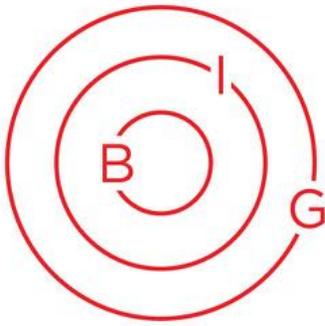




**BORDERS IN
GLOBALIZATION**





Borders in Globalization Research Project 47

The Alaska-BC Memorandum of Understanding and Cooperation: Will it Affect Transboundary Environmental Assessments?

Nicole Lee

University of Victoria

April 15, 2016

Powerpoint presentation

Supervised by Emmanuel Brunet-Jailly

This paper was prepared by Nicole Lee, a Master's of Public Administration student, for Professor Emmanuel Brunet-Jailly and the online course ADMN 590: Borders in Globalization. The purpose of this report is to identify the implications of the recent Memorandum of Understanding and Cooperation (MOU) signed between the Canadian Province of British Columbia and the State of Alaska. In particular, if the MOU will affect transboundary environmental assessment processes and the ability for cross-border public participation in those processes. This paper begins by providing a definition of environmental assessment and details the history of environmental assessment legislation, specifying which legislation applies to projects undertaken in northern British Columbia. The paper will then examine the Canada-USA environmental relationship by identifying key treaties, agreements, negotiations, and cases concerning cross-border environmental impacts. Two cases, the Lutsel K'e, Nihat'ni Program and the Tatshenshini-Alsek Controversy, will be used to highlight the importance of public participation in the environmental assessment process. The paper will conclude with an overview of the MOU and its implications on transboundary environmental assessment processes and cross-border participation and concerns in these processes. Conclusions about the implications of the MOU are based in applicable environmental assessment legislation and previous MOUs signed between Canada and the USA.

BACKGROUND

Definition of Environmental Impact Assessment

An Environmental Impact Assessment (EIA) is a process used to evaluate environmental impacts of a proposed development or project. It also takes into account beneficial and adverse socio-economic, cultural, and human-health impacts. The exact parameters, processes, and considerations for EIA vary by jurisdiction, particularly at the state/provincial and federal levels. It is important to note that EIA never require states to adopt mitigating measures and are not intended to force environmentally correct decisions. They do provide relevant information to decision makers and the public so that potential projects can be used to weigh environmental concerns with economic and social concerns (Knox, 2002). This section will provide a brief overview of the rise and development of EIA legislation; special attention will be given to public participation provisions in EIA processes. The Environmental Assessment Acts of British Columbia (BC) and Canada, also be detailed as they provide the basis for EIA that occur in Northern BC.

History of Environmental Impact Assessment Legislation

The first piece of EIA legislation came from the USA; the *National Environment Policy Act*, 1969, required the study and disclosure of effects of a project or development to be reported prior to undertaking the project. Court interpretations have determined that there is no legal substance for environmental protection contained in the NEPA; the NEPA does not describe minimum levels of environmental protection and does not require the least environmentally damaging alternative design to be chosen. Although there are no substantial legal liabilities outlined in NEPA, it provided a framework under which all interested parties were given access to the potential environmental damages of a particular project and made it difficult for decision makers to ignore the potential environmental damages a project may incur (Tweedie, 2006).

International Environmental Assessment Development. NEPA provided a template for other nations to draft their own EIA legislation. The United Nations Conference on the Human Environment that took place in Stockholm, Sweden, June 5-16 1972, also influenced domestic EIA legislation arising during this time. This conference produced the “harm principle”, or Principle 21, under the Declaration of the United Nations Conference on the Human Environment that states:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction” (UNEP, 1972).

This principle provides international recognition that domestic projects may cause transboundary environmental harm. However, it only protects against “significant” environmental damage without clearly defining what significant damages may be. Obligations of states under this principle are only of conduct, not results; states are required to exercise diligence when planning projects but are not liable for accidental transboundary environmental harm (Craik, 2008). Although a good first step, the harm principle raised questions surrounding which activities were subject to obligations of notifying neighbouring states, which agency or state officials were to be notified, the content of potential environmental harm notifications, and the amount of consultation required to produce such notifications. Effectiveness of the harm principle was lost because of lack of bodies to oversee and enforce the principle (Craik, 2008).

After NEPA in the USA and the Sweden Conference, domestic EIA legislation continued to be developed and enacted at the nation-state level. This rise of EIA globally culminated in the United Nations Environment Programme

(UNEP) adopting the general goals and principles of EIA in 1987. Relevant rules included:

- Government decision makers required to consider environmental consequences of a project before deciding whether to undertake or authorize that project
- Interested members of the public often given a chance to comment at each stage of the EIA process. Final reports of EIA made public
- Complex EIA require decision makers to take into account reasonable alternatives.
- Decision makers must provide an independent review in complex or controversial EIA to ensure all procedures are followed. (Knox 2002).

The international proclamation of UNEP to adopt EIA principles was followed by the World Bank stating, in 1989, that EIA will be required for all projects that it finances (Knox, 2002). This exemplifies the global recognition of EIA processes as a way to integrate environmental concerns with socioeconomic, cultural, and human-health impacts of project developments. In 2006, The Organisation for Economic Co-operation and Development (OECD) released *Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation*. This document came from the OECD's Development Assistance Committee (DAC), a forum where bilateral and multilateral donors work together to support sustainable development – DAC members include Canada and the USA, among others. DAC environmental development is primarily carried out through the Network on Environment and Development Co-operation (ENVIRONET) which established a Task Team on Strategic Environmental Assessment (SEA) in 2004 in response to demand for effective application of SEA in the context of development and co-operation. The *Good Practice Guidance* was the result of extensive consultation process by this task force with partner countries, individual experts, and practitioners from developing and developed countries (OECD, 2006). This document is another example of how EA can be used a means for international development and cooperation amongst

nations. It also expresses the desire for uniformity in EA processes across jurisdictions. Case studies explored in *The Guidelines* often point out the desire for increased public participation with stakeholders, however, there were no solutions or processes given to enhance these relationships or ensure weighted consideration to public opinions in EA. However, the United Nations Conference on Environment and Development (UNCED), 1992, determined that public participation in environmental protection as fundamental to the achievement of sustainability (Macrory & Turner, 2002). This dissonance in international rhetoric regarding public participation in processes with environmental concerns means that citizens must look to domestic EIA legislation in order to determine available participation procedures.

Environmental Impact Assessment in the Arctic. An interesting case in the international EA development surrounds the development of the Guidelines for Environmental Impact Assessment in the Arctic. The *Strategy for the Protection of the Arctic*, 1991, stated that management, planning, and development, which may significantly affect Arctic ecosystems, should be based in informed assessment of potential impacts on the Arctic environment. This included taking into account results of scientific investigations and traditional indigenous knowledge as well as considering the health, social, economic and cultural needs of indigenous peoples (Koivurova, 2008, p. 153). The *Strategy* expanded in 1994 and was renamed the *Guidelines for Environmental Impact Assessment in the Arctic*. The Task Force on Sustainable Development and Utilisation, established through the Rovaniemi Process, and led by Finnish Ministry of Environment with involvement from all other Arctic stakeholders developed the *Guidelines*. At the 1997 Alta Convention, a meeting of the Rovaniemi Process, a declaration recognized that the *Guidelines* be applied in the Arctic. The *Guidelines* primarily instructed nations on how to apply their own EIA processes in the Arctic, taking into consideration specific Arctic characteristics, such as its sparse population and the integration of traditional knowledge of indigenous peoples. The *Guidelines* also provided specific direction

for public participation in transboundary Arctic EIA processes. These included: a specific definition of who the “public” includes, ensuring the public is informed when projects are first proposed, considering unique cultural, socioeconomic, and remoteness factors of Arctic peoples, the ability to submit comments to a permit authority, and clear rules and procedures for organizing meetings and consultations.

After the creation of the Arctic Council, 1996, responsibility for *Guidelines* development transferred from the Rovaniemi Process Task Force to the Arctic Council’s Sustainable Development Working Group (SDWG). The *Guidelines* have failed largely due to the absence of follow-up mechanisms put into place by the SDWG. Many people, from Ministers to citizens, are unaware of the *Guidelines* existence because the SDWG did not provide and upkeep relevant information about *Guideline* use and implementation on its website. Negligence and a shift to other priorities by the SDWG allowed information of the *Guidelines* to be lost and is the reason they still go unused (Koivurova, 2008).

Environmental Assessment in Canada. The *Canadian Environmental Assessment Act (CEAA)* came into effect in 1992. This federal legislation applied to include all potential environmental effects of projects. It also included the assessment of any malfunctions or accidents that may occur. EIAs are also meant to consider public comments and feedback; section 16.1 of the CEAA, 1992, states, “Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment”. The phrasing of this section seems to indicate that the inclusion of public participation is at the discretion of whoever is conducting the EIA. This initial legislation provided information regarding transboundary environmental effects. CEAA, 1992, stated that federal authorities would carry out EA of transboundary effects and includes provisions for supplying a mediator if the neighbouring jurisdictions could not agree on a way to conduct the EA process. Transboundary considerations in the CEAA also included public participation from all jurisdictions that may be affected by the project under assessment. The CEAA, 1992, was reviewed in 2002 and

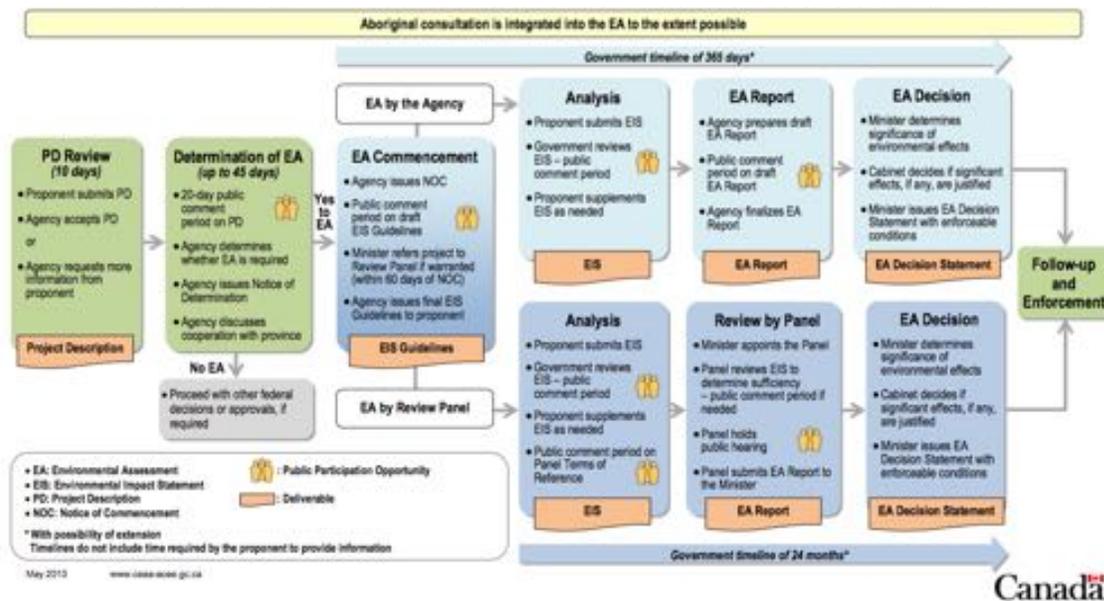
replaced in 2012. For the remainder of this report CEAA will refer to the *Canadian Environmental Assessment Act, 2012*. This new act also operates at the federal level and operates within federal jurisdiction. CEAA applies to potential environmental effects that may impact: fish and fish habitat, other aquatic species, migratory birds, federal lands. It also applies to effects that: cross provincial or international boundaries; impact Aboriginal peoples including their use of lands and resources for traditional purposes. Projects in Northern BC that began prior to 2012 will conduct their EA under the 1992 legislation; all new EA will be conducted under the 2012 legislation. Current projects undergoing environmental assessment in Northern BC, and the year their EA processes began, include:

- Kutcho Copper Zinc Silver Gold Mine Project, Dease Lake, 2007
- Schaft Creek Mine Project, 2010
- Arctos Anthracite Project, 2013
- Red Mountain Gold Mine Project, 2015.

Both the Dease Lake and Schaft Creek projects continued their EA under the 1992 legislation; the Schaft Creek Mine Project proposal was withdrawn on March 23, 2016, due to issues about tailings pond management and greenhouse gas emissions (Yau, 2016). As per the *Memorandum of Understanding between Canadian Environmental Agency and the B.C. Environmental Assessment Office on the Substitution of Environmental Assessments, 2013*, The Arctos Anthracite Project is currently being assessed by the province of BC, rather than by the federal government, even though it may have effects that fall within federal jurisdiction. Under this *Memorandum*, the report from BC will be provided to federal agencies then made available for the public. Throughout the EA process the *Memorandum* states that the public will be given a chance to participate and will also be given access to relevant records to ensure meaningful participation. It also includes specific requirements for Indigenous consultation; funding will be provided to support indigenous consultation during the EA process. As the project submitted most recently, and closest to the Alaskan border, the Red

Mountain Gold Mine Project will be assessed under the federal CEAA. The EA process, when managed by the Canadian Environmental Assessment Agency, is detailed in *Figure 1*.

Figure 1: Canadian Environmental Assessment Agency EA Process



Retrieved from: Canadian Environmental Assessment Agency, 2013

CEAA legislation names the Canadian Environmental Assessment Agency (The Agency) as the authority responsible for conducting the majority of federal EA. (The Canadian Nuclear Safety Commission conducts EA for nuclear projects; The National Energy Board conducts EA for international and interprovincial pipelines and transmission lines). The Agency is required to create review panels composed of experts with the knowledge required to assess the designated project; provisions are in place to create joint review panels when EA effects cross interprovincial boundaries, although there is no mention of creating joint international panels. The Agency is also required to fund and host public hearings such that interested parties directly affected by the proposed project or have relevant information are given the opportunity to participate. The EA team must consider written comments from the public and provide a written summary of all comments received. The Agency submits all EA reports to the Minister of Environment for final decisions. (CEAA, 2015)

The *BC Environmental Assessment Act (EAA)* was first introduced in 1994. It was updated in 2002 to make it “more flexible” by reducing regulations and giving more decision-making alternatives to the BC Minister of the Environment and the Executive Director of the BC Environmental Assessment Office (Haddock, 2010). The BC EAA, 2002, applies to projects that may have significant adverse environmental, economic, social, heritage, or health effects and takes into account practical means of reducing the project to acceptable levels of adverse effects. It includes provisions for informing the public, indigenous peoples, government agencies, and neighbouring jurisdictions (if necessary) of the EA process, information about the EA, and give opportunities to provide comments. However, the changes to the BC EAA eliminated provisions requiring local governments and First Nations to sit on project committees, and provisions for the inclusion of other stakeholders on public advisory committees; the project committees and public advisory committees of the 1994 BC EAA were eliminated entirely and replaced by a working group, diminishing the public role in the EA process. First Nations critiques of the 2002 BC EAA include: the use of timelines that are inconsistent with First Nations processes, the inability of the process to meaningfully consider First Nations values, and unsatisfactory funding mechanisms and sufficient levels of funding to engage Indigenous peoples in meaningful participation (Haddock, 2010). The BC EAA currently only applies to the Arctos Anthracite Project, as all projects with the potential for international effects automatically fall into federal jurisdiction. However, future Memorandums of Understanding may be enacted that shift the responsibility of EA to provincial officials. Understanding the legislation is the first step to determining how public participation can influence an EA.

History of Canada-USA Environmental Relations

Canada and the USA have a long history when it comes to environmental relations. This section will examine the laws and regulations surrounding these relations and will highlight crucial cases that this international environmental relationship is built on.

Boundary Waters Treaty, 1909. The first bilateral approach to environmental protection between Canada and the USA was the Boundary Waters Treaty, signed in 1909 and enacted by the *International Boundary Waters Treaty Act* in Canada. The Treaty was meant to prevent and resolve disputes over boundary waters: surface waters along the international border, excluding upstream tributaries (Preliminary Article, Boundary Waters Treaty, 1909). The Treaty also created the International Joint Commission (IJC) to deal with disputes and approve projects dealing with creating obstructions or diversions that will affect boundary waters. The Treaty states that the IJC will be composed of six commissioners, three from both Canada and the USA and it shall have jurisdiction upon all cases involving the use or obstruction, or diversion of boundary waters. Within Article IV of the Treaty it is “agreed that the waters defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other” (Boundary Waters Treaty, 1909). The IJC is still operational and maintains its authority to issue orders of approval over projects that may affect the natural level of boundary waters, as per the Treaty. It also studies and recommends solutions to transboundary water issues that have been referred to them by either national government (IJC, 2016). The IJC outlines its main activities as: regulating shared water uses, improving water quality, improving air quality (as per the Canada-United States Air Quality Agreement, 1991), and investigating issues and recommending solutions (IJC, 2016). The IJC has the power to make recommendations they are non-binding, although either the Canadian or US governments usually accept them.

Trail Smelter Case, 1927-1941. This case revolves around air-pollution caused by a smelter in Trail, BC. Smoke from the smelter, which processed lead and zinc, caused damage to forests and crops in its surrounding area in BC and across the border in the state of Washington, USA. In 1927, residents brought complaints to the company that owned the smelter. Disputes between smelter operators and landowners were sent to arbitration after years of unsuccessful

bargaining. International law principles were applied during the arbitration. The case was settled in 1941 with Canada having to pay \$350 000 in damages prior to 1932 and \$78 000 for damages from 1932-1937 (McAree & Vin, 2013). This case demonstrated that transboundary public grievances are valid and could be upheld using international law. In later cases both Canadian and American laws are used to hold cross-border companies accountable for their transboundary environmental damages.

Columbia River Treaty, 1964. The Columbia River Treaty exemplified cooperation between Canada and the USA for mutual benefit. The Treaty allowed for the building of four dams, three in Canada and one in the USA, to harness hydroelectric power. Agreements in the Treaty include sharing the benefits, power and financial, bilaterally (Alper, 1997). This Treaty demonstrates the ability of Canada and the USA to work together to equally benefit from an environmental resource.

Skagit/Ross Dam, 1983. The High Ross Dam, on the Skagit River, was built as part of the Skagit River Hydroelectric Project's fourth phase and caused the Ross Lake Reservoir to extend across the Canada-USA international border between Washington State and BC. Environmental controversy over the High Ross Dam first began in 1969, when environmental preservationists on both sides of the border fought to get BC to withdraw its flood compensation agreement with the US, agreed upon in 1967, and transform the dam into boundary waters dispute. The negotiated resolution came about in 1983 with the *British Columbia-Seattle Agreement* and the *Skagit River Treaty*, which established the basis for long-term political and economic interactions between BC and the city of Seattle, Washington (Krolopp Kirn, 1987; Alper, 1997). This was the first time in the history of Canada-US environmental relations that saw an emergence of subnational actors and non-government organizations (NGOs) – such as cities, states, and provinces – as the principal actors in transboundary environmental dispute.

Domestic Liabilities. There has been no shortage of disputes throughout the history of Canada-US environmental relations. In the absence of binding international or bilateral resolution processes, citizens have gone to their domestic legislation to hold cross-boundary companies liable for adverse environmental effects. *Figure 2* two notable disputes that with cross-border liabilities.

Figure 2: Cross-boundary Environmental Liability Cases

| Environmental Offender, Country of Origin | Country Affected | Legislation Applied | Results |
|---|---|---|--|
| Teck Cominco Metals, Ltd. Canada | United States Hazardous smelter dischargers were affecting the Columbia River and Lake Roosevelt | US Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Canadian Fisheries Act | Court determined it had jurisdiction over Teck Cominco; Teck Cominco found violated arrangements for disposal of hazardous substances. Found liable for response costs under U.S. law 7: Liable under Canadian Fisheries Act |
| DTE Energy Co United States | Canada Mercury emissions originating in the USA were harming fish in Canadian waters | Federal Fisheries Act | After summons to the Ontario Superior Court and charges, DTE agreed to address mercury emissions Charges were withdrawn |

Adapted from: McAree & Vin, 2013

These cases have implications for development projects that may cause environmental harm; companies not only have to understand the domestic legislation that applies to their project but also the legislation of neighbouring jurisdictions that may apply should adverse harm occur. In turn, this gives members of the neighbouring jurisdiction's public another avenue to assert their claims to environmental protection. Relying on domestic federal and state/provincial legislation to enforce environmental protection is unrealistic, as

these processes are all reactive; companies are only held liable in these cases after the environmental harm has occurred.

North American Free Trade Agreement (NAFTA). When NAFTA was signed by Canada, the USA, and Mexico in 1994 it included the North American Agreement on Environmental Protection (NAAEC). The NAAEC established the Commission on Environmental Cooperation (CEC) to oversee its implementation. The CEC describes itself as a forum for the discussion of environmental matters within the scope of the NAAEC. It includes that the CEC meets at least once a year, which includes public meetings, to set overall its overall direction. It also assigns responsibilities to committees, working groups, or expert groups to fulfill its mandate (CEC, 2016). The NAAEC includes procedures for implementing transboundary EIA for projects that may have transboundary environmental harms; the CEC gives no indication of pursuing the enforcement of this part of the NAAEC (Tweedie, 2006). In fact, many domestic environmental statutes and policies are challenged by cross-border companies as impediments to net incomes/damaging the income of a company (McAree & Vin, 2013). In this regard, NAFTA has put environmental protection and economic growth at odds with each other all within the same agreement. As long as the CEC continues to avoid enforcing transboundary EIAs, NAFTA will remain an agreement to enforce economic freedoms and growth over environmental protection.

Province of BC-Washington State Relations. The relationship between the province of BC and the state of Washington largely occurred on the national stage until the signing of the *Environmental Cooperation Agreement (ECA)* between the Governor of Washington State and Premier of BC on May 7, 1992. The purpose of this agreement was to coordinate action and information sharing on environmental matters of mutual concern between the two jurisdictions (Environmental Cooperation Agreement, 1992). The BC/Washington Environmental Cooperation Council (ECC) was established to guarantee the implementation of the ECA; the council directs the work of its task forces to achieve the goals of the ECA. The Director of the Washington Department of

Ecology and Deputy Minister of the BC Ministry of Environment, Lands, and Parks chair the ECC; its working groups/task forces include individuals from environmental NGOs, Indigenous tribes, local governments, industry, and other stakeholders. The ECC, although good at bringing together key environmental actors to share information and investigate critical issues, illustrates the difficulty of binational problem solving: it has no authority to develop or execute binational management plans, has no sovereignty, has little political constituency, and is not directly linked to the internal budget of any agency (Alper, 1997, p. 377). Memorandum of Understandings (MOU) between the Washington State Department of Ecology and British Columbia Ministry of Environment, Lands, and Parks were signed in 1996 and 2002. The most recent MOU, 2002, identifies the mutual agreement to: understand the major EA laws, policies, and processes of each jurisdiction, notify the neighbouring jurisdiction of major projects that may have transboundary effects, provide information of the domestic EA report to the neighbouring jurisdiction, consider comments received from the neighbouring jurisdiction about potential effects of the project, and support coordination and consistency between the involved jurisdictions (MOU between Washington State and BC, 2002). This MOU is another example of non-binding procedures meant to provide bilateral cooperation in conducting and evaluating EA on major projects. The terms and results of this MOU may be the best source to predict the outcomes of the recent MOU between the Province of BC and the State of Alaska.

PUBLIC INFLUENCE

Public involvement is identified by Bruch and colleagues, 2007, as one of the major factors that can effect the outcomes of environmental assessments. The following two cases demonstrate the influence that the public can have when they become involved in the EA process. The Tatshenshini-Alsek case in particular identifies the power of public participation and alliance to impact environmental decisions.

Lutsel K'e, Nihat'ni Program

Mineral development in the Canadian north raises many issues for Indigenous communities whose traditional territories may be affected by ecological changes these developments incur. When Slave Geological Province proposed opening a diamond mine in the traditional territory of the Lutsel K'e First Nation locals sought a way to play a role in addressing the environmental concerns that may arise from such a project. As the proposed project would have direct effects on Indigenous peoples, the federal CEAA was applied to assess the project. The Nihat'ni monitoring program was launched in 2002 as a community-monitoring group that uses traditional ecological knowledge (TEK). TEK is used to gather information about the environmental effects of development and reports it in a way that is culturally significant for the Lutsel K'e people. Participants who are a part of Nihat'ni gather TEK while engaged in traditional land use activities. For example, hunters observe fat deposits, bone marrow, and fetal development of harvested caribou. Through discussions with elders and comparisons to observations, they make conclusions about the health of caribou in the region. TEK allows for information sharing that is based on a holistic understanding of quality of life. However, it is difficult for groups to establish credibility and legitimacy for their work to be taken seriously in the EA process; TEK are deemed to be not as rigorous and replicable as favoured scientific methods and are therefore less likely to be considered. Lack of funding for Nihat'ni requires it to rely on volunteers to gather information (Hunsberger, Gibson, Wismer, 2005). Community monitoring programs demonstrate that there is a desire from the public to meaningfully participate in the EA process to understand how development projects may impact their way of life and the environment surrounding them. However, current EA processes put pressure on citizens to conform to non-local agendas and consider non-meaningful ways of collecting information. These community groups are given strength through their ability to mobilize public support under a common agenda to voice their concerns about proposed projects.

Tatshenshini-Alsek Controversy

The Windy Craggy Mountain is located in northern BC and is surrounded by Canadian and US national parks: Kluane National Park, Wrangell-St Elias and Glacier Bay National Parks, and the Tongass National Forest. It provides the mountain watershed for Tats Creek, which is upstream from the Tatshenshini River that joins the Alsek River and flows to the Pacific Ocean. This water system supports a bald eagle preserve and the region's high-density grizzly bear population, amongst other diverse ecosystems. It is also home to the indigenous Yakutat peoples and Champagne-Aishihik First Nations. After ore deposits were found in the mountain, a copper mine development came under review in 1988. The key events surrounding this controversy are outlined in *Figure 3*.

Figure 3: Timeline of Tatshenshini-Alsek Controversy

| Year | Major Events |
|------|---|
| 1988 | Copper mine proposal Strong opposition to mine centered on concern of ore contaminants entering the river system |
| 1989 | Formation of Tatshenshini International: an international coalition of North American Environmentalists from over 50 environmental organizations in Canada and the US, membership of over 10 million people to fight the project. Indigenous groups ally with Tatshenshini International Tatshenshini International submits proposal to make Tatshenshini, including Windy Craggy Mountain, a wilderness preserve |
| 1990 | Mine application rejected by BC and Canadian governments Revised mine proposals rejected by Alaska and US federal authorities |
| 1992 | BC government put issue to land-use planning commission, Commission on Resources and Environment (CORE) |
| 1993 | CORE final report stated that mining and wilderness preserves in Tatshenshini were incompatible BC premier, Harcourt, expressed intention to create Tatshenshini-Alsek Wilderness park, effectively killing the mine proposal Application from BC and US governments for Tatshenshini area to gain world heritage status |
| 1994 | United Nations grants heritage site status to Tatshenshini-Alsek Wilderness Park |

Adapted from: Alper, 1997

The Tatshenshini-Alsek controversy demonstrates the power of NGOs and public awareness campaigns to bring environmental issues. This case was able to gain high profile status that drew the attention of the World Conservation Union and the United Nations Education, Scientific, and Cultural Organization (UNESCO);

extensive public participation brought this issue to the attention of political leaders and was the key influence in prompting the BC premier to create Tatshenshini-Asek Wilderness park and kill the mine proposal. Although it is unlikely that every project will occur in such a high-profile context, this case shows that public concerns about environmental projects are most effective when voiced in unison, supporting individual's collective concerns.

MEMORANDUM OF UNDERSTANDING AND COOPERATION BETWEEN THE STATE OF ALASKA AND THE PROVINCE OF BRITISH COLUMBIA

“British Columbia and Alaska share a lot of common interests that transcend borders, and a long history of working together. This MOU provides for more collaboration and cooperation to ensure the protection, conservation, and enhancement of our shared environment – and a better future for people on both sides of our border”

- BC Premier Christy Clark, November 25, 2015

The final section of this paper will provide an overview of the recently signed MOU between BC and Alaska. It will also discuss the implications of the MOU by drawing on current legislation governing the EA process, the historic environmental relationship between Canada and the USA, and the outcomes of the MOU between BC and Washington State.

Summary of BC-Alaska MOU

The MOU between BC and Alaska was signed by Premier Christy Clark and State Governor Bill Walker on November 25, 2015. It seeks to strengthen cross-border partnerships in many areas of common interest, particularly mining and environmental matters. It also formalizes the mutual commitment to protect and enhance the shared environment (e.g., transboundary rivers, watersheds, and fisheries) and greater involvement and collaboration in proposed major mine development.

A major commitment in the MOU is to establish a bilateral working group on the protection of transboundary waters. This group will work to develop and

implement a joint water quality monitoring program and ensure this information is publicly available. The MOU adds that it will build upon existing collaboration on mining and other development projects that affect transboundary waters and watersheds. This working group proposes to create opportunities to institute a framework that allows government representatives and scientists to be involved in each jurisdiction's EA processes; it proposes to create procedures so that interested Tribes, First Nations, and stakeholders can access information on the EA processes and meaningfully participate in providing input. The bilateral working group will be overseen and chaired by the State of Alaska's Lieutenant Governor and BC's Minister of Environment and the Minister of Energy and Mines.

Implications of the Alaska-BC MOU

The MOU recognizes that projects with transboundary effects are subject to the local state/provincial and federal EA processes of their respective countries. However, this does not mean that projects will not be subjected to environmental laws of neighbouring jurisdictions should environmental damages occur. Projects occurring on each side of the international border should take into account neighbouring laws.

Canada-US environmental relations are increasingly occurring on smaller scales. The MOU is a continuation of this trend towards the rising importance of regional actors; it recognizes the special relationship and intricacies that are involved with the particular relationship between BC and Alaska. The bilateral working group the MOU hopes to establish will drive the implementation of MOU actions. The BC-Washington State ECC is the best predictor for what an Alaska-BC working group will look like. This ECC has established task forces to illustrate and coordinate bilateral efforts on transboundary environmental issues. Some of these task forces include: Abbotsford-Sumas Aquifer, Flooding of the Nooksack River, and the BC-Washington Coastal and Ocean Task Force. The BC-Alaska MOU does not identify specific areas of consideration for its bilateral working group on protection of transboundary waters; this working group is likely to

involve international professionals, government, industry, and public stakeholders to determine priorities areas for protection. The BC-Washington ECC task forces publish reports on their findings relating to each area of interest. Similar reports and updates can be expected from the Alaska-BC working group.

CONCLUSION

Environmental impact assessment has come a long way since its first legislation in 1969, spreading across the globe and gaining international recognition. Although there are agreed upon guidelines to conducting EA processes, the particulars are ultimately left up to the domestic governing body to determine how their EA will be conducted. This has left a gap in the procedures for EA that may have transboundary environmental effects. Especially in the environmental relationship between Canada and the USA, conflicts over environmental impacts, EA processes, and public participation inclusion have caused domestic laws to be extended across the border and applied to companies that cause cross-border environmental harm. Since the Boundary Waters Treaty of 1909, attempts have been made to establish bilateral associations to coordinate the environmental endeavors on both sides of the border. The Alaska-BC MOU aims to create one such group to deal with its specific region. Like other environmental associations that have come before it, this new working group will be able to create a forum to bring relevant stakeholders together. However, none of the group's decisions will be legally binding or carry any real political weight.

REFERENCES

- Alper, D.K. (1997). Transboundary Environmental Relations in British Columbia and the Pacific Northwest. *American Review of Canadian Studies*, 27(3), 359-383. Retrieved from:
<http://www.tandfonline.com/doi/abs/10.1080/02722019709481555>
- Boundary Waters Treaty. (1909). Retrieved from International Joint Commission website:
http://ijc.org/files/tiny/mce/uploaded/Boundary%20Waters%20Treaty%20of%201909_3.pdf
- Bruch, C., Nakayama, M., Troell, J., Goldman, L., Mrema, E.M. (2007). Assessing the Assessments: Improving Methodologies for Impact Assessment in Transboundary Watercourses. *International Journal of Water Resources Development*, 23(3), 391-410. Retrieved from:
<http://www.tandfonline.com/doi/abs/10.1080/07900620701400161>
- Canadian Environmental Assessment Act. (1992). Retrieved from Canadian Environmental Impact Assessment Agency Website: https://www.ceaa-acee.gc.ca/9EC7CAD2-882E-4BB7-8A6F-23AB52B93683/C-15_2.pdf
- Canadian Environmental Assessment Agency. (2016). Arctos Anthracite Project. Retrieved from: <https://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=80040>
- Canadian Environmental Assessment Agency. (2016). *Kutcho Copper Zinc Silver Gold Mine Project, Dease Lake*. Retrieved from: <https://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=36352>
- Canadian Environmental Assessment Agency. (2016). *Schaft Creek Mine Project*. Retrieved from: <https://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=57852>
- Canadian Environmental Assessment Agency. (2016). *Red Mountain Gold Mine Project*. Retrieved from: <https://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=80093>

- Canadian Environmental Assessment Agency. (2015, November 25). *Overview Canadian Environmental Assessment Act, 2012*. Government of Canada. Retrieved from: <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=16254939-1>
- Canadian Environmental Assessment Agency. (2013). *Environmental Assessment Process*. Retrieved from: https://www.ceaa-acee.gc.ca/Content/1/6/2/16254939-1C3C-48A4-B99D-77E34A5DF1EE/EA_processes-Processus.pdf
- Choudhury, E., Islam, S. (2015). Nature of Transboundary Water Conflicts: Issues of Complexity and Enabling Conditions for Negotiated Cooperation. *Journal of Contemporary Water Research and Education*, 155, 43-52.
- Commission For Environmental Cooperation. (2016). *About Us: Council*. Retrieved from: <http://www.cec.org/about-us/council>
- Craik, N. (2008). Transboundary Environmental Impact Assessment in North America: Obstacles and Opportunities. In K. Bastmeijer & T. Koivurova (eds.) *Theory and Practice of Transboundary Environmental Impact Assessment*, 93-118. Boston, MA: Martinus Nijhoff Publishers
- Declaration of the United Nations Conference on the Human Environment. (1972, June 16). *Chapter 11*. Retrieved from United Nations Environment Programme website: <http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>
- Environmental Assessment Act. (2002). Retrieved from Government of British Columbia Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02_043_01
- Environmental Cooperation Agreement between the Province of British Columbia and The State of Washington (1992). Retrieved from the Government of British Columbia website: <http://www.env.gov.bc.ca/spd/ecc/docs/bcwaccord.pdf>

Government of British Columbia. (2015, November 25). *MOU strengthens Alaska and B.C. commitment to protect shared environment*. Victoria, BC.

Retrieved from: <https://news.gov.bc.ca/releases/2015MEM0027-001963>

Haddock, M. (2010). Current issues in environmental assessment in British Columbia. *Journal of Environmental Law and Practice*, 21, 221-245.

Hunsberger, C.A., Gibson, R.B., Wismer, S.K. (2005). Citizen involvement in sustainability-centred environmental assessment follow-up.

Environmental Impact Assessment Review, 25(6), 609-627.

International Joint Commission. (2016). *Role of the Commission*. Retrieved from:

http://www.ijc.org/en/Role_of_the_Commission

Knox, J.H. (2002). The myth and reality of transboundary environmental impact assessment. *The American Journal of International Law*, 96(2), 291-319.

Koivurova, T. (2008). Implementing Guidelines for Environmental Impact Assessment in the Arctic. In K. Bastmeijer & T. Koivurova (eds.) *Theory and Practice of Transboundary Environmental Impact Assessment*, 151-174.

Boston, MA: Martinus Nijhoff Publishers

Krolopp Kirn, J. (1987). *The Skagit River-High Ross Dam Controversy: A case study of a Canada-U.S. transboundary conflict and negotiated resolution*.

(Unpublished Master of Arts dissertation). University of Washington, Washington, USA. Retrieved from:

http://skagiteec.org/skagit-research-library/sp-files/sec-1987-4.pdf/at_download/file

Langshaw, A. (2012). Giving substance to form: Moving towards an integrated governance model of transboundary environmental impact assessment. *Nordic Journal of International Law*, 81, 21-38.

Macrory, R., Turner, S. (2002). Cross-border environmental governance: the EC law Dimensions. *Regional and Federal Studies*, 12(4), 59-87. Retrieved from: <http://www.tandfonline.com/doi/abs/10.1080/714004778>

McAree, M., Vin, J. (2013). Cross-border United States and Canada environmental litigation. *The Brief*, 42(2), 56-60.

McMartin, P., Morton, B. (2013, October 29). *Physician offers perspective on coal; Cross-border" U.S. doctor shares his concerns for our health - and our assessment process.* Vancouver Sun.

Memorandum of Understanding and Cooperation between the Washington State Department of Ecology and The British Columbia Environmental Assessment Office. (2003). Retrieved from Government of British Columbia website: http://www.eao.gov.bc.ca/pdf/MOU_BC-Washington_20031107.pdf

Ministry of the Environment. (2016). *British Columbia/Washington Environmental Cooperation Council.* Retrieved from: <http://www.env.gov.bc.ca/spd/ecc/>

Organisation for Economic Co-operation and Development. (2006). *Applying Strategic Environmental Assessment: Good practice guidelines for development co-operation.* Danvers, Massachusetts: OECD publishing. Retrieved from:

<http://www.oecd.org/environment/environment-development/37353858.pdf>

Tweedie, J. (2006). Transboundary Environmental impact assessment under the North American Free Trade Agreement. *Washington and Lee law Review*, 63(2), 849-910.

Yau, W. (2016, March 22). *Environmental Assessment of Schaft Creek Project.*

Letter to Shelley Murphy. N.d. Retrieved from:

http://a100.gov.bc.ca/appsdata/epic/documents/p283/d40181/1458764518494_nQvQWy5GGpWShBPytkrTjGXcSL8LI74fJmn2DTTB2DHQDhcZ1pNT!1047433189!1458764228731.pdf



University
of Victoria

Public
Administration

The Alaska-BC Memorandum of Understanding and Cooperation: Will it work?

Nicole Lee

Borders in the North Summer Institute

June 22, 2016



Overview

- Background
 - What is an Environmental Assessment?
 - Canadian Federal and BC Provincial Environmental Assessment Legislation
 - Canada-USA Environmental Relations
- Importance of Public Participation
- The current MOU & its implications

What is Environmental Assessment?

- Evaluates environmental impacts of a proposed development or project
- Allows decision makers to weigh environmental effects with economic and social concerns (not instead of)
- Informative, non-binding

Rise of Environmental Assessment

- 1969: *National Environment Policy Act* (USA)
- 1972: UN Conference on the Human Environment, Stockholm, Sweden

Principle 21, The “Harm Principle”

- *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction” (UNEP, 1972).*

Rise of Environmental Assessment

- 1969 - *National Environment Policy Act (USA)*
- 1972 - UN Conference on the Human Environment, Stockholm, Sweden
- 1987 - UN Environment Programme adopts the general goals and principles of Environmental Impact Assessment
- 1989 - World Bank requires all projects it finances to undertake EIA
- 1992 - UN Conference on Environment and Development
- 2006 - OECD: *Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation.*

Arctic Environmental Assessment



Environmental Assessment

- Canadian Environmental Assessment Act, 2012
 - Canadian Environmental Assessment Agency
- BC Environmental Assessment Act, 2002
- *Memorandum of Understanding between Canadian Environmental Agency and B.C. Environmental Assessment Office on the Substitution of Environmental Assessments, 2013*

Canada-US Environmental Relations

- Boundary Waters Treaty, 1909
 - International Joint Commission (IJC)



Canada-US Environmental Relations

- Trail Smelter Case, 1927-1941



Canada-US Environmental Relations

- Skagit River-Ross Dam, 1983



Canada-US Environmental Relations

- Domestic Liabilities

| Environmental Offender, Country of Origin | Country Affected | Legislation Applied | Results |
|---|---|---|--|
| Teck Cominco Metals, Ltd. Canada | United States Hazardous smelter dischargers were affecting the Columbia River and Lake Roosevelt | US Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Canadian Fisheries Act | Court determined it had jurisdiction over Teck Cominco; Teck Cominco found violated arrangements for disposal of hazardous substances. Found liable for response costs under U.S. law 7: Liable under Canadian Fisheries Act |
| DTE Energy Co United States | Canada Mercury emissions originating in the USA were harming fish in Canadian waters | Federal Fisheries Act | After summons to the Ontario Superior Court and charges, DTE agreed to address mercury emissions Charges were withdrawn |

Canada-US Environmental Relations

- Province of BC-Washington State



Importance of Public Influence: Two Key Cases

- Lutsel K'e, Nihat'ni Program



Importance of Public Influence: Two Key Cases

- Tatshenshini-Alsek Controversy

| Year | Major Events |
|------|---|
| 1988 | Copper mine proposal Strong opposition to mine centered on concern of ore contaminants entering the river system |
| 1989 | Formation of Tatshenshini International: an international coalition of North American Environmentalists from over 50 environmental organizations in Canada and the US, membership of over 10 million people to fight the project. Indigenous groups ally with Tatshenshini International Tatshenshini International submits proposal to make Tatshenshini, including Windy Craggy Mountain, a wilderness preserve |
| 1990 | Mine application rejected by BC and Canadian governments Revised mine proposals rejected by Alaska and US federal authorities |
| 1992 | BC government put issue to land-use planning commission, Commission on Resources and Environment (CORE) |
| 1993 | CORE final report stated that mining and wilderness preserves in from BC and US governments for Tatshenshini area to gain world heritage status |
| 1994 | United Nations grants heritage site status to Tatshenshini-Alsek Wilderness Park |

Alaska-BC MOU

“British Columbia and Alaska share a lot of common interests that transcend borders, and a long history of working together. This MOU provides for more collaboration and cooperation to ensure the protection, conservation, and enhancement of our shared environment – and a better future for people on both sides of our border”

- BC Premier Christy Clark, November 25, 2015

Conclusions

- Canadian Federal and Provincial EA processes still apply
- Non-binding
- Transboundary Waters Working Group
 - Forums for discussion
 - Brings Stakeholders together
 - No Political Power