>387</sup> The Report acknowledged that in areas of high perceived risk and low public confidence, credible oversight is essential to maintain public support.<sup>388</sup>

## **Lesson #2: Not all bodies bearing the label “independent oversight agency” are necessarily independent, nor do they necessarily provide oversight functions.**

There are key differences between a project liaison body set up for purposes of community consultation and independent oversight mechanisms. Some bodies bear the name “oversight agency” without an accompanying mandate of oversight. The Faro mine, for example, hosts an Oversight Committee that was created to guide the selection of mine closure alternatives. It is not tasked with mine oversight, despite its name.

The “oversight” mechanism described in the Developer's Report – the Project Oversight Committee (also referred to as the Giant Mine Oversight Committee) – again showcases the multiple potential meanings of the term oversight. The Project Oversight Committee (“the Committee”) is to be responsible for monitoring the implementation and success of the Remediation Project. But, as described in the Developer's Report, the Committee does not possess any hallmarks of independence. The Developer's Report states that the Government of Canada and Territorial Government “will be represented at the senior level by [the Committee]”.<sup>389</sup> The Committee is also to be supported by an “Intergovernmental Working Group, made up of representatives from both federal and territorial departments”.<sup>390</sup> More information is needed to understand the extent of monitoring and oversight offered by these and other bodies. But it appears that the proposed oversight mechanism would see the governments – the bodies responsible for project implementation – monitoring, overseeing, and judging the project's success. The perceived conflict of interest at Giant Mine is due to the same government department wearing multiple hats – in effect acting as both proponent and regulator. Devising a governmental oversight mechanism does not necessarily alleviate the perceived conflict.

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<sup>386</sup> Scoping Hearing Transcript, *supra* note 7 at 145.

<sup>387</sup> *RSC Oil Sands Report*, *supra* note 1 at 295.

<sup>388</sup> *Ibid.*

<sup>389</sup> *Developer's Assessment Report*, *supra* note 10 at 14-4.

<sup>390</sup> *Ibid.*

### **Lesson #3: The primary role of an oversight body needs to be determined prior to choosing an appropriate form and structure.**

It is clear from the case studies that oversight bodies can serve many functions. It is critical in establishing an oversight body to define the primary function of the oversight body. This may seem an elementary point, but a number of oversight bodies are tasked with potentially conflicting roles that can undermine their effectiveness. Is the main role of an oversight body to provide rigorous technical oversight of environmental monitoring? Or is the main purpose of the body to respond to community concerns through providing information to community members, and serving as a conduit for information between the project team and the community?

It is tempting to say that an oversight body needs to perform both of these functions (if not more). Indeed, this has been the task of the three diamond mine monitoring agencies. Yet it is important to note that the tools, structures and expertise needed to successfully fulfill one of these roles (technical oversight) may not be the same to satisfy the other role (community liaison). To maintain public confidence and to provide effective technical oversight, an overseer requires a certain distance and independence from the project proponent. Such an overseer needs to execute his or her mandate free from government or proponent interference. Conversely, the task of community liaison bodies demands less independence and more insider knowledge to effectively bridge gaps between the proponent and community. Close, constructive relationships can advance the functions of information provision and communicating community concerns, rather than undermine these functions. It may be, in some cases, that a single oversight agency is not the most effective way to satisfy these two diverse community demands. Rigorous technical oversight may be more effectively delivered by an external overseer or team of overseers (the Island Copper model) with community liaison functions housed elsewhere.

In the Giant Mine context, clearly defining the role of an oversight agency will require the public liaison and independent oversight functions to be distinguished and clarified. The Developer's Report well documents both sets of community concerns. It acknowledges that "a well-constructed and carried out public engagement process is important in strengthening the effectiveness of the Remediation Project".<sup>391</sup> Community concern stems in part from the fact that past approaches to develop the site and engage Aboriginal groups and the public are perceived as inadequate. These groups identify a critical need for more regular and direct communication between the Project Team and Northwest Territories Aboriginal groups as well as the Yellowknife public.<sup>392</sup> Health and safety concerns emerge from a lack of public knowledge about the toxicity and mobility of different forms of arsenic, the potential impacts of climate change on frozen arsenic, the impacts of environmental contamination on community members' health, and the safety of drinking water.<sup>393</sup> The Developer's Report acknowledges that "perhaps the greatest source of uncertainty in the risk assessment process is in the relationship between arsenic intakes and potential health effects".<sup>394</sup>

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<sup>391</sup> *Ibid.* at 13-1.

<sup>392</sup> *Ibid.* at 13-7.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.* at 8-87.

The Developer's Report forecasts independent involvement from the Giant Mine Community Alliance. This is a communication and liaison body. But it envisages a role short of independent oversight: "the Community Alliance is intended to bring together people and organizations from the community to share information...The group's mandate is to act as a body to assist affected parties...in providing input and feedback into decisions about the remediation and future use of the site".<sup>395</sup>

Effective communication with local communities demands a watchful eye to issues of the institutional presence of the monitoring agency, the skills of its staff in community relationship building, the translation services available, the funding available to maintain a project library and records of meetings, reports and communications; in short, it requires the body to be able to engender community trust.

#### **Lesson #4: Composition should follow function.**

Once the primary goal of an oversight body is determined, attention can turn to the most appropriate form and membership. If the body is mandated to provide technical review and recommendations, such as Ekati's Independent Environmental Management Agency, it should be staffed by an adequate number of technically-fluent members. If the body is mandated to facilitated community knowledge of and participation in the project, it should be comprised of people who both understand the nature of the project and communicate effectively with the local communities. The point being, the expertise required for the varying types of oversight agencies is not uniform. The composition of the body should directly flow from the body's mandate.

The different oversight bodies active at Stillwater Mine (section 5.2.1) illustrate the need for varying composition. Stillwater contains both an "Oversight Committee" and a "Responsible Mining Practices and Technology Committee". The Oversight Committee is responsible for monitoring the implementation of the Good Neighbor Agreement between the community groups and the proponent, resolving new issues that arise, and keeping lines of communication open among the proponent and public. This role requires the Oversight Committee to have a relatively high level of knowledge about the agreement and the activities occurring at the mine, as well as the ability to effectively communicate between the agreement parties.

The Responsible Mining Practices and Technology Committee, on the other hand, is tasked to investigate and recommend innovative methods of waste reducing and increase environmental protections at the mine. Through its expertise on industry best practices it aims to improve the mine's environmental management strategies. The technical capacity this Committee brings to investigating and proposing emergent technologies over time is particularly valuable for a long-term project.

Those forming an oversight body at Giant Mine should be acutely aware of what the body is supposed to achieve and tailor the composition of the body to comport with its end-goals.

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<sup>395</sup> *Ibid.* at 13-14.

## **Lesson #5: Access to information is paramount.**

The oversight mechanisms discussed in this report demonstrate some universal requirements of independent oversight. The power to access information is paramount, regardless of subject matter. The overseen are unlikely to provide information demonstrating failures or shortcomings unless they are so required. If an oversight body is going to perform effectively it must have in-depth knowledge of the actions of the overseen. Providing a legal basis for access to information ensures that self-preservation instincts cannot trump legitimate information requests.

To watch a decision-maker, an oversight body must know what is being decided; it must be aware of the actor's actions. This is the basic foundation of oversight. Establishing contractual rights to information on, e.g., environmental management activities and impact assessment reports is the safest way to engender oversight. If an oversight body has to scrap and claw for information – as did the UC Davis South-Campus Superfund Oversight Committee (see case study 5.2.4) – its ability to disseminate, review, and critique that information will be reduced. Time and energy which should be focused on apprising the public, addressing its concerns, and improving environmental management is wasted on squabbling over access.

In jurisdictions where regulations oblige proponents to make environmental management proposals public, contractual rights to information may not be as large an issue. However, regulations may only mandate intermittent submissions from the proponent. Oversight is a constant activity. Access to information should, correspondingly, be constant.

Requiring Project Team reports to be produced and provided to oversight agencies has been critical in the contexts of Diavik, Snap Lake, Voisey's Bay and Ekati. The Developer's Report asserts that INAC will facilitate third party access to monitoring data; however, access will be "subject to applicable government legislation, policies and contractual obligations".<sup>396</sup> It is important that contractual provisions thus explicitly provide for access to information. If an oversight body is formed at Giant Mine, the creators should be careful not to undermine its potency by shielding it from necessary information. Without information to be overseen there can be no meaningful oversight.

## **Lesson #6: Guaranteed funding is necessary.**

The case studies in this report sharply reveal that inadequate and insecure funding pose one of the most significant impediments to effective operation of oversight agencies. The Voisey's Bay Environmental Monitoring Board is "on life support"; an agreement to fund the Board was due in 2007 and still has not emerged. The Ekati Monitoring Agency has had to resort to dispute resolution over budget work plans. The Diavik Monitoring Board has experienced substantial disagreements over budgets, including binding arbitration. The oversight body attached to the Laboratory for Energy-related Health Research Superfund site (section 5.2.4) experienced such challenges from the conditions imposed with each intermittent budget grant that the group disbanded completely. A clear conclusion from these examples is that an oversight body cannot effectively carry out the task of oversight if it is forced to constantly battle for funding.

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<sup>396</sup> *Ibid.* at 14-5.

A guaranteed budget not only reduces a body's subservience to the funder, but also allows it to focus on substantive oversight instead of combating its insecure existence. However, the specific tasks of an oversight body are likely to change over time as environmental management strategies evolve. The potential to renegotiate the budget in accordance with the evolving tasks of the body safeguards against budgetary deficiencies. The inclusion of dispute resolution mechanisms further protects against intractable disagreements between the body and the proponent. The Ekati case study reveals the need to allow oversight agencies to access dispute resolution provisions in environmental agreements. If oversight agencies are not party to contractual agreements, they will be left outside the agreements due to contractual privity, and will be unable access dispute resolution mechanisms that are vital for their effective operation.

The Developer's Report states that INAC will fund the Community Alliance, a community participation group (discussed above).<sup>397</sup> However, there is no obligation on INAC to continue such funding, creating a situation where the Community Alliance is dependent on the government for continued operations. As the Laboratory for Energy-related Health Research case study demonstrates, if funding is *ad hoc*, the oversight body becomes subject to policy shifts and may not survive.

#### **Lesson #7: Proponents should be obliged to respond to recommendations from oversight bodies.**

Some of the proponents in the case studies discussed are required to respond to the recommendations of their oversight bodies (see Ekati, Diavik, Stillwater). Others are not (see Saskatchewan uranium mines, Frontier Fertilizer). No oversight body presented has the power to unilaterally implement change in environmental management. However, those that receive responses can, at least, be certain that their concerns and recommendations were heard. The proponents may not implement the recommendations, but, in theory, they must rationalize their decision and communicate that rationale to the public. Mandating powers of response is particularly important in contexts, as here, where governments occupy the role of project proponent and regulator, and the potential for conflicts of interest is heightened. Safeguarding the Remediation Plan may thus require an oversight body to have powers of recommendation and required response within a reasonable period of time.

#### **Lesson #8: Oversight bodies should have a legal base.**

Many of the recommendations above are best implemented and assured through legal instruments. The discrepancies are evident between bodies that have legal rights to funding, access, and responses – like the Independent Environmental Monitoring Agency at Ekati, the Environmental Monitoring Advisory Board at Diavik – and bodies that do not. Bodies with established rights are better able to oversee decision-makers and improve environmental management. Without legal rights to necessary resources and information, oversight bodies will always be fighting an uphill battle against the self-preservation instincts of the overseen. The contractual model has been one way to legally entrench obligations with respect to independent monitoring agencies.

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<sup>397</sup> *Ibid.* at 13-14, 13-15.

## **Lesson #9: Independent oversight bodies can promote effective environmental management through identifying gaps in environmental monitoring and management.**

The case studies in this report document numerous examples of improved environmental management emerging from oversight agency practices. The ways in which oversight bodies can provide enhanced management are numerous. They can vet management and monitoring proposals, adding to the robustness of environmental management strategies; they can recommend new courses of action, ensuring legitimate alternatives are not overlooked; and they can incorporate information from local communities into the project, preventing relevant concerns from being overlooked.

Various case studies in this report, and elsewhere, confirm the challenges that regulatory agencies can face in fulfilling monitoring and inspection functions due to restrictions on budgets, personnel and capacity. This was a factor highlighted in the Royal Society of Canada's Tar Sands Report: in 2006 the Government of Alberta called for an increase in the regulatory capacity of agencies to deal with the demands of oil sands development; yet the Expert Panel noted that such increases in capacity were not evident.<sup>398</sup> Monitoring and oversight functions demand specialized technical expertise, time, resources and capacity. Agencies are often stretched beyond their means and challenged to provide services which demand industry-specific technical knowledge. These challenges can be exacerbated over the long-term when new undertakings lure regulatory attention from ongoing projects. Independent Oversight bodies have proven capable of complementing stretched regulators in ensuring robust and ongoing attention to issues of effective environmental management.

In seeking to establish an oversight body capable of rigorous and effective environmental oversight, the following questions need to be asked:

- What rights and powers does the oversight body require to carry out its mandate?
- What recourse will it have if its rights and powers are infringed?
- How can the body ensure its recommendations are listened to?
- Will the oversight agency have access to information?
- How will effective communication channels between the oversight body and the Project Team be forged and maintained?
- What will the qualifications of the overseers be?
- Will the oversight body have the financial resources to monitor and to oversee monitoring results?
- How will Aboriginal groups and community members participate in and advance the work of the monitoring agency?

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<sup>398</sup> RSC Oil Sands Report, *supra* note 1 at 281.

## **Lesson #10: The meaningful involvement of Aboriginal groups in oversight and monitoring requires careful attention and devoted capacity funding.**

Incorporating meaningful Aboriginal involvement will be another important element of oversight at Giant Mine. The Developer's Report acknowledges that:

the meaningful involvement of Aboriginal people in the planning and remediation of Giant Mine has a very high and immediate priority. It is important for the future of the Remediation Project planning and implementation, and in particular for dealing with issues and concerns such as traditional knowledge, monitoring and dispute resolution. The Project Team is prepared to make the formation and support of a partnership with [Yellowknives Dene] and other relevant Aboriginal groups a high priority, and to act immediately to institute and fund such a Giant Mine Remediation Aboriginal and Government Body.<sup>399</sup>

Details about the formation of this group, who will be responsible for supporting the collection and consideration of Traditional Knowledge in future decisions related to the Remediation Project, have yet to be worked out.

Successful incorporation of Traditional Knowledge and Aboriginal perspectives has been difficult in other Canadian natural resource and remediation project settings. The authors of a report on a proposed community-based monitoring program in the Oil Sands Region identified several areas in which current follow-up initiatives were lacking. Included was a "lack of integration of scientific and traditional knowledge and lack of MCFN [Mikisew Cree First Nation] involvement in designing monitoring programs...[and a] lack of scientific research to enable MCFN environmental questions to be answered."<sup>400</sup>

Moreover, the three oversight agencies to emerge from the Northwest Territories' diamond mines have all struggled to effectively integrate Traditional Knowledge and to ensure Aboriginal participation in the work of the oversight agencies and the monitoring programs. There is much room to improve upon past initiatives in this area. Some ways to improve on existing practices include: 1) overcoming problems of disrespect for Traditional Knowledge. These problems emerge from a world view that Traditional Knowledge is necessarily opposed to "Western science" and that ignores the synergies between the two epistemologies; 2) incorporating greater Aboriginal involvement in environmental monitoring. Aboriginal youths, in particular, could be provided with opportunities to train as monitors; and 3) ensuring sufficient levels of capacity funding so that Aboriginal groups can participate in the activities of the monitoring agencies. Some existing studies of Traditional Knowledge are also advancing understandings of the use of Traditional Knowledge in environmental management.<sup>401</sup>

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<sup>399</sup> *Developer's Assessment Report, supra* note 10 at 13-24.

<sup>400</sup> L.B. Lawe, J. Wells & Mikisew Cree First Nations Industry Relations Corporation, "Cumulative effects assessment and EIA follow-up: a proposed community-based monitoring program in the Oil Sands Region, Northeastern Alberta" (2005) 23 *Impact Assessment and Project Appraisal* 205 at 206.

<sup>401</sup> Peter Usher, "Traditional Ecological Knowledge in Environmental Assessment and Management" 53(2) *Arctic* (June 2000) 183. See also Yellowknives Dene First Nation Land and Environment Committee, *Impact of the Yellowknife Giant Gold Mine on the Yellowknives Dene: A Traditional Knowledge Report* (Yellowknives Dene First Nation, 2005).



Current problems with Aboriginal participation in environmental management are often traced to limited funds and the fact that competition for resources means that many worthwhile initiatives to increase Aboriginal participation do not get funded. Opportunities for greater Aboriginal involvement in monitoring may lead to the greater mobilization and application of Aboriginal Traditional Knowledge. The Athabasca Working Group example (see case study 5.1.5) suggests that community involvement in monitoring can increase community confidence in the monitoring results.

At the same time, there is a real need for sensitivity to the multiple demands that consultation and participation pose on Aboriginal groups and the limited resources afforded to communities being consulted. This is revealed in a letter on file with the Review Board from Todd Slack of the Yellowknives Dene:

From the Lands perspective, we're expecting the IR phase to kick in 2011. We are hopeful that the Board is aware of: a) the time requirements for a small office to review several hundred (thousands? I haven't look at the appendices) pages of the [Developer's Assessment Report] among other duties. We do not have a team of people standing by. We have one guy.<sup>402</sup>

This concern is confirmed by a letter of the North Slave Métis Alliance to the Review Board dated 18 January 2011, citing: "we are completely unable to deal with this environmental assessment under our current capacity level".<sup>403</sup> It is unrealistic to expect individuals or offices with time and resource constraints to perform meaningful reviews of complex and lengthy documents.

To overcome the pitfalls experienced at other projects, close consideration should be given to the following questions:

- How will Aboriginal involvement in monitoring and oversight be encouraged?
- Will the oversight body contribute to Aboriginal capacity-building?
- Will monitoring or other tasks be available for interested participants?
- How will the body foster trust and communication between Aboriginal groups and the Project Team?
- What mechanisms will be created for communicating concerns and complaints?

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<sup>402</sup> Letter from Todd Slack, Yellowknives Dene First Nation to Adrian Paradis, Head Technical and Environmental Services Giant Mine Remediation Project Re: Giant Mine Environmental Assessment Work Plan dated 9 Nov 2010, on file with Mackenzie Valley Environmental Impact Review Board.

<sup>403</sup> Grieve, *supra* note 11.

**Lesson #11: The impacts of natural resource projects are differentially experienced. Ensuring community participation requires an attentiveness to the gendered impacts of resource development.**

Public participation in natural resource decisions has been heralded as “one of the signal developments of the last years of the Twentieth Century.”<sup>404</sup> Yet the degree to which “public” participation in natural resource decisions can be male-dominated is increasingly apparent. The gendered impacts of resource extraction on Aboriginal communities in Northern Canada is a subject of ongoing concern and research.<sup>405</sup> As part of the environmental impact assessment for the Voisey’s Bay mine, the Tongamiut Inuit and Innu Nation women developed a gender-based analysis of the mine development.<sup>406</sup> In the context of oversight bodies, the question of how to ensure the effective representation of women in oversight bodies equally arises. One option, adopted by the Argyle Mine Relationship Committee, is to specify that the roles of chair and deputy chair of the oversight committee must be occupied by one man and one woman.

**Lesson #12: Ensuring an oversight body’s independence can be critical to ensuring public confidence.**

Regardless of its goals, an oversight body should have a high level of independence if it is going to instil confidence in the local public. Alleviating conflict-of-interest concerns at projects like Giant Mine will only be achieved through non-governmental safeguards. An oversight body either comprised of or responsible to members of the federal and territorial governments is unlikely to build public confidence.

The structure of an oversight body – its members, its funding, its longevity – contributes to its independence. Mechanisms to ensure an oversight body’s independence include:

- a dedicated budget, sufficient for the body to accomplish its mandate;
- a membership appointed by consensus between all legitimate stakeholders and which has a modicum of tenure;
- a guaranteed lifespan over the course of the project. In addition to ensuring independence, permanent oversight bodies bring continuity of knowledge to lengthy projects which will inevitably suffer from turnover of personnel.

To create a body with the sort of independence necessary to ensure public confidence, it is necessary to address the following questions:

- How will the continued existence of the oversight body be assured?
- Will its membership include members of the project team (the “watched”)?
- How will members be appointed and removed?
- Will funding arrangements compromise the oversight agency’s independence?
- Will the agency be able to publish its reports free from requirements of prior approval?

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<sup>404</sup> Donald Zillman, “Introduction to Public Participation in the Twenty-first Century” in Zillman, supra note 22 at 1.

<sup>405</sup> See National Aboriginal Health Organization, *Resource Extraction and Aboriginal Communities in Northern Canada: Gender Considerations* (Ottawa: National Aboriginal Health Organizations, 2008).

<sup>406</sup> See Voisey’s Bay Mine, Section 5.1.6, “Discussion”.

- What access to information will be ensured?
- How will disputes between the body and the Project Team be resolved?

### **Lesson #13: Long term projects require long term oversight and continuity of knowledge.**

Several of the case studies in this report illustrate the challenges of *ad hoc* institutions that are created to deal with immediate public concerns without attention to their long term role, mandate, or source of funding. The concerns enunciated by the affected communities to date reveal that, with respect to the Giant Mine Remediation, the community's need for assurance will be ongoing. The Island Copper example (section 5.1.4) reveals the benefit of having members perform oversight over long periods of time.

One particular challenge facing communities such as Yellowknife is frequent staff turnover. This challenge plagues government agencies just as it presents challenges for mining operators. Rapid staff turnover among government regulators and monitors can create fear that the long term commitment to robust environmental management and monitoring of the Giant Mine remediation may be lacking. An oversight agency with access to information and the ability to provide long term records of reports to the public can provide a valuable community contribution, particularly over the long term. Security of funding over the long term also needs to be assured, particularly as new "sexier" projects can compete for attention and funds.

The Stillwater Mine provides an example of a project where oversight has endured over a decade through changes of project ownership, a recession, and a significant drop in the prices of precious metals. Critical to this endurance is the contractual requirement that the oversight institutions survive any changes in project ownership. To ensure the security of oversight over the long term, attention needs to be put to legal mechanisms that will ensure that institutions put in place survive changes in management. In the case of the Faro Mine, a Community Liaison Committee was continued at the discretion of the site managers, Deloitte & Touche. When the care and maintenance contract for the site was transferred to a new operator, the Committee did not survive the change of management.

### **Lesson # 14: Independent oversight can play an important role in emergency response planning.**

A number of the projects examined in the case studies have the potential for widespread harm. Preparing for worst-case scenarios is an indispensable aspect of these projects. The case studies demonstrate that independent oversight can play a vital role in emergency preparedness. The Prince William Sound Regional Citizens' Advisory Committee (Section 5.2.5) and the Idaho National Laboratory Oversight Body (Section 5.2.2) both have mandates which include vetting proponents' and authorities' emergency response plans. In the contexts of Alaskan marine oil transportation and nuclear testing facilities, emergency preparedness is a paramount public concern. Ensuring that emergency response plans are not purely a function of financially interested parties is key to ensuring the robustness of such plans and public confidence therein. Independent oversight of worst-case scenario responses and emergency preparedness provides a mechanism for responding to community concerns and containing harms in the unlikely event of disaster.

## Conclusions

Discussions around the formation of an oversight agency provide an opportunity to commit to the creation of robust systems for environmental monitoring, review, and community participation. Independent oversight agencies are institutional structures that can advance management processes where long term environmental monitoring and management and Aboriginal involvement are priorities. Oversight is about more than adding extra layers of monitoring or extra mechanisms of participation for participation's sake. Oversight is a mechanism that can ensure the shared goals of effective environmental management and ensuring public trust and support for a remediation project. It is about both creating and preserving public confidence in the Remediation Plan.

Models of oversight differ, as do functions. A particular challenge for existing oversight agencies arises where they are tasked with multiple (and potentially conflicting) roles. Some oversight bodies take on mandates of technical oversight and investigation which demand independence and distance to ensure public confidence in their processes and results. At the same time they are charged with communication and bridge-building roles that require a certain embeddedness and closeness to be able to serve as effective conduits between communities and project teams. One conclusion of this report is that this tension needs to be acknowledged. The danger of not admitting to this tension lies in the temptation to seek out some middle ground – a non-independent body tasked with oversight yet lacking robust powers, or, alternatively, a highly-skilled technical body lacking the funding and personnel to effectively communicate community needs. Neither form may provide the most effective solution to community needs. Careful attention to the question – what form of oversight does the community need to gain confidence in the Remediation Plan – must come before a decision on the form and function of an appropriate oversight body. The key is to create a body that will ensure the levels of public support and public confidence necessary to make the Remediation Plan a success.

To date, many good intentions about monitoring, participation, and consultation have been included in the Developer's Assessment Report. One can applaud, for example, numerous commitments already made:

Input from the public and Aboriginal communities will also be sought in shaping specific environmental monitoring. As the Remediation Project advances, and in response to monitoring results, the public and Aboriginal communities will continue to be engaged in the review of monitoring results and the identification of adaptive management approaches needed to address any environmental issues identified through the monitoring program.<sup>407</sup>

But the real challenge comes in translating these good intentions into sufficiently funded and staffed mechanisms of effective oversight that are up to the task of meeting public demands and ensuring public confidence in the Remediation Plan. This demands the creation of effective and responsive institutional mechanisms, backed up by formal structures and legal commitments that will withstand funding cycles, policy shifts, and changes in leadership. Nothing less.

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<sup>407</sup> *Developer's Assessment Report, supra note 10 at 13-22.*

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