Court File No. 32797

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MININGWATCH CANADA

Appellant (Respondent)

and

MINISTER OF FISHERIES AND OCEANS, MINISTER OF NATURAL RESOURCES, and ATTORNEY GENERAL OF CANADA

Respondents (Appellants)

AND BETWEEN:

MININGWATCH CANADA

Appellant (Respondent)

and

RED CHRIS DEVELOPMENT COMPANY LTD. and BCMETALS CORPORATION

Respondents (Appellants)

and

MINING ASSOCIATION OF BRITISH COLUMBIA, ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, WEST COAST ENVIRONMENTAL LAW ASSOCIATION, SIERRA CLUB OF CANADA, QUEBEC ENVIRONMENTAL LAW CENTRE, FRIENDS OF THE EARTH CANADA and INTERAMERICAN ASSOCIATION FOR ENVIRONMENTAL DEFENSE

Interveners

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. OVERVIEW

1. The Interveners submit that the Federal Court of Appeal erred in interpreting the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA") in a manner which would allow Responsible Authorities ("RAs") to evade their section 21 duties by narrowly re-defining a project in the absence of adequate public consultation, and by ignoring or excluding the project's most environmentally significant and potentially harmful components. Such an approach contravenes the provisions and purposes of the CEAA, subverts the intention of Parliament, and conflicts with relevant international law principles.

2. Where a project proposed by a proponent is prescribed by the *Comprehensive Study List Regulations*, SOR/94-638 ("*CSL Regulations*") under the CEAA, section 21 of that Act requires the project (and its environmental effects) to be considered as a whole within a comprehensive study, rather than evaluated in a piecemeal fashion in a screening-level assessment. This reading of section 21:

(a) is consistent with the plain language and legislative intent of the CEAA;

(b) reflects the international legal context within which the CEAA must be interpreted generally, and applies the precautionary principle;

(c) conforms with relevant jurisprudence from other jurisdictions; and

(d) affirms the importance of public participation in environmental decision-making under the CEAA.

2. STATEMENT OF FACTS

(a) The Interveners

3. The Canadian Environmental Law Association, West Coast Environmental Law Association, Sierra Club of Canada, Québec Environmental Law Centre, Friends of the Earth Canada, and Interamerican Association for Environmental Defense (hereinafter collectively referred to as the "Interveners") were granted leave to intervene in this appeal pursuant to the order of this Honourable Court dated July 3, 2009. The

Interveners hereby request an opportunity to make oral submissions at the hearing of this appeal.

(b) The Facts

4. The Interveners agree with the facts as set out in paragraphs 9 to 30 of the Appellant's factum. The specific facts relied upon by the Interveners for the purposes of their intervention may be summarized as follows:

(a) the RA initially concluded that the Red Chris Mine Project was caught by the Comprehensive Study List ("CSL"), and therefore required a comprehensive study and public consultation prior to project scoping under section 21 of the CEAA;

(b) the RA subsequently opined that this project did not require a comprehensive study in light of the Federal Court of Appeal's decision in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] F.C. 610 ("*Truenorth*");

(c) the RA then undertook only a screening-level assessment of certain aspects of the project, having decided, in the absence of public consultation, to scope out key project components (i.e. the mine and mill) from the screening-level assessment; and

(d) there are a number of adverse environmental effects associated with the project as proposed by the proponent, including potential impacts upon fish and wildlife habitat, water quality and quantity, aquatic resources, air quality, and an endangered species.

Appeal Record, Vol. 1, pp. 11-15, 26-28, 31-33, 36-43: Reasons for Judgment of Martineau J., para. 14-17, 22-23, 30-31, 33-35, 93-95, 108-111, 125-130, 146, 155

PART II – STATEMENT OF QUESTIONS AT ISSUE

5. At paragraph 31 of its factum, the Appellant has framed the two points in issue in this appeal as follows:

> 1. Can an RA avoid the requirement to conduct a comprehensive study for major projects described on the CSL by re-defining the project, and thereby downgrade to a screening-level assessment?
>
> 2. Can an RA avoid the requirement of public consultation under subsection 21(1) of CEAA, for major projects described on the CSL, by re-defining the project?

6. The Interveners respectfully submit that this Honourable Court should answer both of the questions posed by the Appellant in the negative.

7. With respect to the first question, the Interveners submit that section 21 of the CEAA prohibits RAs from re-defining a project in a manner that downgrades the applicable environmental assessment from a comprehensive study to a screening, or that otherwise allows environmentally significant components of a CSL-prescribed project to avoid the rigorous public scrutiny of a comprehensive study. As outlined below, this interpretation of the CEAA is consistent with: (a) the purposes of the CEAA and the role of the CSL within the Act; (b) international law principles regarding the scope of environmental assessments and the precautionary principle; (c) relevant U.S. jurisprudence regarding environmental assessment and project-splitting; and (d) the benefits and importance of public participation in environmental decision-making.

8. With respect to the second question, the Interveners submit that section 21 prohibits RAs from making project-scoping decisions unless and until there has been meaningful public consultation. As outlined below, this interpretation of the CEAA: (a) flows from the plain language of section 21; (b) is consistent with relevant international law principles; and (c) reflects the widely recognized benefits and importance of public participation in environmental decision-making.

PART III – STATEMENT OF ARGUMENT

ISSUE 1: PROJECT-SCOPING AND ENVIRONMENTAL ASSESSMENT

1. PURPOSES AND STRUCTURE OF THE CEAA: SUSTAINABLE DEVELOPMENT, PUBLIC PARTICIPATION, AND PRECAUTION

9. Paragraphs 32 to 37 and 77 to 118 of the Appellant's factum accurately describe the important purposes and statutory scheme of the CEAA, and are hereby adopted by the Interveners.

10. In addition to the statutory purposes set out in subsection 4(1) of the Act, subsection 4(2) imposes an overarching duty upon governmental officials who administer CEAA to "exercise their powers in a manner that protects the environment and human health and applies the precautionary principle." This approach is consistent with what this Honourable Court has described as Parliament's "all-important duty ... to make full use of the legislative powers respectively assigned to them in protecting the environment...". This general duty should inform the in terpretation of the CEAA, its purposes, and the powers and discretion it confers upon government decision-makers.

> ***Canadian Environmental Assessment Act*, S.C. 1992, c.37, ss. 4(2) ["CEAA"]**
> **Appeal Record, Vol. 1, pp. 17-18: Reasons for Judgment of Martineau J. at para. 51**
> ***Canada c. Hydro-Quebec*, [1997] 3 S.C.R. 213, at para. 86**

11. The Interveners submit that the above-noted purposes and duties under the CEAA require federal officials (including RAs) to undertake a precautionary approach to decision-making, ensure meaningful public participation, prevent significant adverse environmental effects from projects or activities subject to the CEAA, and promote sustainable development. These important public policy objectives will not be achieved if section 21 of the CEAA is interpreted in a manner that permits RAs to unilaterally scope (or split) projects, sidestep public consultation requirements, substitute screenings for comprehensive studies, or evaluate only the "federal" aspects of certain discrete components of projects. Rather, the environmental effects of a project as a whole (including all functionally related or ancillary facilities and activities) should be

identified, evaluated and mitigated within environmental assessments under the CEAA.

CEAA, *supra*, ss. 4, 15(3)

12. Indeed, Canadian courts have recognized the need to construe environmental assessment requirements with a view to the long-term public interest. For example, the Newfoundland Court of Appeal has considered the purposes of CEAA (and Newfoundland's environmental assessment legislation), and emphasized its role in achieving sustainable economic development, protecting the rights and interests of future generations, and providing a "blueprint for protective action."

***Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (Nfld. C.A.), at paras. 10-12**

13. While the CEAA permits "cooperation" and "coordinated action" between the federal environmental assessment process provincial environmental assessment regimes (where applicable), RAs cannot abdicate or defer their decision-making duties under the CEAA to provincial environmental assessment officials. Moreover, the CEAA triggers in subsection 5(1) do not distinguish between environmental effects on areas of federal jurisdiction, and environmental effects on areas of provincial jurisdiction. Thus, where a project triggers the application of the CEAA, RAs are duty-bound to ensure that <u>all</u> environmental effects associated with the project are properly evaluated well before a "course of action" decision is made under the CEAA.

CEAA, *supra*, ss. 2 ("environmental effect"), 4(1)(b.2), 5(1),12(4), 17(2), 20(1), 37(1)

14. For all projects to which it applies, the CEAA is intended to provide a uniform, transparent, and accountable process for environmental assessments across Canada. However, provincial environmental assessment regimes vary considerably, often including far fewer environmental safeguards and public participation rights than those enshrined in the CEAA. For example, British Columbia's *Environmental Assessment Act* ("BC EAA") lacks many of the purposes and legal duties mandated under the CEAA for comprehensive studies (precautionary principle, cumulative effects assessment, consideration of the need for the project or alternatives, mandatory public consultation on the scope of a project, possibility of panel review, etc.). Indeed, opportunities for public

participation under the BC EAA are discretionary, as the Act does not mandate public participation at all. Given these substantive and procedural differences, the RAs' narrow project-scoping and avoidance of public participation requirements under the CEAA in the instant case was not somehow "cured" by the application of British Columbia's environmental assessment legislation to the Red Chris Mine Project.

> ***British Columbia Environmental Assessment Act*, S.B.C. 2002, c.43, ss. 10-16**
> **CEAA, *supra*, ss. 4(2), 16(1)-(2), 21(1), 21.1**
> ***Public Consultation Policy Regulation*, B.C. Reg. 373/2002, s. 7**

15. In the absence of any motion in the instant case to state a constitutional question, the Interveners respectfully submit that this Honourable Court should not read down the CEAA to limit its constitutional applicability to so-called "federal" issues (i.e. fish, navigation, migratory birds, etc.), and should not condone the evasion of mandatory duties under the CEAA in the name of "coordination" or "cooperative federalism". Such an interpretation of the CEAA runs the risk of creating an undesirable "race to the bottom" in terms of federal and provincial environmental assessment processes across the country (i.e. if RAs are permitted to sidestep CEAA in favour of weaker provincial laws), and it conflicts with this Honourable Court's earlier judgments (i.e. *National Energy Board*, *Oldman River*), which indicate that federal decision-makers should consider all environmental effects of projects, rather than a limited so-called "federal" sub-set of environmental effects. In addition, reading down the CEAA would conflict with international environmental assessment principles, as discussed below. In short, there is no constitutional impediment to fully applying CEAA requirements regarding Comprehensive Studies to mines or other CSL-listed projects.

> ***Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at paras. 64-68**
> ***Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at paras. 94, 106-107, 109**
> **Amended Factum of the Respondents Minister of Fisheries and Oceans, Minister of Natural Resources, and Attorney General of Canada, at para. 100**

2. SCREENINGS, COMPREHENSIVE STUDIES, AND PROJECT JUSTIFICATION UNDER THE CEAA

(a) Nature of CSL Projects

16. In this appeal, it is not seriously disputed that the Red Chris Mine Project, as proposed by the proponent, exceeds the thresholds for metal and gold mines prescribed in subsections 16(a) and (c) of the CSL. Accordingly, the Interveners submit that RAs do not possess administrative discretion to "determine" or "identify" whether a project is caught by the CSL, or to substantially scope a CSL-listed project in a manner which purports to evade the obligation to undertake a comprehensive study. While a project-scoping decision under the CEAA may be fact-specific, requiring consideration of many factors and issues, the initial tracking decision which precedes it is simply a matter of determining whether the CEAA applies, and, if so, reviewing the CSL to resolve whether or not the project is prescribed. A project, as proposed by a proponent, is either prescribed on the CSL, or it is not. If it is caught by the CSL, then a comprehensive study is required, subject only to the Minister's section 21.1 authority to refer the project to mediation or panel review.

CEAA, *supra*, ss. 21, 21.1(b)
Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Canada: Thomson Canada Ltd., 1994), at pp. 599-600

17. RAs are not authorized under the CEAA to second-guess Cabinet, on a case-by-case basis, as to which projects should be subject to – or exempted from – the requirements of a comprehensive study. Generally, projects prescribed on the current CSL (e.g. oil and gas projects, electricity projects, nuclear facilities) are very large in scale, affect sizeable areas of land, and/or involve considerable commitments of natural resources. By their very nature, the projects prescribed in the *CSL Regulations* pose significant environmental risks, and are so prescribed because Cabinet, after considering stakeholder input, prudently determined that such projects are likely to cause significant adverse environmental effects, and therefore require more thorough assessments.

***Comprehensive Study List Regulation*, S.O.R./94-638, Schedule (s. 3)**
Appeal Record, Vol. 1, pp. 69-70: Reasons for Judgment of Martineau J. at paras. 277-281
Beverly Hobby & Daniel Ricard, et al., *Canadian Environmental Assessment Act: An Annotated Guide*, (Canada: The Cartwright Group Ltd., 2008) at p. II-8 ["Hobby & Ricard"]
CEAA , *supra*, ss. 58(1)(i)

18. In addition, it is important to note that RAs are not only government agencies which may issue the necessary federal permits, or provide funds or lands, for a project. In some instances, an RA can be the actual proponent of a CSL-listed project that is subject to CEAA requirements. This reality (and potential conflict of interest) renders even more untenable the respondents' proposition that RAs should enjoy complete, unfettered discretion to narrowly scope projects so as to avoid comprehensive studies of CSL-listed projects. Indeed, the Federal Court of Appeal's decision – specifically, its finding that "project" in ss.5(1)(d) means "project as scoped" – could have the absurd result of allowing an RA to scope a project to exclude those components requiring federal permits, even where those permits are listed on the *Law List Regulations*, SOR/94-626. Potentially allowing an RA to thus avoid <u>any</u> form of assessment under the CEAA is an undesirable result that clearly subverts the public interest purposes of the CEAA, and does not reflect sound public policy.

CEAA, *supra*, ss. 5(1)(a)
Appeal Record, Vol. 1, pp. 111-112: Reasons for Judgment of Desjardin, Sexton and Evans JJ.A. at paras. 48-49

(b) Substantive and Procedural Limitations of Screenings

19. In contrast to comprehensive studies, screenings under the CEAA are to be performed in relation to smaller projects that are not on the CSL, and are therefore less likely to cause significant adverse environmental effects. Only the minimal considerations listed in subsection 16(1) of the CEAA are required for screening-level assessments. Such assessments do <u>not</u> include consideration of the important factors listed in subsection 16(2), including the purpose of the project, project alternatives, and the need for follow-up programs.

CEAA , *supra*, ss. 16(1)-(2)
Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique*, (Canada: LexisNexis Canada Inc., 2008) at pp. 168-170

20. Furthermore, the CEAA does not require public participation for screening-level assessments. Public consultation in relation to a screening-level assessment only occurs if and when an RA decides that it is "appropriate" (or if regulations are passed requiring consultation). In the instant case, the RA determined that public consultation was not

appropriate for the screening, despite the environmental effects associated with the project. In contrast, the CEAA entrenches public participation rights at various steps in the comprehensive study process.

CEAA, *supra*, ss. 18(3), 21, 21.2, 23
Appeal Record, Vol. 1, pp. 52-53: Reasons for Judgment of Martineau J. at paras. 205-208
Hobby & Ricard, *supra*, at p. I-6

(c) Justification of Projects

21. Under the CEAA, at the conclusion of the applicable environmental assessment process, it is possible for a project to proceed even where significant adverse environmental effects are likely to occur despite mitigation measures, provided that such effects can be "justified" in the opinion of the RA. This decision is based upon the consideration of both the positive benefits and negative effects of the project.

CEAA, *supra*, ss. 20(1)(b), 20(1)(c), 37(1)(a)(ii)

22. The Interveners submit that an RA cannot make an informed or credible decision about whether a project's significant adverse environmental effects are "justifiable" if the project has been narrowly scoped to exclude central aspects of the undertaking. Put another way, an RA's analysis of the environmental and socio-economic costs/benefits of a project is impracticable if the project-scoping decision has excluded the most significant aspects of the project. For example, in the case of a tailings pond determined to have significant adverse environmental effects, there could be no possible justification for it except by reference to the mine that the pond serves.

23. Accordingly, an attempt by an RA to narrowly scope a project under section 21 of the CEAA not only has negative repercussions for the conduct and content of the environmental assessment process itself, but also materially undermines the RA's ability to "justify" the project following the completion of the assessment process.

3. CONTEXT FOR INTERPRETING THE CEAA

24. The Interveners submit that the appropriate context for construing the CEAA includes: (a) international law principles regarding the need to conduct comprehensive environmental assessments, apply the precautionary principle, and ensure public participation; and (b) U.S. law and jurisprudence regarding environmental assessment and project-splitting. This contextual analysis reveals that there are two overarching principles which should be considered by this Honourable Court when interpreting the CEAA:

(a) an environmental assessment must address all direct, cumulative and delayed impacts of projects, and must necessarily include consideration of projects in their entirety; and

(b) an environmental assessment should be required for projects that are likely to have substantive negative social or environmental impacts.

(a) International Law: Prevention, Precaution, and the Need for Comprehensive Impact Assessment

25. A fulsome interpretation of environmental legislation such as the CEAA is not possible without having regard to relevant principles, norms, and values of international law and policy, especially in cases involving the exercise of discretion conferred by such laws. Parliament is presumed to respect values and principles recognized and protected in international customary and conventional laws. Accordingly, this Honourable Court, in nearly all of its recent environmental law decisions, has duly considered international environmental law and policy developments.

11497 Canada v. Hudson (Ville), [2001] 2 S.C.R. 241 at para. 30 ["_Spraytech_"]
Ruth Sullivan, _Sullivan and Driedger on the Construction of Statutes_, 5th ed. (Canada: LexisNexis Canada Inc., 2008) at pp. 538-43 ["Sullivan"]
R. v. Hape, [2007] 2 S.C.R. 292 at paras. 53-56 ["_Hape_"]
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817at paras. 67, 69-71
Jerry V. DeMarco & Michelle L. Campbell, "The Supreme Court of Canada's Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation" (2004) 13 R.E.C.I.E.L. 320 at pp. 320, 322

International Law: The Precautionary Principle

26. The precautionary principle is a vital tenet of international environmental law embodied in a vast array of domestic laws and international instruments. It has been considered and applied by a number of courts in Canada and beyond, including this Honourable Court, which accepted that it was an emerging principle of international law. According to the precautionary principle, governments must take anticipatory action to prevent or reduce activities' serious or irreversible adverse environmental effects where such harm is a possibility, despite a lack of scientific certainty.

> **Hugh M. Kindgred & Phillip M. Saunders et al., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Canada: Emond Montgomery, 2006) at pp. 1039-1041 ["Kindred & Saunders"]**
> **Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment*, 3rd ed. (United States: Oxford University Press, 2009) at pp. 27-28, 136-138, 162-163 ["Birnie, Boyle & Ridgwell"]**
> **Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Netherlands: Kluwer Law International, 2002) at pp. 181-185, 259-263, 275-276, 283-286**
> ***Spraytech, supra*, at paras. 30-32**

27. Section 4 of the CEAA expressly entrenches the precautionary principle, both as a purpose of the CEAA and as part of the federal government's duties under the Act. Thus, it serves as a guide to the interpretation of the Act as a whole, and section 21 in particular. Indeed, the precautionary principle cannot be divorced from the environmental assessment process, in that prior environmental assessment is an important part of a precautionary approach to achieving the goal of sustainable development.

> **Appeal Record, Vol. 1, pp. 17-18: Reasons for Judgment of Martineau J. at para.51**
> **CEAA, *supra*, ss. 4(1)(a), 4(2)**
> **International Law Commission, *Report on the work of its fifty-second session (1 May-9 June and 10 July-18 August 2000)*, UN GAOR, 52nd Sess., Supp. No. 10, UN Doc. A/55/10, (2000), at para. 716**
> **Birnie, Boyle & Ridgwell, *supra* at pp. 164-165**
> ***Gray v. The Minister for Planning and Ors*, [2006] N.S.W.L.E.C. 720 at paras. 115-116**

28. The Interveners submit that it is contrary to the principles of prevention and precaution for RAs to split off, scope out, or otherwise ignore the key components of large-scale industrial projects which have been prescribed in the *CSL Regulations,* or to issue permits for such projects without evaluating their most serious potential direct, indirect and cumulative environmental effects. In fact, such an interpretation of the CEAA represents the antithesis of the precautionary principle, and could result in

needlessly exposing the environment, the Canadian public, and future generations to unknown and potentially significant and irreversible risks.

International Law: Appropriate Scope of Environmental Assessment

29. The Interveners submit that international law authorities regarding environmental assessments are clear on two fundamental principles: (1) environmental assessments should accompany any project likely to have a significant, negative environmental or social impact; and (2) such assessments should comprehensively evaluate the potential impacts of an entire project, including all cumulative and delayed impacts.

30. In addition to the international law obligations that are binding upon Canada, including the Rio Declaration and the Convention on Biological Diversity (as discussed in the Appellant's factum at paras. 142-148), there are numerous international "soft law" instruments, guidelines and policies which provide further direction on how environmental impact assessments should be conducted. The Interveners submit that the overwhelming concurrence of these international standards on the two principles mentioned above is an important factor in interpreting similar standards in the CEAA.

Birnie, Boyle & Ridgwell, *supra*, at pp. 171-173

31. Regarding the first principle, the *Principles of Environmental Impact Assessment Best Practice* state that environmental assessments should be conducted for "all development proposals that may cause potentially significant effects." A number of other international institutions have also incorporated this fundamental principle.

International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice* (1999), at Principles 2.3-2.5 ["IAIA Principles"]
***Rio Declaration on Environment and Development*, UN Doc. A/CONF. 151/26/Rev. 1(Vol. I), 31 I.L.M. 874 (1992), at Principle 17 ["*Rio Declaration*"]**
***UNEP Goals and Principles of Environmental Impact Assessment*, UNEP Res. GC Dec. 14/25, 14th Sess. (1987), endorsed by GA Res. 42/184, UN GAOR, 42nd Sess., UN Doc. A/Res/42/184 (1987), at Principle 1 ["UNEP *EIA Principles*"]**
OECD, Development Assistance Committee, *Recommendation of the Council on Environmental Assessment of Development Assistance Projects and Programmes*, c(85)104 (1985) at Appendix
World Bank, *Operational Policy/Bank Procedure 4.01: Environmental Assessment* (1999), at para. 8(a) ["World Bank OP"]
Inter-American Development Bank, *Environment and Safeguards Compliance Policy*, Sustainable Development Department Sector Strategy and Policy Papers Series, ENV-148 (2006), at para. 4.17 ["*Environment and Safeguards Compliance Policy*"]

32. The second principle, as embodied in the *Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*, adopted by the parties to the Convention on Biological Diversity, posits that impact assessments should include "the identification of indirect and cumulative impacts, and of the likely cause–effect chains." This important requirement of full consideration of information regarding environmental effects is contained in a number of international instruments, including the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo, 1991) ["Espoo Convention"], to which Canada is a Party.

> ***Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*, CBD Dec. VIII/28, 8th Mtg. (2006), at para. 28(a)**
> ***IAIA Principles*, *supra* at Principles 2.4-2.5**
> ***UNEP EIA Principles*, *supra* at Principle 4**
> **OECD, Development Assistance Committee, *No. 1: Good Practices for Environmental Impact Assessment of Development Projects*, DAC Guidelines on Aid and Development (1992), at p. 7**
> **World Bank OP, *supra* at para. 2, Annex A**
> ***Environment and Safeguards Compliance Policy*, *supra* at para. 4.17**
> ***Convention on Environmental Impact Assessment in a Transboundary Context (Espoo)*, 25 February 1991, 30 I.L.M. (1971) 802, at Art. 4(1), Appendix II ["*Espoo Convention*"]**

(b) Comparative Law: U.S. Jurisprudence regarding Environmental Assessment and Project-Splitting

33. In addition to the above-noted international law instruments, guidelines and policies, the Interveners submit that it is instructive for this Honourable Court to consider relevant U.S. jurisprudence when construing section 21 of the CEAA, as outlined below.

> **Gérard V. La Forest, "The Use of American Precedents in Canadian Courts" (1994), 46 Me. L. Rev. 211 at pp.212, 216-217**

34. The requirement for Environmental Impact Statements (EIS) was first incorporated into U.S. federal law via the *National Environmental Policy Act* of 1969 ("NEPA"). The standards for decision-making with EIS were developed through regulation and case law shortly after the adoption of NEPA in 1972, and helped form the basis for environmental assessment laws and practices throughout the world, including the CEAA (and its predecessor, the *Environmental Assessment and Review Process*). Jurisprudence with respect to environmental impact assessment has been most developed in the United States, as a result of numerous cases brought under NEPA.

> **Birnie, Boyle & Redgwell, *supra*, at p. 165**

Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada* (Canada: Emond Montgomery Publications Limited, 2009), at pp. 125-27

Judith Hanebury, "Environmental Impact Assessment and the Constitution: The Never Ending Story" (1999), 9 J.E.L.P. 169 at p. 172

35. United States jurisprudence and legislation makes clear that: (a) all components and cumulative impacts of distinct elements of a project must be considered in a project-specific EIS; and (b) where multiple projects are involved, the cumulative impact must be considered in a programmatic EIS.

36. Following a U.S. Supreme Court decision *(Kleppe v. Sierra Club)* that "the environmental consequences of proposed actions must all be considered together in a single, programmatic EIS when their impacts will have a compounded effect on a region", the Council on Environmental Quality ("CEQ") issued NEPA regulations in 1978 that underscore the need to conduct programmatic EIS in three situations: (a) "connected actions", which means that they are closely related and therefore should be discussed in the same impact statement; (b) "cumulative actions", which, when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same impact statement; and (c) "similar actions", which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.

***National Wildlife Federation v. Appalachian Regional Com'n*, 677 F. 2d 883 at 888 (C.A.D.C., 1981), quoting *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)**
40 C.F.R. 1508.25

37. The CEQ regulations have been judicially interpreted as requiring "'connected actions' to be considered together in a single EIS." Thus, in considering the construction of a road for timber extraction, the court held that:

> It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.... [T]he road construction and the contemplated timber sales are inextricably intertwined, and [are] 'connected actions' within the meaning of the CEQ regulations.

***Thomas v. Peterson*, 753 F. 2d 754 at 758-59 (9th Cir. 1985)**

38. With respect to "cumulative actions", it has been held that NEPA "requires consideration of cumulative impacts when determining whether an action significantly affects the quality of the human environment."

***LaFlamme v. Federal Energy Regulatory Commission*, 852 F. 2d 389 at 401 (9th Cir. 1988)**

39. It has been further held in the U.S. that "one of the specific requirements under NEPA is that an agency must consider the effects of the proposed action in the context of all relevant circumstances, such that where 'several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.'"

***Oregon Natural Resources Council Fund v. Brong*, 492 F. 3d 1120 at 1132-1133 (9th Cir. 2007), quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F. 3d 1372 at 1378 (9th Cir. 1998)**

40. U.S. courts have also made eminently clear that a project may not be segmented into smaller pieces in order to avoid NEPA. In one case involving segmentation (*Old Town Neighbourhood Association v. Kauffman*), the court noted that: "Such deliberate evasion of these federal laws by carefully carving up one project into smaller segments cannot and should not be tolerated."

***Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F. 2d 1129 at 1140 (5th Cir. 1992)**
***Dickman v. City of Santa Fe*, 724 F. Supp. 1341 at 1345 (D.N.M. 1989)**
***Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F. 2d 1477 at 1483 (10th Cir. 1990)**
***Old Town Neighborhood Association v. Kauffman*, Case No. 1:02-cv-1505-DFH at 22 (S.D. Ind. 11/15/2002)**

41. Another U.S. court has similarly held that:

> An analysis of improper segmentation...requires that where 'proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.'

***O'Reilly v. U.S. Army Corps of Engineers*, 477 F. 3d 225 at 236 (5th. Cir. 2007), quoting *Fritiofson v. Alexander*, 772 F. 2d 1225 at 1241 (5th Cir.1985)**

42. In addition, in order to rely upon a State-produced EIS, the responsible federal official under NEPA must "participate and provide guidance in the preparation of the EIS, and must independently evaluate the EIS." Such reliance on State-prepared assessments also does not relieve federal officials of their "responsibilities for the scope,

objectivity, and content of the entire statement" in accordance with NEPA standards. In the instant case, the federal Screening Report would not fulfil these requirements. First, the RAs had very limited involvement in the provincial assessment, after re-scoping the project in March 2005 to avoid a Comprehensive Study. Second, the RAs' apparent reliance on the conclusions of the provincial assessment – as opposed to the underlying data – demonstrates the lack of a truly independent evaluation of all the project's environmental effects pursuant to the standards set out under the CEAA.

> ***Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 at 1039 (2d Cir. 1983)**
> **42 U.S.C. § 4332(2)(D)**
> **Amended Factum of the Respondents Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada at para. 7**

43. The parallel between these U.S. cases and the Canadian RA's attempt in the instant case to redefine the nature of a project to reduce requirements for environmental impact assessments is evident. The RA's exclusion of the mine and mill from the project definition constitutes the very type of project-splitting or segmentation that has been disallowed by U.S. courts under NEPA. Accordingly, the Interveners respectfully submit that this Honourable Court should consider the NEPA jurisprudence and uphold CEAA by refusing to permit project-splitting in circumstances where project components are clearly inter-related and functionally or economically dependent on one another. Since there is no purpose in constructing a tailings impoundment without an associated mine or milling facility, the mine and mill should not have been scoped out by the RA.

ISSUE 2: PUBLIC PARTICIPATION RIGHTS

44. As described above, the Interveners submit that the Federal Court of Appeal erred in allowing the RA to downgrade the federal environmental assessment from a comprehensive study to a screening, thus eliminating the public process rights associated with a comprehensive study. The Interveners submit that the Court of Appeal erred further by allowing the RA to do so in the absence of meaningful public consultation. In both respects, the Federal Court of Appeal's decision contravenes the plain language of section 21 of the CEAA, ignores the utility of public participation in environmental decision-making, and conflicts with relevant international law principles.

1. UTILITY OF PUBLIC PARTICIPATION

45. The Interveners submit that section 21 of the CEAA should be interpreted in a manner that recognizes and affirms the values, benefits and importance of early and meaningful public participation in the environmental assessment process. This is particularly true in relation to CSL-listed projects, such as the Red Chris Mine Project, which may cause or contribute to significant adverse environmental effects.

46. Public participation rights, such as those enshrined in the CEAA, ensure that all interested persons, communities and organizations have a meaningful opportunity "to contribute and to see how their contributions have been used." The exercise of these participatory rights not only benefits interested stakeholders, communities, and the public at large, but it also improves the quality and credibility of the environmental assessment process, in that government decision-makers may receive further or better information about location conditions, which can supplement the scientific analysis of the effects of environmental processes and actions. Public values and input can also help to frame the scientific questions asked during the assessment, enabling decision-makers to "better address public concerns and priorities".

> **Birnie, Boyle & Redgwell, *supra*, at pp. 174-175**
> **Appeal Record, Vol. 1, p. 73: Reasons for Judgment of Martineau J, at para. 297**
> **Canadian Environmental Assessment Agency, *Strengthening Environmental Assessment for Canadians: Report of the Minister of the Environment to the Parliament of Canada on the Review of the Canadian Environmental Assessment Act*, (Ottawa: Public Works and Government Services Canada, 2001) at pp. 22, 24-25**
> **National Research Council, *Public Participation in Environmental Assessment and Decision Making* (Washington, DC: National Academies Press, 2008) at pp. 43-44, 50-51, 91-92, 226**

47. Indeed, this Honourable Court has recognized that both the CEAA itself, and the public importance of environmental matters in general, support the granting of a high level of protection for pubic participation in the context of environmental assessments.

> ***Atomic Energy of Canada Ltd. v. Sierra Club of Canada*, [2002] 2 S.C.R. 522, at para. 84**

48. By enacting the CEAA, Parliament intended to create a thorough, credible and public environmental assessment process that promotes the goal of sustainable development. This process is intended to be more rigorous for the major industrial projects listed on the CSL, and involves mandatory opportunities for public engagement

at key stages of the decision-making process. The Interveners respectfully submit that if this Honourable Court should find that there is any ambiguity in section 21 of the CEAA, it should adopt an interpretation that is strictly in favour of the public participation rights entrenched within this section specifically, and the CEAA generally.

2. INTERNATIONAL LAW AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

49. The Interveners submit that section 21 of the CEAA should be interpreted in light of the vast number of international law instruments, both binding and merely persuasive, which recognize the value and importance of public participation in environmental decision-making generally, and in environmental assessments specifically. Means of public involvement enshrined in these international legal documents include access to information, participation in decision-making, and access to justice.

Kindgred & Saunders, *supra*, at p. 1038
Birnie, Boyle & Ridgwell, *supra*, at p. 173
***Rio Declaration*, *supra*, at Principle 10**
***Espoo Convention*, *supra*, at Arts. 2(6), 3(8)**
***Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818, at Art. 14(1)(a)**
***UNEP EIA Principles*, *supra*, at Principle 7**
***Convention on Access to Information, Public Participation in Environmental Decision-Making, and Access to Justice in Environmental Matters (Aarhus)*, 25 June 1998, 38 I.L.M. 517, at Arts. 1, 4, 6, 7, and 9(2) ["*Aarhus Convention*"]**
***Agenda 21*, Report of the United Nations Conference on Environment and Development, Resolution 1, Annex II, UN Doc. A/CONF.1151/26/Rev.1 (Vols. I, II, III) (1992), at Para. 23.2**
***1982 World Charter for Nature*, GA Res. 37/7, UN GAOR, 1982, Supp. No. 51, UN Doc. A/37/51 (1982), at Arts. 14 and 16**
***The Johannesburg Principles on the Role of Law and Sustainable Development*, adopted at the Global Judges Symposium held in Johannesburg, South Africa (2002) at p. 4 ["*Johannesburg Principles*"]**
***Malmo Ministerial Declaration*, adopted at the UNEP Global Ministerial Environment Forum held in Malmo, Sweden (2000), at Arts. 14-16 ["*Malmo Declaration*"]**
***Draft Declaration of Principles on Human Rights and the Environment*, in *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9 (1994), Annex II at Principles 15, 16, 18.**
***Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century (Montevideo Programme III)*, adopted at UNEP/GC.21/23 (2001), at Parts 7-8**
***Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, 21 May 2003, U.N. Doc. ECE/MP.EIA/2003/2 (not yet in force) ["*SEA Protocol*"]**
OAS, General Assembly, 28th Special Sess., *Inter-American Democratic Charter*, OEA/Ser.P/AG/Res. 1 (XXVIII-E/01) (2001) at Art. 6

50. In addition to the Rio Declaration and the Convention on Biological Diversity referred to above, Canada has helped draft, or has ratified, many of the other above-noted international instruments. The important participatory principles entrenched within these instruments exemplify the fundamental values that are relevant to a contextual interpretation of section 21 of the CEAA.

> ***Agenda 21*,supra, at Item 23.2**
> ***Rio Declaration*, supra, at Principle 10**
> ***Espoo Convention*, supra, at Articles 2(6) and 3(8)**
> ***Convention on Biological Diversity*, supra, Article 14(1)(a)**
> ***Johannesburg Principles*, supra, at p. 4**
> ***Malmo Declaration*, supra, at Arts. 14-16**
> ***Baker*, supra, at paras. 67, 69-71**

51. The Aarhus Convention elaborates on Principle 10 of the Rio Declaration. In particular, the 42 Parties to the Convention are required to "guarantee the rights of access to information [and] public participation" in environmental decision-making (art 1). The Convention provides, *inter alia*, for public participation early in the process (art. 4), and in decisions on the specific activities listed in Annex I thereto and on activities not so listed that may have a significant effect on the environment (art. 6). To date, Canada is not a Party to the Aarhus Convention on the grounds, *inter alia,* that the CEAA already incorporates this Convention by requiring public participation in comprehensive studies.

> ***Aarhus Convention, supra,* Articles 1, 4 and 6**
> **Minister of the Environment, Minister of Justice and Attorney General of Canada, Minister of Health, & Minister of Foreign Affairs, *Government of Canada's Response to Environmental Petition 163 Filed by Mr. David R. Boyd Under the Auditor General Act (Received February 16, 2006): Right of Canadians to Clean Air, Clean Water, and a Healthy Environment* (June 2, 2006)**

52. In addition, the Espoo Convention mentioned above addresses governments' respective notification and consultation duties for major proposed projects that might have adverse transboundary environmental impacts. It sets out a number of requirements, including many pertaining to consultation and notification. Once it comes into force, the second amendment to the Convention will, *inter alia*, specifically provide for affected Parties to participate in decisions on scoping in certain circumstances. The Protocol on Strategic Environmental Assessment will also augment the Convention by enhancing public participatory rights, including with respect to scoping.

> ***Espoo Convention, supra,* Arts. 2(6), 3(8)**

***Second Amendment to the Espoo Convention*, Annex VII to the report Third Meeting of the Parties to the Convention, ECE/MP.EIA/6 (2004) (not yet in force)**
***SEA Protocol, supra*, at Art. 6(3)**

53. In summary, an RA's determination on the scope of a project under section 21 of the CEAA has a fundamental impact on the nature, extent, and quality of the environment assessment that is ultimately carried out in relation to CSL-prescribed projects. The Interveners submit that section 21 should be interpreted in light of the international law values outlined above, such that members of the Canadian public are not deprived of: (a) their right to comment on proposed decisions regarding project-scoping; and (b) their ability to meaningfully influence and contribute to comprehensive study process (or mediation or panel review, if subsequently ordered by the Minister).

PART IV – COSTS

54. Pursuant to the order granting the Interveners leave to intervene, the Interveners are liable to pay the parties any additional disbursements occasioned by the intervention. Aside from such disbursements, the Interveners respectfully request that no costs be awarded to or against them in respect of this appeal.

PART V – ORDER SOUGHT

55. For the foregoing reasons, the Interveners respectfully request an order allowing this appeal, and restoring the order of the Federal Court.

All of which is respectfully submitted this 21 day of August, 2009.

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PART VI - TABLE OF AUTHORITIES

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PART VII – LEGISLATION

40 C.F.R. 1508.25

Sec. 1508.25

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs.1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

1. Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

2. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

3. Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

1. No action alternative.
2. Other reasonable courses of actions.
3. Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

42 USC § 4332(2)(D)

§ 4332 (2) all agencies of the Federal Government shall—

...

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> (ii) the responsible Federal official furnishes guidance and participates in such preparation,
>
> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
>
> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

***British Columbia Environmental Assessment Act*, S.B.C. 2002, c.43**

...

10 (1) The executive director by order

(a) may refer a reviewable project to the minister for a determination under section 14,

(b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is not required for the project, and

(ii) the proponent may proceed with the project without an assessment, or

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment.

(2) The executive director may attach conditions he or she considers necessary to an order under subsection (1) (b).

(3) A determination under subsection (1) (b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

11 (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

(a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;

(b) the potential effects to be considered in the assessment;

(c) the information required from the proponent

(i) in relation to or to supplement the proponent's application, and

(ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);

(d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;

(e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

12 The executive director's discretion to make a determination under section 11 (1) for a reviewable project does not include the discretion to consign the assessment of the reviewable project to

(a) a commission,

(b) a hearing panel, or

(c) a person not employed in or assigned to the environmental assessment office.

13 The executive director may vary the scope, procedures and methods determined under section 11

(a) to take into account modifications proposed for the reviewable project by the proponent, including modifications proposed in relation to an application submitted under section 16, or

(b) if necessary in his or her opinion to complete an effective and timely assessment of the reviewable project.

14 (1) If the executive director under section 10 (1) (a) refers a reviewable project to the minister, the minister by order

(a) may determine the scope of the required assessment of the reviewable project, and

(b) may determine procedures and methods for conducting the assessment, including for conducting as part of the assessment a review, under section 16 (6), of the proponent's application.

(2) The minister's discretion under this section to determine scope, procedures and methods includes but is not limited to the discretion by order to exercise any of the powers in section 11 (2).

(3) An order of the minister making a determination under this section may

(a) require that the assessment be conducted

(i) by a commission that the minister may constitute for the purpose of the assessment, consisting of one or more persons that the minister may appoint to the commission,

(ii) by a hearing panel, with a public hearing to be held by one or more persons that the minister may appoint to the hearing panel, or

(iii) by any other method or procedure that the minister considers appropriate and specifies in the order, and by the executive director or other person that the minister may appoint, and

(b) delegate any of the minister's powers under this section to make orders determining scope, procedures and methods to

(i) the executive director, or

(ii) a commission member, hearing panel member or another person, depending on which of them is responsible for conducting the assessment.

(4) For the purposes of an assessment conducted under this section by a commission or hearing panel, the minister, by order, may confer on the commission or hearing panel, as the case may be, the powers, privileges and protection of a commission under sections 16, 17, 22 (1), 23 (a), (b) and (d) to (f) and 32 of the Public Inquiry Act.

15 (1) In relation to an assessment of a reviewable project, the minister by order may

(a) vary the scope, procedures and methods determined under section 14, or

(b) provide for the executive director, a commission member, hearing panel member or another person to vary the scope, procedures and methods, depending on whether the commission, hearing panel or other person is responsible for conducting the assessment for either of the following reasons:

(c) to take into account modifications proposed for the reviewable project by the proponent, including any modification proposed in relation to an application submitted under section 16;

(d) if necessary in the minister's opinion to complete an effective and timely assessment of the reviewable project.

(2) The minister may delegate the discretion under subsection (1) to a commission, member, hearing panel member, the executive director or another person, depending on which of them is responsible for conducting the assessment.

16 (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

(4) On accepting the application for review, the executive director

(a) must notify the proponent of the acceptance for review, and

(b) may require the proponent, for the purpose of the review, to supply a specified number of paper or electronic copies of the application, in the format specified by the executive director.

(5) On receipt of the copies of the application required under subsection (4), the executive director must proceed with and administer the review of the application in accordance with the assessment procedure determined under section 11 (1) or as varied under section 13.

(6) The proponent of a reviewable project for which the minister has made a determination under section 14 may apply for an environmental assessment certificate in the manner determined by the minister, and must pay any prescribed fee in the prescribed manner.

...

***Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (as amended)**

Preamble

WHEREAS the Government of Canada seeks to achieve sustainable development by

conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

SHORT TITLE

Short title

1. This Act may be cited as the *Canadian Environmental Assessment Act*.

INTERPRETATION

Definitions

2. (1) In this Act,

"Agency"

« Agence »

"Agency" means the Canadian Environmental Assessment Agency established by section 61;

"assessment by a review panel"

« examen par une commission »

"assessment by a review panel" means an environmental assessment that is conducted by a review panel established pursuant to section 33 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"comprehensive study"

« étude approfondie »

"comprehensive study" means an environmental assessment that is conducted pursuant to sections 21 and 21.1, and that includes a consideration of the factors required to be considered pursuant to subsections 16(1) and (2);

"comprehensive study list"

« liste d'étude approfondie »

"comprehensive study list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(*d*);

"environment"

« environnement »

"environment" means the components of the Earth, and includes

(*a*) land, water and air, including all layers of the atmosphere,

(*b*) all organic and inorganic matter and living organisms, and

(*c*) the interacting natural systems that include components referred to in paragraphs (*a*) and (*b*);

"environmental assessment"

« évaluation environnementale »

"environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;

"environmental effect"

« effets environnementaux »

"environmental effect" means, in respect of a project,

(*a*) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,

(*b*) any effect of any change referred to in paragraph (*a*) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes by aboriginal persons, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or

(*c*) any change to the project that may be caused by the environment,

whether any such change or effect occurs within or outside Canada;

"exclusion list"

« liste d'exclusion »

"exclusion list"means a list of projects or classes of projects that have been exempted from the requirement to conduct an assessment by regulations made under paragraph 59(*c*) or (*c.1*);

"federal authority"

« autorité fédérale »

"federal authority" means

(*a*) a Minister of the Crown in right of Canada,

(*b*) an agency of the Government of Canada, a parent Crown corporation, as defined in subsection 83(1) of the *Financial Administration Act*, or any other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,

(*c*) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and

(*d*) any other body that is prescribed pursuant to regulations made under paragraph 59(*e*),

but does not include the Executive Council of — or a minister, department, agency or body of the government of — Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the *Indian Act*, Export Development Canada, the Canada Pension Plan Investment Board, a Crown corporation that is a wholly-owned subsidiary, as defined in subsection 83(1) of the *Financial Administration Act*, The Hamilton Harbour Commissioners as constituted pursuant to *The Hamilton Harbour Commissioners' Act*, a harbour commission established pursuant to the *Harbour*

Commissions Act, a not-for-profit corporation that enters into an agreement under subsection 80(5) of the *Canada Marine Act* or a port authority established under that Act;

"federal lands"

« territoire domanial »

"federal lands" means

(*a*) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut,

(*b*) the following lands and areas, namely,

(i) the internal waters of Canada,

(ii) the territorial sea of Canada,

(iii) the exclusive economic zone of Canada, and

(iv) the continental shelf of Canada, and

(*c*) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands;

"follow-up program"

« programme de suivi »

"follow-up program" means a program for

(*a*) verifying the accuracy of the environmental assessment of a project, and

(*b*) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project;

"interested party"

« partie intéressée »

"interested party" means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious;

"mediation"

« médiation »

"mediation" means an environmental assessment that is conducted with the assistance of a mediator appointed pursuant to section 30 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"Minister"

« ministre »

"Minister" means the Minister of the Environment;

"mitigation"

« mesures d'atténuation »

"mitigation" means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

"prescribed"

Version anglaise seulement

"prescribed" means prescribed by the regulations;

"project"

« projet »

"project" means

(*a*) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(*b*) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(*b*);

"proponent"

« promoteur »

"proponent", in respect of a project, means the person, body, federal authority or government that proposes the project;

"record"

« document »

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

"Registry"

« registre »

"Registry"means the Canadian Environmental Assessment Registry established under section 55;

"responsible authority"

« autorité responsable »

"responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;

"screening"

« examen préalable »

"screening" means an environmental assessment that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1);

"screening report"

« rapport d'examen préalable »

"screening report" means a report that summarizes the results of a screening;

"sustainable development"

« développement durable »

"sustainable development" means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

Extended meaning of"administration of federal lands"

(2) In so far as this Act applies to Crown corporations, the expression "administration of federal lands" includes the ownership or management of those lands.

For greater certainty

(3) For greater certainty, any construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work and any activity that is prescribed or is within a class of activities that is prescribed for the purposes of the definition "project" in subsection (1) is a project for at least so long as, in relation to it, a person or body referred to in subsection 5(1) or (2), 8(1), 9(2), 9.1(2), 10(1) or 10.1(2) is considering, but has not yet taken, an action referred to in those subsections.

...

PURPOSES

Purposes

4. (1) The purposes of this Act are

(*a*) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;

(*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(*b.1*) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(*b.2*) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(*b.3*) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(*c*) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the

environment and human health and applies the precautionary principle.

ENVIRONMENTAL ASSESSMENT OF PROJECTS

PROJECTS TO BE ASSESSED

Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(*a*) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part

(*b*) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(*c*) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(*d*) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

...

More than one responsible authority

12.

...

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

...

Scope of project

15.

...

All proposed undertakings to be considered

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(a) the responsible authority, or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(*b*) the significance of the effects referred to in paragraph (*a*);

(*c*) comments from the public that are received in accordance with this Act and the regulations;

(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(*e*) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the purpose of the project;

(*b*) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(*c*) the need for, and the requirements of, any follow-up program in respect of the project; and

(*d*) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

...

Delegation

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation of the screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).

Idem

(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.

SCREENING

Screening

18.

...

Public participation

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances — or where required by regulation — the responsible authority

(*a*) shall, before providing the public with an opportunity to examine and comment on the screening report, include in the Internet site a description of the scope of the project, the factors to be taken into consideration in the screening and the scope of those factors or an indication of how such a description may be obtained;

(*b*) shall give the public an opportunity to examine and comment on the screening report and on any record relating to the project that has been included in the Registry before taking a course of action under section 20 and shall give adequate notice of

that opportunity; and

(*c*) may, at any stage of the screening that it determines, give the public any other opportunity to participate.

...

Decision of responsible authority following a screening

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(*a*) subject to subparagraph (*c*)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

(*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(*c*) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (*b*) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

...

COMPREHENSIVE STUDY

Public consultation

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be

considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

Report and recommendation

(2) After the public consultation, as soon as it is of the opinion that it has sufficient information to do so, the responsible authority shall

(*a*) report to the Minister regarding

(i) the scope of the project, the factors to be considered in its assessment and the scope of those factors,

(ii) public concerns in relation to the project,

(iii) the potential of the project to cause adverse environmental effects, and

(iv) the ability of the comprehensive study to address issues relating to the project; and

(*b*) recommend to the Minister to continue with the environmental assessment by means of a comprehensive study, or to refer the project to a mediator or review panel in accordance with section 29.

Minister's decision

21.1 (1) The Minister, taking into account the things with regard to which the responsible authority must report under paragraph 21(2)(*a*) and the recommendation of the responsible authority under paragraph 21(2)(*b*), shall, as the Minister considers appropriate,

(*a*) refer the project to the responsible authority so that it may continue the comprehensive study and ensure that a comprehensive study report is prepared and provided to the Minister and to the Agency; or

(*b*) refer the project to a mediator or review panel in accordance with section 29.

Decision final

(2) Despite any other provision of this Act, if the Minister refers the project to a responsible authority under paragraph (1)(*a*), it may not be referred to a mediator or review panel in accordance with section 29.

Public participation

21.2 Where a project has been referred to a responsible authority under paragraph 21.1(1)(*a*), the responsible authority shall ensure that the public is provided with an opportunity, in addition to those provided under subsection 21(1) and section 22, to participate in the comprehensive study, subject to a decision with respect to the timing of the participation made by the federal environmental assessment coordinator under paragraph 12.3(*c*).

...

Decision of Minister

23. (1) The Minister shall, after taking into consideration the comprehensive study report and any comments filed pursuant to subsection 22(2), refer the project back to the responsible authority for action under section 37 and issue an environmental assessment decision statement that

(*a*) sets out the Minister's opinion as to whether, taking into account the implementation of any mitigation measures that the Minister considers appropriate, the project is or is not likely to cause significant adverse environmental effects; and

(*b*) sets out any mitigation measures or follow-up program that the Minister considers appropriate, after having taken into account the views of the responsible authorities and other federal authorities concerning the measures and program.

More information required

(2) Before issuing the environmental assessment decision statement, the Minister shall, if the Minister is of the opinion that additional information is necessary or that there are public concerns that need to be further addressed, request that the federal authorities referred to in paragraph 12.3(*a*) or the proponent ensure that the necessary information is provided or actions are taken to address those public concerns.

Time for statement

(3) The Minister shall not issue the environmental assessment decision statement before the 30th day after the inclusion on the Internet site of

(*a*) notice of the commencement of the environmental assessment;

(*b*) a description of the scope of the project;

(*c*) where the Minister, under paragraph 21.1(1)(*a*), refers a project to the responsible authority to continue a comprehensive study,

(i) notice of the Minister's decision to so refer the project, and

(ii) a description of the factors to be taken into consideration in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained; and

(*d*) the comprehensive study report that is to be taken into consideration by a responsible authority in making its decision under subsection 37(1) or a description of how a copy of the report may be obtained.

...

DECISION OF RESPONSIBLE AUTHORITY

Decision of responsible authority

37. (1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

...

ADMINISTRATION

MINISTER'S POWERS

Powers to facilitate environmental assessments

58. (1) For the purposes of this Act, the Minister may

(*a*) issue guidelines and codes of practice respecting the application of this Act and the regulations and, without limiting the generality of the foregoing, establish criteria to determine whether a project, taking into account the implementation of any appropriate mitigation measures, is likely to cause significant adverse environmental effects or whether such effects are justified in the circumstances;

(*b*) establish research and advisory bodies;

(*c*) enter into agreements or arrangements with any jurisdiction within the meaning of paragraph 40(1)(*a*), (*b*), (*c*) or (*d*) respecting assessments of environmental effects;

(*d*) enter into agreements or arrangements with any jurisdiction, within the meaning of subsection 40(1), for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the environmental effects of projects of common interest;

(*e*) recommend the appointment of members to bodies established by federal authorities or to bodies referred to in paragraph 40(1)(*d*), on a temporary basis, for the

purpose of facilitating a substitution pursuant to section 43;

(*f*) establish criteria for the appointment of mediators and members of review panels;

(*g*) establish criteria for the approval of a substitution pursuant to section 43;

(*h*) establish criteria for the purposes of an alternative manner of conducting an assessment of the environmental effects of a project referred to in subsection 46(2) or 47(2); and

(*i*) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

...

***Comprehensive Study List Regulations*, SOR/94-638**

...

GENERAL

3. The projects and classes of projects that are set out in the schedule are prescribed projects and classes of projects for which a comprehensive study is required.

SCHEDULE

(Section 3)

COMPREHENSIVE STUDY LIST

PART I

NATIONAL PARKS AND PROTECTED AREAS

1. The proposed construction, decommissioning or abandonment in relation to a physical work in or on a national park, national park reserve, national historic site or historic canal that is contrary to its management plan.

2. The proposed construction, decommissioning or abandonment, in a wildlife area or migratory bird sanctuary, of

(*a*) an electrical generating station or transmission line;

(*b*) a dam, dyke, reservoir or other structure for the diversion of water;

(*c*) an oil or gas facility or oil and gas pipeline;

(*d*) a mine or mill;

(*e*) a nuclear facility;

(*f*) an industrial facility;

(*g*) a canal or lock;

(*h*) a marine terminal;

(*i*) a railway line or public highway;

(*j*) an aerodrome or runway; or

(*k*) a waste management facility.

3. The proposed increase in the size of an area that is used for golfing in a national park or national park reserve, or the proposed increase in the number of holes that are used for golfing within such an area.

3.1 The proposed development of a commercial ski area in a national park or national park reserve:

(*a*) as set out in a long-range development plan that is to be submitted to the Minister responsible for the Parks Canada Agency for approval;

(*b*) that is not consistent with a long-range development plan approved by the Minister responsible for the Parks Canada Agency; or

(*c*) that is consistent with a long-range development plan approved before 1999 but that involves development of currently undeveloped, unskied or unserviced terrain.

PART II

ELECTRICAL GENERATING STATIONS AND TRANSMISSION LINES

4. The proposed construction, decommissioning or abandonment of

(*a*) a fossil fuel-fired electrical generating station with a production capacity of 200 MW or more; or

(*b*) a hydroelectric generating station with a production capacity of 200 MW or more.

5. The proposed expansion of

(*a*) a fossil fuel-fired electrical generating station that would result in an increase in production capacity of 50 per cent or more and 200 MW or more; or

(*b*) a hydroelectric generating station that would result in an increase in production capacity of 50 per cent or more and 200 MW or more.

6. The proposed construction, decommissioning or abandonment of a tidal power electrical generating station with a production capacity of 5 MW or more, or an expansion of such a station that would result in an increase in production capacity of more than 35 per cent.

7. The proposed construction of an electrical transmission line with a voltage of 345 kV or more that is 75 km or more in length on a new right of way.

PART III

WATER PROJECTS

8. The proposed construction, decommissioning or abandonment of a dam or dyke that would result in the creation of a reservoir with a surface area that would exceed the annual mean surface area of a natural water body by 1500 hectares or more, or an expansion of a dam or dyke that would result in an increase in the surface area of a reservoir of more than 35 per cent.

9. The proposed construction, decommissioning or abandonment of a structure for the diversion of 10 000 000 m^3/a or more of water from a natural water body into another natural water body or an expansion of such a structure that would result in an increase in diversion capacity of more than 35 per cent.

10. The proposed construction, decommissioning or abandonment of a facility for the extraction of 200 000 m^3/a or more of ground water or an expansion of such a facility that would result in an increase in production capacity of more than 35 per cent.

PART IV

OIL AND GAS PROJECTS

11. The proposed construction, decommissioning or abandonment of

(*a*) [Repealed, SOR/2003-282, s. 2]

(*b*) a heavy oil or oil sands processing facility with an oil production capacity of more than 10 000 m^3/d; or

(*c*) an oil sands mine with a bitumen production capacity of more than 10 000 m^3/d.

11.1 The proposed construction or installation of a facility for the production of oil or gas, if the facility is located offshore and

(*a*) is outside the limits of a study area delineated in

(i) an environmental assessment of a project for the offshore production of oil or gas that was conducted by a review panel or as a comprehensive study under the *Canadian Environmental Assessment Act*, or

(ii) an environmental assessment of a proposal for the offshore production of oil or gas that was conducted by a Panel under the *Environmental Assessment Review Process Guidelines Order*; or

(*b*) is inside the limits of a study area delineated in an environmental assessment described in subparagraphs (*a*)(i) or (ii) and is not connected by an offshore oil and gas pipeline to a previously assessed facility in the study area.

11.2 The proposed decommissioning or abandonment of a facility for the production of oil or gas if the facility is located offshore and it is proposed that the facility be disposed of or abandoned offshore or converted on site to another role.

12. The proposed expansion of a heavy oil or oil sands processing facility that would result in an increase in oil production capacity that would exceed 5 000 m^3/d and would raise the total oil production capacity to more than 10 000 m^3/d.

13. The proposed construction, decommissioning or abandonment, or an expansion that would result in an increase in production capacity of more than 35 per cent, of

(*a*) an oil refinery, including a heavy oil upgrader, with an input capacity of more than 10 000 m^3/d;

(*b*) a facility for the production of liquid petroleum products from coal with a production capacity of more than 2 000 m^3/d;

(*c*) a sour gas processing facility with a sulphur inlet capacity of more than 2 000 t/d;

(*d*) a facility for the liquefaction, storage or regasification of liquefied natural gas, with a liquefied natural gas processing capacity of more than 3 000 t/d or a liquefied natural gas storage capacity of more than 50 000 t;

(*e*) a petroleum storage facility with a capacity of more than 500 000 m^3; or

(*f*) a liquefied petroleum gas storage facility with a capacity of more than 100 000 m^3.

14. The proposed construction of

(*a*) an oil and gas pipeline more than 75 km in length on a new right of way; or

(*b*) an offshore oil and gas pipeline, if any portion of the pipeline is outside the limits of a study area delineated in

(i) an environmental assessment of a project for the offshore production of oil or gas that was conducted by a review panel or as a comprehensive study under the *Canadian Environmental Assessment Act*, or

(ii) an environmental assessment of a proposal for the offshore production of oil or gas that was conducted by a Panel under the *Environmental Assessment Review Process Guidelines Order*.

15. [Repealed, SOR/2005-335, s. 2]

PART V

MINERALS AND MINERAL PROCESSING

16. The proposed construction, decommissioning or abandonment of

(*a*) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;

(*b*) a metal mill with an ore input capacity of 4 000 t/d or more;

(*c*) a gold mine, other than a placer mine, with an ore production capacity of 600 t/d or more;

(*d*) a coal mine with a coal production capacity of 3 000 t/d or more; or

(*e*) a potash mine with a potassium chloride production capacity of 1 000 000 t/a or more.

17. The proposed expansion of

(*a*) an existing metal mine, other than a gold mine, that would result in an increase in its ore production capacity of 50 per cent or more, or 1 500 t/d or more, if the increase would raise the total ore production capacity to 3 000 t/d or more;

(*b*) an existing metal mill that would result in an increase in its ore input capacity of 50 per cent or more, or 2 000 t/d or more, if the increase would raise the total ore input capacity to 4 000 t/d or more;

(*c*) an existing gold mine, other than a placer mine, that would result in an increase in its ore production capacity of 50 per cent or more, or 300 t/d or more, if the increase would raise the total ore production capacity to 600 t/d or more;

(*d*) an existing coal mine that would result in an increase in its coal production capacity of 50 per cent or more, or 1 500 t/d or more, if the increase would raise the total coal production capacity to 3 000 t/d or more; or

(*e*) an existing potash mine that would result in an increase in its potassium chloride production capacity of 50 per cent or more, or 500 000 t/a or more, if the increase would raise the total potassium chloride production capacity to 1 000 000 t/a or more.

18. The proposed construction, decommissioning or abandonment, or an expansion that would result in an increase in production capacity of more than 35 per cent, of

(*a*) an asbestos mine;

(*b*) a salt mine with a brine production capacity of 4 000 t/d or more;

(*c*) an underground salt mine with a production capacity of 20 000 t/d or more;

(*d*) a graphite mine with a production capacity of 1 500 t/d or more;

(*e*) a gypsum mine with a production capacity of 4 000 t/d or more;

(*f*) a magnesite mine with a production capacity of 1 500 t/d or more;

(*g*) a limestone mine with a production capacity of 12 000 t/d or more;

(*h*) a clay mine with a production capacity of 20 000 t/d or more;

(*i*) a stone quarry or gravel or sand pit with a production capacity of 1 000 000 t/a or more; or

(*j*) a metal mine located offshore or on the ocean bed.

PART VI

NUCLEAR AND RELATED FACILITIES

19. The proposed construction, decommissioning or abandonment, or an expansion that would result in an increase in production capacity of more than 35 per cent, of

(*a*) a uranium mine, a uranium mill or a waste management system any of which is on a site that is not within the boundaries of an existing licensed uranium mine or mill;

(*b*) a uranium mine, a uranium mill or a waste management system any of which is on a site that is within the boundaries of an existing licensed uranium mine or mill, if the proposal involves processes for milling or uranium tailings management that are not authorized under the existing licence;

(*c*) a Class IB nuclear facility for the refining or conversion of uranium that has a uranium production capacity of more than 100 t/a;

(*d*) a Class IA nuclear facility that is a nuclear fission reactor that has a production capacity of more than 25 MW (thermal);

(*e*) a Class IB nuclear facility that is a plant for the production of deuterium or deuterium compounds using hydrogen sulphide that has a production capacity of more than 10 t/a;

(*f*) a Class IB nuclear facility for the processing of irradiated nuclear fuel with an irradiated nuclear fuel input capacity of more than 100 t/a;

(*g*) a Class IB nuclear facility that is on a site that is not within the boundaries of an existing licensed nuclear facility and is for

(i) the storage of irradiated nuclear fuel, where the facility has an irradiated nuclear fuel inventory capacity of more than 500 t,

(ii) the processing or storage of radioactive waste other than irradiated nuclear fuel, where

(A) the activity of the throughput of radioactive material with a half-life greater than one year is more than 1 PBq/a (10^{15} Bq/a), or

(B) the activity of the inventory of radioactive material with a half-life greater than one year is more than 1 PBq (10^{15}), or

(iii) the disposal of radioactive nuclear substances.

PART VII

INDUSTRIAL FACILITIES

20. The proposed construction, decommissioning or abandonment of a pulp mill or pulp and paper mill.

21. The proposed expansion of a pulp mill or pulp and paper mill that would result in an increase in its production capacity of more than 35 per cent and more than 100 t/d.

22. The proposed construction, decommissioning or abandonment, or an expansion that would result in an increase in its production capacity of more than 35 per cent, of

(*a*) a facility for the production of primary steel with a metal production capacity of 5 000 t/d or more;

(*b*) an industrial facility for the commercial production of non-ferrous metals or light metals by pyrometallurgy or high temperature electrometallurgy;

(*c*) a non-ferrous metal smelter located in the Yukon Territory or Northwest Territories;

(*d*) a facility for the manufacture of chemical products with a production capacity of 250 000 t/a or more;

(*e*) a facility for the manufacture of pharmaceutical products with a production capacity of 200 t/a or more;

(*f*) a facility for the manufacture of wood products that are pressure-treated with chemical products, with a production capacity of 50 000 m^3/a or more;

(*g*) a facility for the manufacture of plywood or particle board with a production capacity of 100 000 m^3/a or more;

(*h*) a facility for the production of respirable natural mineral fibres;

(*i*) a leather tannery with a production capacity of 500 000 m^2/a or more;

(*j*) a facility for the manufacture of primary textiles with a production capacity of 50 000 t/a or more;

(*k*) a factory for the manufacture of chemical explosives employing chemical processes; or

(*l*) a facility for the manufacture of lead-acid batteries.

PART VIII

DEFENCE

23. The proposed construction outside an existing military base of

(*a*) a military base or station; or

(*b*) a training area, range or test establishment for military training or weapons testing.

24. The proposed expansion of a military base or station that would result in an increase in the area of the military base or station of more than 25 per cent, or an increase in the cumulative floor area of existing buildings located on the military base or station of more than 25 per cent.

25. The proposed decommissioning of a military base or station.

26. The proposed testing of weapons for more than five days in a calendar year in an area other than those training areas, ranges and test establishments established under the authority of the Minister of National Defence for the testing of weapons prior to the coming into force of these Regulations.

27. The proposed low-level flying of military fixed-wing jet aircraft for more than 150 days in a calendar year as part of a training program at an altitude below 330 m above ground level on a route or in an area that is not established by or under the authority of the Minister of National Defence or the Chief of the Defence Staff as a route or area set aside for low-level flying training prior to the coming into force of these Regulations.

PART IX

TRANSPORTATION

28. The proposed construction, decommissioning or abandonment of

(*a*) a canal or any lock or associated structure to control water levels in the canal;

(*b*) a lock or associated structure to control water levels in existing navigable waterways; or

(*c*) a marine terminal designed to handle vessels larger than 25 000 DWT unless the terminal is located on lands that are routinely and have been historically used as a marine terminal or that are designated for such use in a land-use plan that has been the subject of public consultation.

29. The proposed construction of

(*a*) a railway line more than 32 km in length on a new right of way;

(*b*) an all-season public highway that will be more than 50 km in length and either will be located on a new right-of-way or will lead to a community that lacks all-season public highway access; or

(*c*) a railway line designed for trains that have an average speed of more than 200 km/h.

30. The proposed construction or decommissioning of

(*a*) an aerodrome located within the built-up area of a city or town;

(*b*) an airport; or

(*c*) an all-season runway with a length of 1 500 m or more.

31. The proposed extension of an all-season runway by 1 500 m or more.

PART X

WASTE MANAGEMENT

32. The proposed construction, decommissioning or abandonment of a facility used exclusively for the treatment, incineration, disposal or recycling of hazardous waste, or an expansion of such a facility that would result in an increase in its production capacity of more than 35 per cent.

SOR/99-439, ss. 2 to 7; SOR/2003-282, ss. 2 to 5; SOR/2003-352, ss. 2, 3(F), 4; SOR/2005-335, s. 2; SOR/2006-175, ss. 2(F), 3, 4(F).

***Public Consultation Policy Regulation*, B.C. Reg. 373/2002, s. 7**

...

7 (1) It is a general policy requirement that at least one formal comment period of between 30 and 75 days be established by the executive director in an order under section 11 [executive director determines assessment process] of the Act or a variation under section 13 [executive director may vary assessment process] of the Act.

(2) It is a general policy requirement that the executive director order one or more further formal comment periods under section 11 or 13 of the Act unless satisfied that the period is

(a) impracticable because of insufficient time, or

(b) unnecessary because the public has not demonstrated sufficient interest in the assessment of the reviewable project.

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