



Alternatives North

Mr. Robert Jenkins
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Conveyed Electronically

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Dear Mr. Jenkins:

RE: **Environmental Legislation – Environmental Rights Act (ERA)**

This letter contains Alternatives North’s questions and comments on the proposed *Environmental Rights Act* (ERA), along with some additional comments regarding the five pieces of legislation (additional to our letter of June 15).

In general, Alternatives North believe that the GNWT should use the Model Environmental Rights Act created by the Alberta Environmental Law Centre (<http://elc.ab.ca/>) as a standard of best practice. If something is included in that Act, but not in the GNWT version, ENR should provide a clear explanation why they decided not to include it.

In reviewing the above Model Environmental Rights Act, Alternatives North notes that environmental rights include both “substantive” and “procedural” rights. In general, Alternatives North believes that the proposed Environmental Rights Act should do more to strengthen substantive environmental rights. In plain language, this means that the right to a healthy environment should be equivalent to other human rights such as the rights that are protected under the NWT Human Rights Act and the Canadian Charter of Rights and Freedoms.

More specific comments follow:

Preamble

We agree with ENR that the right to a healthy environment in the preamble should be strengthened. Along with points made by ENR (the addition of new requirements on the GNWT to seek public input and provide responses to that input as well as new tools for NWT citizens to use to implement their rights), the preamble should describe that the right to a healthy environment should be a fundamental right, the same as other rights in the Canadian Charter of Rights and Freedoms.

Definitions

This act, and the other acts, should define "healthy environment". Please consider this definition from the Environmental Law Centre:

*"**healthy environment** means an environment that protects human health and wellbeing, and that maintains all components of the environment, including ecological processes, for their own sake and for the wellbeing of present and future generations of humans" (<http://elc.ab.ca/wp-content/uploads/2018/03/ELC-Annotated-EBR-March-2018.pdf>)*

We note that even this "best practice" definition does not address the question of how to define a healthy environment within the context of global climate change. In a changing climate, we cannot expect eco-systems to stay in their current locations or states. The definition of a healthy environment should include a "resilience to climate change" component.

We understand that the GNWT has stated that there will not be "principles" sections in any of the 5 Acts, but we suggest that principles are needed in the ERA because the legislation includes a role for the courts to interpret and rule on whether the right to a healthy environment has been violated. For this act, the definition of healthy environment should be further clarified through a "guiding principles" section, including the principles outlined in the Model Environmental Rights Act:

- the principle of environmental justice;
- the principle of intergenerational equity;
- the principle of non-regression;
- the polluter pays principle;
- the pollution prevention principle;
- the precautionary principle (already mentioned in our June 15th letter);
- the principle of public trust;
- the principle of sustainable development.

ENR states that the ERA will ensure that the word "person" includes corporate and non-corporate entities. We believe government entities should be included. Please clarify from a legal perspective if "non-corporate" includes government. If it does not, then this should be included separately.

We note again that it is important to define what constitutes an emergency. The situation at Giant Mine, which has been in an 'emergency' situation for many years, should not be allowed.

Application of act

We agree on the removal of the non-application clause (Section 2(2)), so that the ERA can apply to activities that are authorized under other legislation if stricter provisions exist under the EPA than are being applied under that other legislation. However, the ERA should go further, by providing an avenue to protect the right to a healthy environment even if it is permitted by the EPA and/or other legislation. In such cases, the courts can decide, based on the definitions and preamble in the Act.

Public Proposals

We support ENR’s proposal (PowerPoint slide 87) that the public should be able to propose policies etc. that impact the right to a healthy environment; that such proposals are posted to the public registry; and that a public comment period is allowed. We would like clarification on how this is to be achieved. For instance, the existing system of public petitions through the NWT legislature have not led to any meaningful actions by the GNWT: what changes would require the government to take some action on public concerns?

Dispute resolution

We assume ENR’s intent to resolve environmental disputes outside the legal system (PowerPoint slide 88) means this is the preference, but that court action would still be available. We support resolving disputes outside of the time-consuming and expensive court system, but are concerned that the “substantive” right to a healthy environment not be weakened as a result. Please confirm that the right to commence a court action in the Supreme Court (Section 6) will remain in place. The courts have a system of continuously evolving the interpretation of the law, by looking at previous decisions. Dispute resolution mechanisms will struggle if the law is vague or open to interpretation and will only be able to function if there are very clear definitions of a healthy environment, related principles and a strong preamble.

Responsibility for Investigations

We understand that currently, the GNWT does not intend to have an environmental ombudsperson under the EPA or ERA, but this could be included in upcoming GNWT ombudsperson legislation through another department. How can we be involved in those discussions?

ENR has stated (May 3, 2018) that “under the ERA, investigations will not be done by the Minister, but rather by the inspector”. While it is self-evident that the Minister him/herself would not do the investigation, it remains unclear who holds the responsibility for the investigation. In other words, who would a resident petition? We believe that if a person(s) feels their right to a healthy environment has been violated, they should not have to appeal to the Minister or to any other part of the executive branch. The right to a healthy environment is a legal human right and human rights should not be open to case-by-case interpretation by the political branch of our system of government. The right to appeal should be to, if not an ombudsperson, then the Chief Environmental Protection Officer (which



should be a ADM role as outline in our *Environmental Protection Act* letter of June 29), or an expanded Human Rights Commission.

Note that we are not suggesting the investigation itself be done by an outside party, since the investigation should be public (and theoretically if not satisfied, then the petitioner could take the government to court).

Section 6: RIGHT TO PROTECT ENVIRONMENT

We agree that the fact that damage to the environment has stayed on the owner’s land will be removed as a defence. We are unclear on what changes are intended to the other defences.

We believe that 6-5-a-ii – “will not materially impair the quality of the environment” needs to be re-phrased as “impairment of a **healthy** environment”. Again, healthy environment should be defined.

Regarding 6-5-b “defendant is in compliance with....an approval given under an enactment”: this is problematic since the purpose of an Environmental Rights Act is to guarantee the human right to a healthy environment, even when there are gaps left by other legislation. This point is related comments on “application of the Act”.

We look forward to continued engagement on this and the other Acts.

Alternatives North



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cc. Christine_glowach@gov.nt.ca
Cory Vanthuyne, Chair, Standing Committee on Economic Development and Environment
