ENVIRONMENTAL LAW CENTRE

COMMENTS ON THE DRAFT OVERVIEW REPORT ON THE FEDERAL-PROVINCIAL-TERRITORIAL REVIEW OF REGULATIONS AFFECTING MINING

In compiling these comments we have reviewed the following documents:

- Draft Overview Report on the Federal-Provincial-Territorial Review of Regulations Affecting Mining, dated April 2, 1998 ("main report");

- Discussion Draft of Alberta's Submission to the Federal, Provincial and Territorial Review of Regulations Affecting the Mining Sector, dated April 21, 1998 ("Alberta report").

We appreciate having the opportunity to review and comment on these documents, and commend the Mines Ministers for their commitment to the maintenance of effective measures for environmental protection. The Environmental Law Centre's mandate is to ensure that law works to protect the environment, and that there are good environmental laws. Given that, we have limited our comments to those matters in the documents that are covered by our mandate.

Streamlining environmental regulations

We are not opposed to the concept of streamlining environmental regulation to avoid duplication and inefficiency, but we feel that caution must be exercised in adopting such measures to ensure that they are legally acceptable. For example, we note the comment made by Newfoundland and Labrador at p.9 of the main report stating: "Cooperation between agencies is welcomed but is not seen as sufficient." Stronger measures of cooperation could be achieved through bilateral agreements on the implementation and administration of overlapping federal and provincial legislation. However, such agreements generally do not have legal status and are usually entered into and administered without the public scrutiny and discussion that is applied to legislation. To go beyond the use of such agreements by seeking to change the current situation of shared jurisdiction for the environment would require constitutional amendment to give one level of government sole jurisdiction, which we do not support, as we feel that both levels of government have valuable roles to play in environmental regulation.

We are somewhat confused by the comments in section 2.4 of the Alberta report (p.3) dealing with duplication of environmental assessment processes. It is our understanding that Alberta has been working cooperatively with the federal government in this area for some time under the auspices of the *Canada-Alberta Agreement for Environmental Assessment Cooperation*, and that the new *Sub-Agreement on Environmental Assessment* under the *Canada-Wide Accord on Environmental Harmonization* should continue this cooperation. It would seem that the recent assessment of the Cheviot project would be a

prime example of federal-provincial cooperation in relation to environmental assessment of a mining project.

We note that the matter of timing concerns related to both environmental assessment and regulatory approvals is mentioned a number of times in the main report and also within the Alberta report. Many of these concerns could be remedied by imposing specific time limits on steps to be taken by government regulators under legislation, as currently most of the specifically legislated timing requirements are imposed on project proponents, operators, intervenors and other persons who may be affected by government decisions. Very few, if any, time limitations are imposed on regulators in relation to assessment and approval processes. However, given budget reductions to environmental regulatory departments in the past several years, any time limitations that are to be imposed by legislation on regulators should be reasonable in relation to the resources available to them.

Fisheries Act concerns

Concerns about certainty of application of s.35(2) of the *Fisheries Act* and its role in triggering assessment under the *Canadian Environmental Assessment Act* are mentioned numerous times within the main report. At present, clarification by example or otherwise of when harmful alteration of fish habitat is likely to occur could take place on a policy basis only. The *Fisheries Act* does not include enabling powers to allow regulations specifying or listing actions that would constitute harmful alteration of fish habitat. Amendments could be made to that Act to include such enabling powers.

Section 2.3 of the Alberta report (pp.2-3) suggests that a process should be developed to allow provincial legislation to address federal concerns or requirements, to avoid the issuance of separate approvals. To some extent, these concerns could be dealt with by an administrative agreement between the federal government and the province. However, we feel that if such an agreement were entered into, it should be done with public input and involvement, and its administration should be open to public scrutiny. There is not another way of dealing with this matter without usurping the constitutional jurisdiction of the federal government.

Role of intervenors in the environmental assessment process

We are quite concerned that both the main report and the Alberta report seem to seek restriction of the participation of intervenors in the environmental assessment process. In section 2.5.2 of the Alberta report (p.4) we note the suggestion that intervenors and government agencies that have had the opportunity to raise issues at the terms of reference development stage should be restricted in what can be subsequently raised at the hearing. We do not agree with this restriction, given the relative imbalance in resources and access to information between operators, government and the public. However, if such a restriction were adopted, it should be limited to identification of issues and should not operate to limit parties in the presentation of their positions at the hearing. It should also be kept in mind that intervenors in particular may not have access

to sufficient expertise or technical support to readily identify all relevant issues at the early stages of the process. Allowances should be made for this, and perhaps early funding for intervenors could assist in this matter.

With respect to the comments in section 2.8 of the Alberta report (p.5) on early participation of intervenors in the process, we agree with modification of intervenor funding rules to facilitate earlier involvement, but feel that such modifications should not operate to restrict access to the process at later stages by those parties who have legitimate concerns.

Other comments

We question why section 3.0 of the Alberta report outlining the provincial regulatory process for mining activities does not address the reclamation certification process. Reclamation requirements do have a significant effect on the planning and operational activities of operators, and should be mentioned in more detail than one flow chart.

May 15, 1998