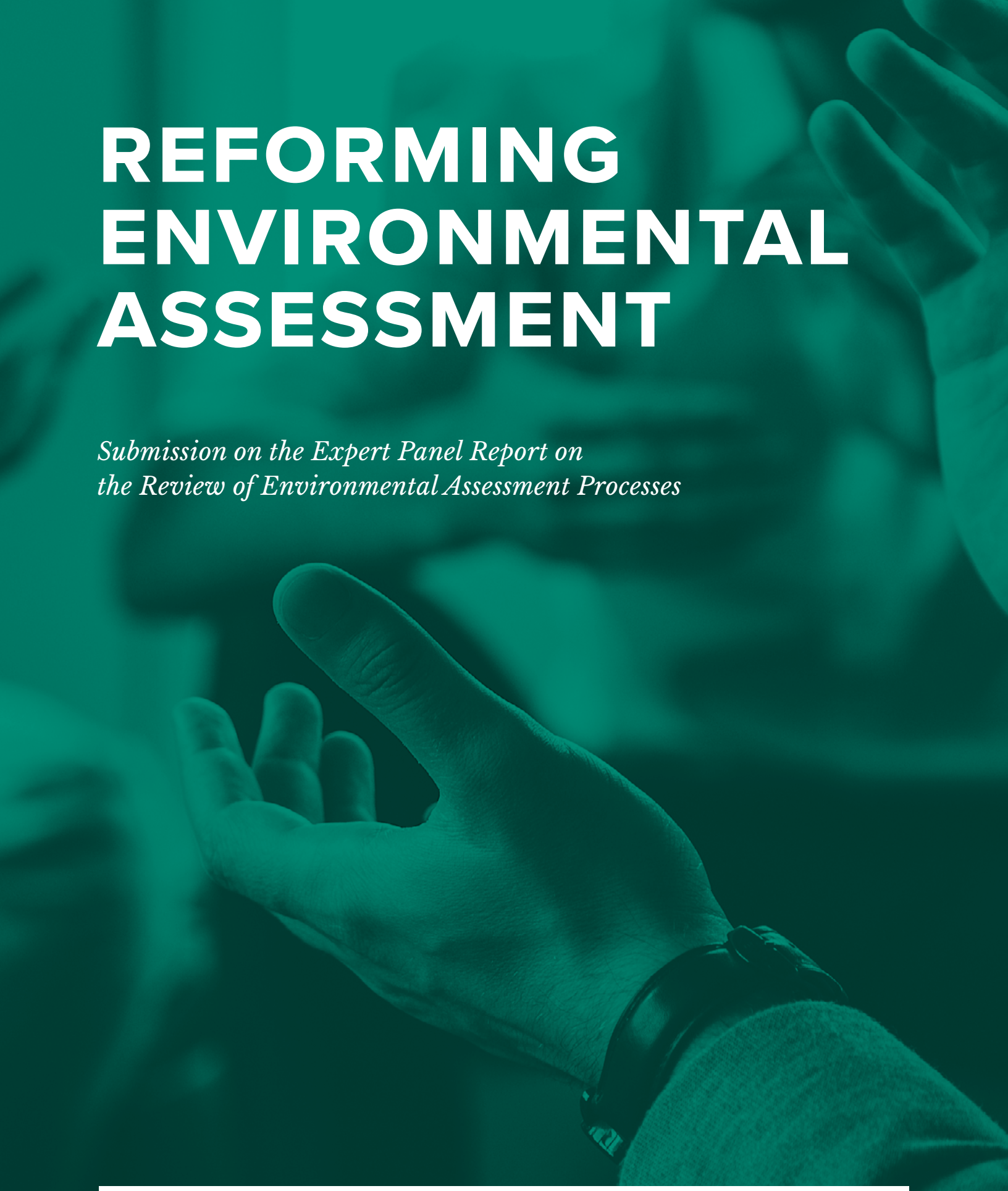

REFORMING ENVIRONMENTAL ASSESSMENT

Submission on the Expert Panel Report on the Review of Environmental Assessment Processes

CANADAWEST FOUNDATION
cwf.ca

MAY 2017
NICK MARTIN

SUBMISSON *on the* ENVIRONMENTAL ASSESSMENT EXPERT PANEL REPORT

The Canada West Foundation submits the following comments to the Expert Panel ("Panel") on its report *Building Common Ground: A New Vision for Impact Assessment in Canada*. The Canada West Foundation is an evidence-based, non-partisan think tank based in Calgary, Alberta.

We appreciate the opportunity to provide input on efforts to reform federal project approval processes. In addition to the Expert Panel on federal environmental assessment processes, a similar effort is underway with the National Energy Board ("NEB") Modernization Expert Panel. Both look at how the government evaluates major project proposals, and the federal government will need to consider the recommendations of each panel jointly. In April, we published our recommendations for reforming the NEB in *Up Front: Modernizing the National Energy Board*. Many of the recommendations made in our report apply to environmental assessment reform.

The Panel's recommendations represent a dramatic shift away from the current environmental assessment regime. In many ways, the Panel accurately identifies some of the deficiencies hampering the current process. For example, the Panel understands that litigating broad policy issues such as climate change and the need for new infrastructure for each project proposal is inefficient and should be avoided. The Panel also understands that decisions on basic principles – especially on the issues cited above – need to be made before significant investments are committed by project investors.

Any environmental assessment reform needs to address these problems. But in this effort, we must also ensure that the process contributes to a competitive investment climate in Canada. Investors will be hesitant to dedicate their capital if Canada's approval processes are uncertain. An ideal approval process would address major points of uncertainty upfront before significant investments are made.

Unfortunately, many of the Panel's recommendations do the opposite. First, the Panel's proposal infuses uncertainty throughout the process by placing value-based judgements into the hands of arm's-length regulators and delaying political involvement to late in the assessment process. Second, the Panel's focus on achieving consensus, while important, fails to articulate an efficient process for moving forward when consensus cannot be found. Finally, the Panel's proposal raises concerns regarding federal jurisdiction, which would only inject more uncertainty into the process by increasing the probability of long drawn-out litigation.

Holding political uncertainty until the end

The Panel recommends that a newly created Impact Assessment Commission ("Commission") approve projects based on the five pillars of sustainability – environment, economy, social, culture, and health – with final decisions appealable to the federal cabinet. This appeal process represents the only opportunity for political input in the Panel's proposal, and it comes at the end of the entire assessment process.

Holding political input to the very end will only perpetuate many of the problems of the current regime, especially when the proposed process would have regulators making judgements on broad valued-based policy issues. With a federal cabinet decision at the end, political uncertainty will shroud the entire assessment process – something that should be avoided when encouraging a competitive investment environment.

The problem occurs because arm's-length regulators lack direct democratic accountability, therefore reducing the legitimacy of decisions made on broad value-based policy issues. Legitimacy can be achieved if regulators make decisions aligned with the politics of the day, but if the regulators make decisions that run counter to political realities or the political disposition of the government changes to one with different views and values, politicians can then step in at the end and reverse

decisions after significant time and money has already been invested. These situations need to be avoided. Arm's-length regulators should not be making the larger public policy decisions – elected officials should. The Panel recognizes this and argues that the late-in-the-game appeal to the federal government solves this problem; however, this is terrible for decision efficiency and certainty of process. Elected officials should be making the major public policy decisions early in the assessment process so investments can be made (or not made) with confidence.

In *Up Front*, we recommend the NEB's approval process consist of a two-part review where the federal government makes an early, high-level political decision about whether a project should proceed. The same applies to environmental assessments. A two-part process would take value-based judgements out of the hands of regulators entirely and allow elected officials to make the decisions prior to a more technical review of proposed projects.

Many of the Panel's recommendations will be improved with an up-front political framework decided in advance.

Regional and strategic impact assessment could directly inform the federal government. We support the Panel's intentions behind incorporating broader policy issues and impacts into the assessment process through these assessments. The Panel envisioned these assessments feeding into and informing project assessments. We agree that these broader policy issues and impacts should be incorporated into an overall project approval process, but these issues are political and should be made by elected officials. Regional and strategic impact assessments would be valuable informational tools for the federal government as it weighs the pros and cons of project proposals. However, more attention will need to be paid to federal jurisdictional issues affecting how these decisions are made.

We also support the Panel's intentions behind adding an additional "planning phase." The planning phase would begin the process earlier to address significant issues before plans have been set into place. We agree that the assessment process should begin earlier, but it should also be structured with an overarching objective of reducing uncertainty as the process progresses. A planning phase, which would lack technical granularity and would focus on big picture issues, would be the optimal time for the federal government to have a say on the policy implications of a proposed project. Any additional phases, however, need to be structured to avoid unnecessarily increasing the time it takes to move projects through the regulatory process.

When consensus cannot be found

In addition to the uncertainty of a delayed political decision, the Panel's recommendations lack clarity on addressing issues where consensus cannot be achieved. Consensus building is a key theme of the Panel's report, and it should always be a central objective of any decision-making process. However, consensus building is predicated on all parties negotiating in good faith, and in today's political climate, this may not be a likely scenario. Even acting in good faith, consensus may not always be possible.

We urge that any reforms keep this reality in mind by ensuring mechanisms are in place to avoid protracted regulatory debates in the name of seeking consensus that will never arrive. The Panel's recommendations lack clarity on the process of moving from unsuccessful consensus building to ultimate decision-making. A strong mechanism is needed to ensure the regulatory process does not become stuck between these two points.

Federal jurisdictional issues

Finally, we have strong concerns about federal jurisdictional issues in the Panel's recommendations. The Panel recognizes that legally binding conditions based on a broadened assessment framework by the federal government may not have constitutional authority. In addition to close co-operation with relevant jurisdictions, the Panel suggests that the Commission may enter a compliance agreement with project proponents to enforce conditions outside of federal jurisdiction. Failure to enter an agreement would be cause to reject a proposed project. Such a mechanism would be a significant overreach by the federal government. This may not be a problem when federal government priorities align with provincial and other jurisdictional priorities, but in the case of conflict, such a mechanism would invoke expensive and drawn out litigation – further harming Canada's investment appeal.

CANADAWEST FOUNDATION

cwf.ca