THE UNIVERSITY OF WINNIPEG
DEPARTMENT OF GEOGRAPHY

UBC

Alan Ehrlich
Senior Environmental Assessment Officer
Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre, Box 938, 5102-50th Ave
Yellowknife, NT X1A 2N7

By Mail and By Email

March 3, 2010

Dear Mr. Ehrlich,

As you are aware, the Yellowknives Dene First Nation, City of Yellowknife, and Kevin O'Reilly (private citizen) prepared a call for research on independent oversight bodies and experiences to support the environmental assessment of the Giant Mine Remediation project. In response to this request, two research projects were initiated. Natasha Affolder, from the Faculty of Law, University of British Columbia is undertaking a comparative analysis of the legal and institutional aspects of environmental oversight agencies (see Appendix A). Patricia Fitzpatrick, from the Department of Geography, University of Winnipeg is considering the role of oversight bodies in project implementation, community involvement, research, enforcement and monitoring (see Appendix B). It is our intention to prepare written reports on our findings, which the three parties will submit to the Mackenzie Valley Environmental Impact Review Board.

The purpose of this letter is twofold. First, we wanted to inform the Board of our research programmes. Second, we request that, should the Board revise its work plan and timelines (given the delayed submission of the developer's report), consideration be given to our timelines. We believe our research can make a significant contribution to the Environmental Assessment, is relevant to section 3.6 of the Terms of Reference particularly paragraph 1(f) "Plans to engage with local communities in the development, implementation and review of monitoring activities", and is being carried out using outside funding. As indicated in our proposals, we anticipate completing our work by September, 2010.

Thank you for considering our request.

Sincerely,

Natasha Affolder, Faculty of Law, University of British Columbia
Patricia Fitzpatrick, Department of Geography, University of Winnipeg

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APPENDIX A

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

RESEARCH PROPOSAL

Independent Environmental Oversight Agencies: A Legal and Institutional Analysis

Natasha Affolder
Director, Centre for Global Environmental and Natural Resources Law, and Assistant Professor, Faculty of Law, UBC

February 25, 2010

Background and Purpose

Environmental oversight agencies are being adopted in various projects across the globe at the insistence of diverse communities of interest including Aboriginal organizations, community groups, municipalities, and financial institutions providing project finance. The Giant Mine Remediation in Yellowknife, Northwest Territories, is a project where the federal Department of Indian Affairs and Northern Development occupies both the role of project proponent and government regulator. Various concerns about the proposed remediation plan have been voiced by communities of interest, including the Yellowknives Dene, the City of Yellowknife, and local citizens. The creation of an independent oversight agency has been suggested as one appropriate vehicle for addressing community concerns around this project. **This research project seeks to provide a comparative analysis of the legal and institutional aspects of environmental oversight agencies to inform the Mackenzie Valley Environmental Review Board in its environmental assessment of the Giant Mine Remediation.**

Despite the proliferation of examples of environmental oversight agencies, comparative analysis of these arrangements is lacking. In other words, new institutions are being created absent an informed understanding of existing agreement forms, substance, and function. This research project intends to address this gap in our knowledge. Specifically, the objectives of this research project are to: i) compile a detailed annotated bibliography of the literature on environmental oversight agencies, ii) compile a database of agreement forms and implementing legislation where these bodies have a legislative base, and iii) based on this information, compile a report on the legal forms and legal drafting issues that could inform the decision to create an oversight agency for the Giant Mine Remediation. This research will be international in scope.

The focus on legal form and drafting issues in this research reflects the fact that where these agencies have been created in the past, issues of legal structure may have limited their effectiveness. For example, under the Ekati Environmental Agreement, the Independent Oversight Agency is not a party to the Agreement. This means that it is unable to invoke the dispute resolution clauses under the Agreement, due to the issue of contractual privity. Another example of the centrality of careful legal drafting emerges from the Stillwater Mine Good Neighbor Agreement in Stillwater, Montana. The Agreement negotiators had the foresight to include a clause binding all successors and assigns of the mining company, which was critical to the continuation of the oversight committee's work once the mining company sold the project to a Russian company. This research is intended to complement the simultaneous case study-based research project of Dr. Patricia Fitzpatrick, an Assistant Professor in the Geography Department of the University of Winnipeg – a research project that will investigate selected North American examples of independent oversight bodies through the lens of best practices in environmental monitoring.

Methodology

This research seeks to improve our understanding of the use of environmental oversight agencies in diverse project settings. It will first involve a compilation and analysis of interdisciplinary literature on environmental oversight institutions. It will also include a legal and textual analysis of agreement forms and implementing legislation. This research will not be interview-based, except to the extent that it draws upon previous interview-based analysis of environmental contracts and good neighbour agreements for the Stillwater Mine, Ekati Mine, Snap Lake Mine, Diavik Mine, and others. All interviews conducted for this research proceeded on the basis of signed letters of consent and the approval of the Behavioral Research Ethics Board of the University of British Columbia.

Budget

Student Salaries - The central budget item for this project involves hiring either a Ph.D. student or an upper level law student to assist with the research literature searches and database compilation. To hire a law student for a four-month summer position (or to hire a Ph.D. student for a shorter focussed period of research) will cost *$12,000.*

Travel – As this research is not interview-based, the only travel anticipated would be to present the final report to the Mackenzie Valley Environmental Review Board. Airfare ($1000) plus hotel and per diems *($600*). Total travel expenses *$1600*

This budget *($13,600*) can be fully covered by existing sources of research support that the principal investigator (Assistant Professor Natasha Affolder) is able to access at the University of British Columbia including funding from the Social Sciences and Humanities Research Council (SSHRC) and The Law Foundation of British Columbia for a project that investigates the practice of using contractual agreements as a form of environmental regulation.

Project Deliverables

This project will produce a report on legal forms of oversight agencies and legal drafting issues, which will contain 2 appendixes: i) an annotated bibliography of international literature on environmental oversight agencies and ii) an international database of environmental oversight models (including implementing legislation, where appropriate). This report will be available by **September 1, 2010**, for consideration by the Mackenzie Valley Environmental Review Board.

APPENDIX B: INDEPENDENT OVERSIGHT: A COMPARATIVE CASE STUDY OF DIFFERENT MODELS

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1. PURPOSE

The purpose of this project is to increase understanding of the role of independent oversight bodies in project implementation, community involvement, research, enforcement and monitoring for consideration during the environmental assessment of the Giant Mine Remediation project.

1. INTRODUCTION

As environmental problems become increasingly characterized by uncertainty, complexity and conflict (Diduck, 2004), there is growing interest in how to manage resource-based activities in ways considered to be ecological sound, socially responsible, and fiscally prudent. One relatively recent innovation in resource management in Canada involves independent oversight bodies (O'Faircheallaigh, 2007). Most often, independent oversight, or public overseers are utilized to monitor impacts surrounding complex or controversial projects. "[M]onitoring is an activity designed to identify the nature and cause of change. More specifically, it is a data collection activity undertaken to provide specific information on the characteristics and functioning of environmental and social variables"(Noble, 2005, 141). Oversight can be undertaken for a variety of basic purposes, including as a means for enforcement, identifying changes in systems, learning from experience, or for a combination of such goals. Individual programs are tailored to specific functions, and thus have different temporal and spatial dimensions.

One project that exhibits the aspects of the complexity described above involves the Giant Mine Remediation, in Yellowknife, Northwest Territories. When the proponent of this former gold mine went into receivership in 1999, the site was left with approximately 237,000 tonnes of arsenic trioxide dust located in the mined out areas specially built chambers(SENES Consultants Limited, 2006). Indian and Northern Affairs Canada, as the land owner and manager, was left with the responsibility for remediation. The department proposed to freeze (and maintain in perpetuity) the chambers to restrict arsenic from leaching into the groundwater (and ultimately Great Slave Lake). The community of interest, including the City of Yellowknife and the Yellowknives Dene First Nation, have expressed concerns about several aspects of the remediation plan, including the federal department's role dual function as proponent and regulator, the

method of remediation resulting in a perpetual care situation, the potential danger posed by a flow of vehicular traffic over the some of the storage chambers, the need for ongoing research and development into a more permanent solution and questions surrounding how the site may be used in the future. The uncertainty, complexity and conflict surrounding this proposal suggest that the Giant Mine project may be a prime candidate for independent oversight.

2. RESEARCH PROGRAM

The purpose of this study is to increase understanding of the role of independent oversight bodies for consideration during the environmental assessment of the Giant Mine Remediation project.

The project includes four objectives:

- Objective 1: Compare the logistical organization of various oversight bodies related to mining or remediation projects, primarily in North America.
- Objective 2: Contrast models of independent oversight against best practices in environmental monitoring and community involvement.
- Objective 3: Conduct an in-depth review of three to five oversight bodies to examine the effectiveness, efficiency and transparency of each model.
- Objective 4: Propose a model of independent oversight suitable for the Giant Mine Remediation

The research will employ a qualitative, case study approach (Creswell, 2003; McNabb, 2002; Yin, 2003) focusing on existing independent oversight bodies (Stake, 1994). Table 1 identifies a preliminary list of oversight bodies to be considered.

Table 1: Potential Case Studies

Location	Purpose	Board
Yellowknife, Northwest Territories	Operational mine	Independent Environmental Monitoring Agency for the BHP Billiton Ekati diamond mine
Yellowknife, Northwest Territories	Operational Mine	Environmental Monitoring Advisory Board for the Diavik diamond mine;
Yellowknife, Northwest Territories	Operational Mine	Snap Lake Environmental Monitoring Agency for the De Beers Snap lake diamond mine;
Valdez and Anchorage, Alaska	Operational Oil Transport	Prince William Sound Regional Citizen's Advisory Committee for oversight of shipments of oil from Alaska after the *Exxon Valdez* spill;
Kenai, Alaska	Operational Oil Transport/ Remediation?	Cook Inlet Regional Citizens Advisory Committee for oversight of shipments of oil from Alaska after the *Exxon Valdez* spill;
Billings, Montana	Operational Mine	Stillwater and East Boulder Oversight Committees under the "Good Neigbour Agreement" for the Stillwater Mining

		palladium/gold/platinum mine;
Happy Valley-Goose Bay, Labrador and Moncton, New Brunswick (Office of the Chair)	Mitigation	Institute for Environmental Monitoring and Research for the low-level military flying operations in Labrador; and
Faro, Yukon	Planning stages, Mine?	
Mackenzie Gas Project	Operational Oil Transport	The panel recommended that the Commissioner of the Environment and Sustainable Development fulfill an independent oversight function.
Sydney, Nova Scotia	Remediation	Remediation Monitoring Oversight Board for the Sydney Tar Ponds and Coke Ovens Remediation Project.

2.1. Compare the logistical organization of various oversight bodies related to mining or remediation projects, primarily in North America..

Data collection for this objective focuses on grey and published literature surrounding up to eight oversight bodies. Factors to consider include, but are not limited to, aspects identified by the City of Yellowknife, Yellowknives Dene First Nation and Kevin O'Reilly (private citizen):

- Source of authority for the independent oversight body;
- Purpose, organization, mandate and powers including ability to intervene in regulatory proceedings;
- Membership with special attention to Aboriginal peoples, local citizens, municipal governments, qualifications of members, terms of appointment;
- Funding and staffing including opportunities for additional funding, including funding for involvement or implementation by interested parties;
- Review and amendment provisions including outside evaluations of organization and any conclusions;
- Timing of establishment and duration;
- Frequency of meetings, rules of procedure;
- Community-based monitoring, review of monitoring and management plans and results;
- Accountability and reporting including public information;
- Access to information and information sharing with regulators and others;
- Duties of developer(s) and regulators, including responses to information requests, responses to recommendations, timelines; and
- Default remedies and dispute resolution.

2.2. Contrast models of independent oversight against best practices in environmental monitoring and community involvement.

The purpose of this objective is to contrast the logical operation of each independent oversight body against best practices in environmental monitoring and community involvement. The criteria against which "best practices" is considered (see Table 2) is taken from Moyer, Fitzpatrick, Diduck & Froese (2008) as derived from the work from a number of scholars and practioners (Indian and Northern Affairs Canada, 2007; Kernaghan, Marson, & Borins, 2002; Marshall, Arts, & Morrison-Saunders, 2005; Mitchell, 2002; Morrison-Saunders & Arts, 2005; Rafique Ahhamed & Nixon, 2006; Shindler, Cheek, & Stankey, 1999)

Table 2: Aspects of Best Practice in Environmental Monitoring (Moyer, Fitzpatrick, Diduck, & Froese, 2008)

Criteria	*Description*
Authoritative	The program should have a clear (and where possible legislated) mandate so project proponents and regulated industries cannot avoid their monitoring responsibilities.
Resourced	The program needs sufficient human and financial capacity and political will for implementation.
Change-oriented	The program must have a feedback function, so that results have an impact on future resource management activities, including legislative, regulatory and project-specific monitoring requirements.
Comprehensive	Monitoring requirements should address both project-specific impacts and cumulative effects.
Learning-oriented	The programs should promote continuous learning from experience to improve future practice.
Participatory	Monitoring should include participation by industry, regulators and the public.
Collaborative	The program requires organizational structures to ensure communication and facilitate collaboration among different actors
Citizen-centred	Results should be publicly accessible.
People-centred	The program should reflect the cultural and societal context in which it is developed and implemented.
Timing	The program should be established as early as possible after legislation is passed, permits or licenses are issued, or management interventions occur.
Results-oriented	The program should identify the basis on which success (of the monitoring program) can be defined.

2.3. Objective 3: Conduct an in-depth review of three to five oversight bodies to examine the effectiveness, efficiency and transparency of each model.

Beyond logistical design, implementation is a critical component of independent oversight success. Thus this objective is designed to consider the strengths and weaknesses of up to five oversight bodies.

Research questions address (Wood, 2007):

- Effectiveness: environmental performance; ambitiousness of targets;
- Efficiency: opportunities to maximize social welfare, cost effectiveness, transaction and operating costs, effects on competition; and
- Transparency: opportunities for public participation, systems of reporting, and verification and enforcement
- Might other criteria include how the structure, resourcing and authority of particular bodies may lead to stronger effectiveness in improving design or operations, monitoring, technical peer review, and community involvement?

Three criteria will inform the choice of case studies. The factors considered in case selection include:

- the nature of the oversight body, with remediation, followed by mining considered more favourable;
- the design of the oversight body, with varied legal and logistical frameworks considered more favourable; and
- the accessibility of the oversight body, with access (and by extension, access to participants of those hearings) considered more favourable.

Each criterion will be given the same numerical weight. The application of the criteria will be applied to the potential case studies (see Table 1) as objective 1 is complete.

2.4. Propose a model of independent oversight suitable for the Giant Mine Remediation

Finally, the research will include a summary of recommend application based on the proposed development. This will not involve a detailed prescription but instead outlines a preliminary blueprint including principles, structure, organization and authority for consideration by the Mackenzie Valley Environmental Review Board and the interested parties to the environmental assessment.

2.5. Timelines

Date	Activity
January 1-February 15, 2010	Data collection objective 1
February 15- April 30	Data analysis objectives 1 and 2
May 1- June 30	Data collection objective 3
July 1- July 31	Data analysis objectives 3 and 4
August 1	Preliminary findings distributed to interested parties
September 15	Final report, to be submitted to the MVEIRB
September-December	Presentation of Report at MVEIRB Public Hearing, dependent on schedule.

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