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Canada: Joint Review Panels Exceed Mandate With Use of Sustainability Framework  
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**Two recent joint review panel decisions (Kemess Panel Report and the White's Point Panel Report) illustrate a recent trend towards expanding the role of sustainable development in environmental assessments. By using sustainability frameworks to make their decisions, both panels exceeded their mandate under existing environmental legislation.**

### The Kemess Panel Decision

The federal/provincial environmental assessment joint review panel (the Kemess Panel) for the Kemess North Copper-Gold Mine Project (the Kemess Project) released its report on September 17, 2007. The Kemess Panel recommended the rejection of the Kemess Project on the basis that the economic and social benefits of the project, on balance, were outweighed by the "risks of significant adverse environmental, social and cultural effects".

Northgate Minerals Corporation had proposed to expand the existing Kemess South Mine, located in northern British Columbia, with a new open pit and modifications to the mill. The Kemess Project proposed to enlarge Duncan Lake to store toxic tailings and waste rock resulting from the expansion.

Pursuant to the *Canadian Environmental Assessment Act* (CEAA), the B.C. *Environment Act* and the Kemess Panel's Terms of Reference (TOR), the Kemess Panel was required to evaluate the potential environmental effects of the project and determine if there were likely significant adverse effects that could not be justified in the circumstances, taking into account the proposed mitigation measures.

For its review, the Panel formulated a sustainability framework comprised of five "perspectives"-- namely, environmental stewardship, economic benefits and costs, social and cultural benefits and costs, fairness in the distribution of benefits and costs, and present versus future generations. The ultimate decision making of the Panel was based on a "broad and holistic" approach within this sustainability framework.

Consistent with its mandate, the Panel did make significance determinations in respect of the potential project effects. However, it then reassessed the issues within its sustainability framework. The Panel noted that the project's benefits would accrue for only a short period (two years of construction and 11 years of production), whereas key adverse effects "may continue for several thousand years." The Kemess Panel also took a negative view of the fact that the bulk of the project benefits would accrue to the proponent, whereas the local aboriginal communities would shoulder the bulk of the project risks.

Notwithstanding the Panel's various significance determinations in advance of its framework analysis, its ultimate rejection of the project appears to have been rooted in an analysis of the perceived "risks" of significant adverse effects rather than their likelihood. For example, under the "Environmental Stewardship" criterion analysis, the Panel questioned whether the "site management regime mitigation measure" was actually realistic given the amount of time over which the mitigation measure would have to be in place. By making such a statement, the Panel seems to undercut its initial finding of "no likely significant environmental effects," based on a lack of faith in the proponent's proposed commitments and mitigation measures.

Another factor that appears to have swayed the Panel was its analysis under its "Present versus Future Generations" criterion. The Panel's analysis focused on whether it was appropriate to pass risks on to future generations rather than analyzing whether the risk created a likely significant adverse effect, as required under environmental assessment legislation.

### The White's Point Quarry Decision

The federal/provincial environmental assessment joint review panel (the White's Point Panel) for the White's Point Quarry and Marine Terminal Project (the White's Point Project) released its report on October 23, 2007.

Bilcon of Nova Scotia Corporation had proposed the construction, operation and decommissioning of a large basalt quarry, processing facility, ship loading facility and marine terminal at White's Point, Nova Scotia for the export of aggregate to New Jersey over a 50-year time period.

In its directive to the proponent, the Panel stressed adherence to five guiding principles – public involvement, traditional community knowledge, an ecosystem approach, sustainable development and the precautionary principle. The Panel considered that its mandate was twofold:

- to determine whether the project would result in significant adverse or beneficial physical, biological or socio-economic environmental effects; and
- whether it would be in the public interest.

The Panel acknowledged that the approach it was using was "somewhat unconventional".

In its report, the Panel identified several shortcomings with the Environmental Impact Statement and expressed doubt about the effectiveness of proposed measures to mitigate physical project effects (dust and runoff) and project effects on the ecosystem (notably marine species, nesting birds and endangered plants), particularly in the absence of appropriate baseline information. Again, had the Panel based its decision on these shortcomings (whether accurate or not), it would likely have been acting within its mandate. However, the Panel went further and based its decision on its sustainability criteria.

In part, the proposed project was rejected due to a lack of net benefits to the community as compared to the risk the project presented to endangered species and the local way of life. The analysis centred around the Panel's perception of the community's desire to retain fishing as its primary economic activity and a finding that the proponent had failed to adequately address the loss of gear and displacement of local fishers due to shipping or quarrying activities. The project would therefore cause undesirable changes to the community, resulting in an immitigable significant adverse environmental effect. This finding was made despite the absence of a "core values" requirement in either the Panel's terms of reference or the CEAA. Rejection on this ground ignores the explicit legal test of whether the project is likely to cause significant adverse environmental effects after the application of mitigation measures.

While a consideration of "core values" could potentially fit within a significance determination structure, by making sustainability a separate, stand-alone consideration, the Panel's analysis is inconsistent with the significant effects analysis upon which a panel must base its recommendations.

## Conclusion

There is no question that sustainable development remains a noble aim and a fundamental objective of environmental assessment. The two decisions discussed above illustrate that review panels, on their own initiative and inappropriately, are moving towards expanding the role of sustainable development in their analysis and decision making within environmental impact reviews. The problem with this development is that is not consistent with, nor is it supported by, existing environmental assessment legislation. It therefore presents a risk to project proponents presently bringing forward their projects within the current legal framework.

Environmental assessment is a legal process and the express direction articulated in environmental assessment legislation must be respected and adhered to. If policy-makers wish to see sustainable development take on a more prominent role in the process, those legislative changes should be pursued.

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