



**DEPARTMENT OF JUSTICE
CANADA
MINISTÈRE DE LA JUSTICE
CANADA**

**Changes to Environmental Impact Assessment
Project Scoping by Federal Responsible
Authorities After Red Chris Mines**

**ALBERTA CHAMBER OF RESOURCES
ENVIRONMENTAL FORUM**
250 Karl Clark Road, Edmonton

June 2, 2010

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Environmental Assessment and Sustainable Development

1987 *World Commission on Environment and Development* (the UN Brundtland Commission)

- Sustainable Development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

Auditor General of Canada

- Conducting environmental assessment early in the planning and proposal stages of a project is important so that the analysis can be of practical use to decision makers and mitigation measures can be incorporated into the project plans. Failure to predict and mitigate adverse environmental effects before carrying out a project can lead to significant environmental degradation and increased economic costs. .. Effective, timely, and meaningful public consultation can help ensure that public concerns and values are considered during the environmental assessment process.





Canadian Environmental Assessment Act

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;

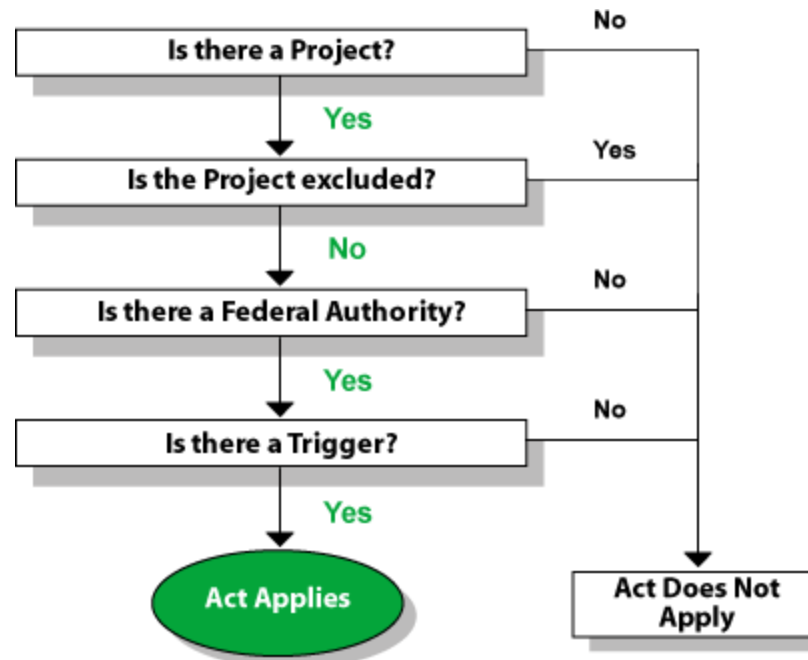
WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

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;



Canadian Environmental Assessment Act





Triggers in the Canadian Environmental Assessment Act

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
 - (b) makes or authorizes payments
 - (c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands,, 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.



Triggers Defined by the Law List Regulations

SOR/94-636

Registration October 7, 1994

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

Law List Regulations

P.C. 1994-1685 October 7, 1994

His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to paragraphs 59(f) and (g) of the *Canadian Environmental Assessment Act*, is pleased hereby to make the annexed *Regulations prescribing provisions of Acts of Parliament and regulations made pursuant to any such Act that confer powers, duties or functions on federal authorities or on the Governor in Council, the exercise of which requires an environmental assessment*, effective on the day on which section 59 of the *Canadian Environmental Assessment Act* comes into force.



Statutes From A to Z in the Law List Regulations

PROVISIONS OF ACTS

- *Aeronautics Act*
 - *Arctic Waters Pollution Prevention Act*
 - *Canada National Parks Act*
 - *Canada-Newfoundland Atlantic Accord Implementation Act*
 - *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*
 - *Canada Oil and Gas Operations Act*
 - *Canada Transportation Act*
 - *Canadian Environmental Protection Act, 1999*
 - *Dominion Water Power Act*
 - *Explosives Act*
 - *Fisheries Act*
 - *Indian Act*
 - *Migratory Birds Convention Act, 1994*
 - *National Energy Board Act*
 - *Navigable Waters Protection Act*
 - *Northwest Territories Waters Act*
 - *Nuclear Safety and Control Act*
 - *Radiocommunication Act*
 - *Railway Safety Act*
 - *Railway Relocation and Crossing Act*
 - *Telecommunications Act*
 - *Territorial Lands Act*
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Specific Fisheries Act Triggers in the Law List Regulation

Fisheries Act

- (a) subsection 22(1)
- (b) subsection 22(2)
- (c) subsection 22(3)
- (d) section 32
- (e) subsection 35(2)
- (f) subsection 37(2)





Fisheries Act of Canada – HADD Prohibited

Harmful alteration, etc., of fish habitat

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Alteration, etc., authorized

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

- **Penalties for violating Subsection 35(1) include fines of up to \$1,000,000, up to 6 months imprisonment, or a combination of both.**





Environmental Assessments & DFO Triggers

Statistical Summary - 2008-2009

Screenings in Fiscal Year 2008-2009

- Fisheries and Oceans Canada -- 599

Comprehensive Studies in fiscal year 2008-2009

- Fisheries and Oceans Canada -- 15

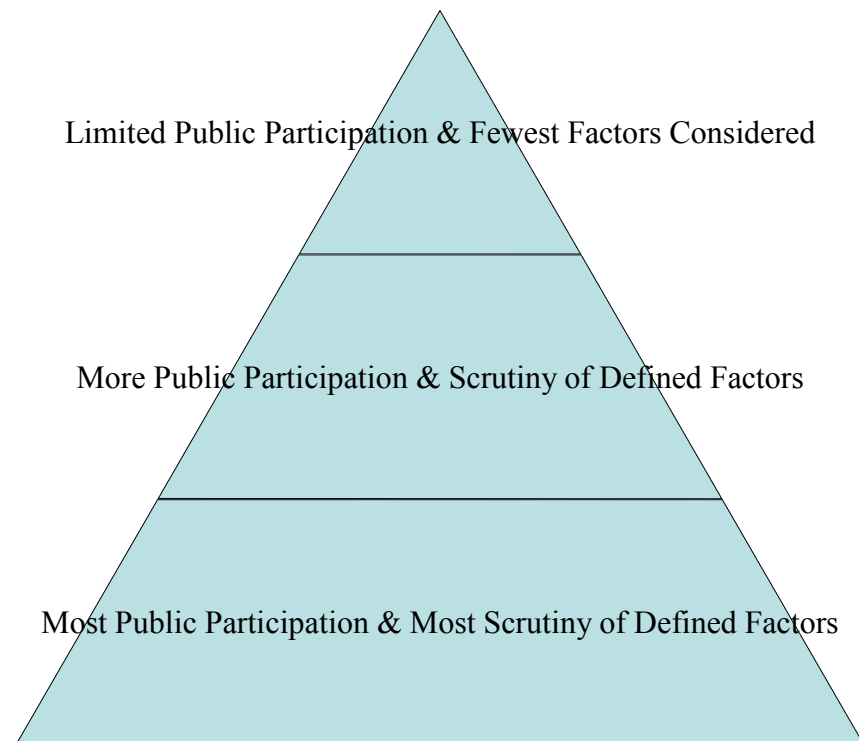
Review Panels in fiscal year 2008-2009

- Fisheries and Oceans Canada -- 7



Three Forms of Federal Environmental Assessment in CEAA

- Screening
- Comprehensive Study
- Panel Review





Cumulative Effects Assessment Mandatory In All Cases

Federal environmental assessment involves both

(i) a determination of the scope of the project pursuant to s. 15 of CEAA, and

(ii) a determination of the scope of the environmental assessment to be conducted in respect of that project pursuant to s. 16 of CEAA.





Cumulative Environmental Effects Mandatory in CEAA

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;

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a) shall be determined

(a) by the responsible authority





Friends of the West County Assn. v. Canada

Friends of the West Country Assn. v. Canada
(Minister of Fisheries and Oceans), [2000] 2 F.C. 263 per Rothstein J.A.

[34] Under paragraph 16(1)(a), the responsible authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1). Nor is it restricted to considering only environmental effects emanating from sources within federal jurisdiction. Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered. Further, nothing in paragraph 16(1)(a) or subsection 16(3) limits the assessment to sources within federal jurisdiction. In order to trigger a federal environmental assessment, some aspect of federal jurisdiction must be engaged. However, once engaged, the federal responsible



Comprehensive Study List Regulations

SOR/94-638

Registration October 7, 1994

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

Comprehensive Study List Regulations

P.C. 1994-1687 October 7, 1994

Whereas the Governor in Council is satisfied that certain projects and classes of projects are likely to have significant adverse environmental effects;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to paragraph 59(d) of the *Canadian Environmental Assessment Act*, is pleased hereby to make the annexed Regulations prescribing those projects and classes of projects for which a comprehensive study is required, effective on the day on which section 59 of the *Canadian Environmental Assessment Act* comes into force. [emphasis added]





Comprehensive Study List Regulations

- PART I: NATIONAL PARKS AND PROTECTED AREAS**
- PART II: ELECTRICAL GENERATING STATIONS AND TRANSMISSION LINES**
- PART III: WATER PROJECTS**
- PART IV: OIL AND GAS PROJECTS**
- PART V: MINERALS AND MINERAL PROCESSING**
- PART VI: NUCLEAR AND RELATED FACILITIES**
- PART VII: INDUSTRIAL FACILITIES**
- PART VIII: DEFENCE**
- PART IX: TRANSPORTATION**
- PART X: WASTE MANAGEMENT**





Canadian Environmental Assessment Act

Comprehensive Study

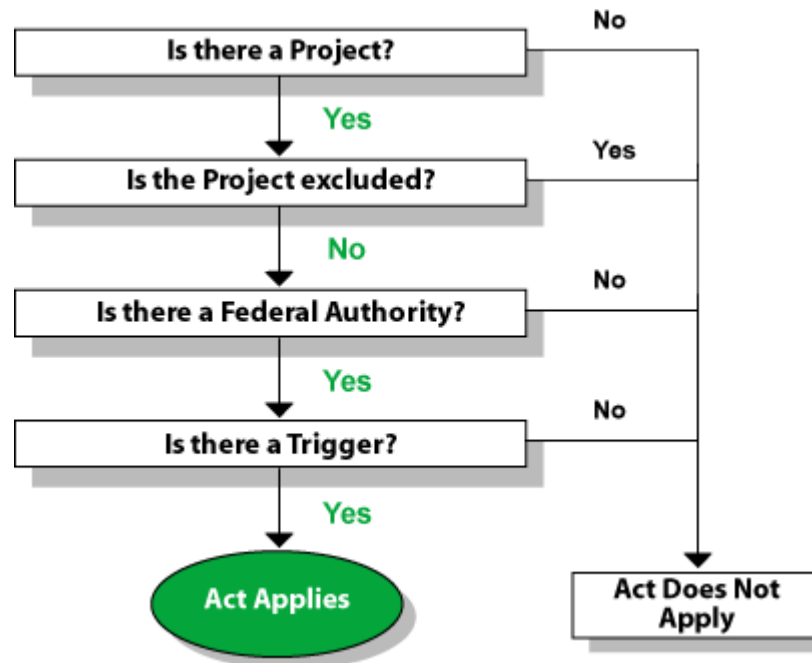
Public consultation

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.





Canadian Environmental Assessment Act





Canadian Environmental Assessment Act

ENVIRONMENTAL ASSESSMENT PROCESS

General

Scope of project

- 15.** (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
- (a) the responsible authority; or ...



Office of the Auditor General of Canada

2009 Fall Report of the Commissioner of the Environment and Sustainable Development

1.16 One of the first steps of the environmental assessment process is for federal authorities to determine the scope of a project. The scope of a project defines the parts of the project that are to be included or excluded from the environmental assessment analysis. Responsible authorities have the discretion to establish a project's scope according to their mandate or responsibilities.





Office of the Auditor General of Canada

2009 Fall Report of the Commissioner of the Environment and Sustainable Development

1.18 According to responsible authorities and the Agency, reaching consensus and establishing the scope of a project when there is more than one responsible authority is a long-standing issue. It is a point of contention between responsible authorities and an ongoing problem for achieving timely federal coordination. This is particularly the case when the *Canadian Environmental Assessment Act* is triggered by a regulatory function, such as the issuing of a permit, licence, or any other approval as prescribed in the *Law List Regulations* of the Act. In these cases, responsible authorities have the discretion to include in the project's scope only those components of the proponent's work that may have an impact on aspects of the environment that fall within their specific departmental mandate and therefore over which they have authority.





Friends of the West County Assn. v. Canada

**Friends of the West Country Assn. v. Canada
(Minister of Fisheries and Oceans), [2000] 2 F.C. 263**

Judgment Written by Rothstein JA

[12] Subsection 15(1) is straightforward. It confers on the responsible authority (the Canadian Coast Guard in this case) the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.

[18] It follows that the environmental assessment that must be carried out will be in respect of the project as scoped.





The Issue that Went to the SCC in *MiningWatch v. DFO*

As a matter of statutory interpretation, which has priority?

- **CEAA s. 15.** (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by ... the responsible authority

OR

- **Comprehensive Study List Regulations prescribing those projects and classes of projects for which a comprehensive study is required**



Discretion in Federal Environmental Assessment

Canadian Environmental Assessment Act

Scope of the Project

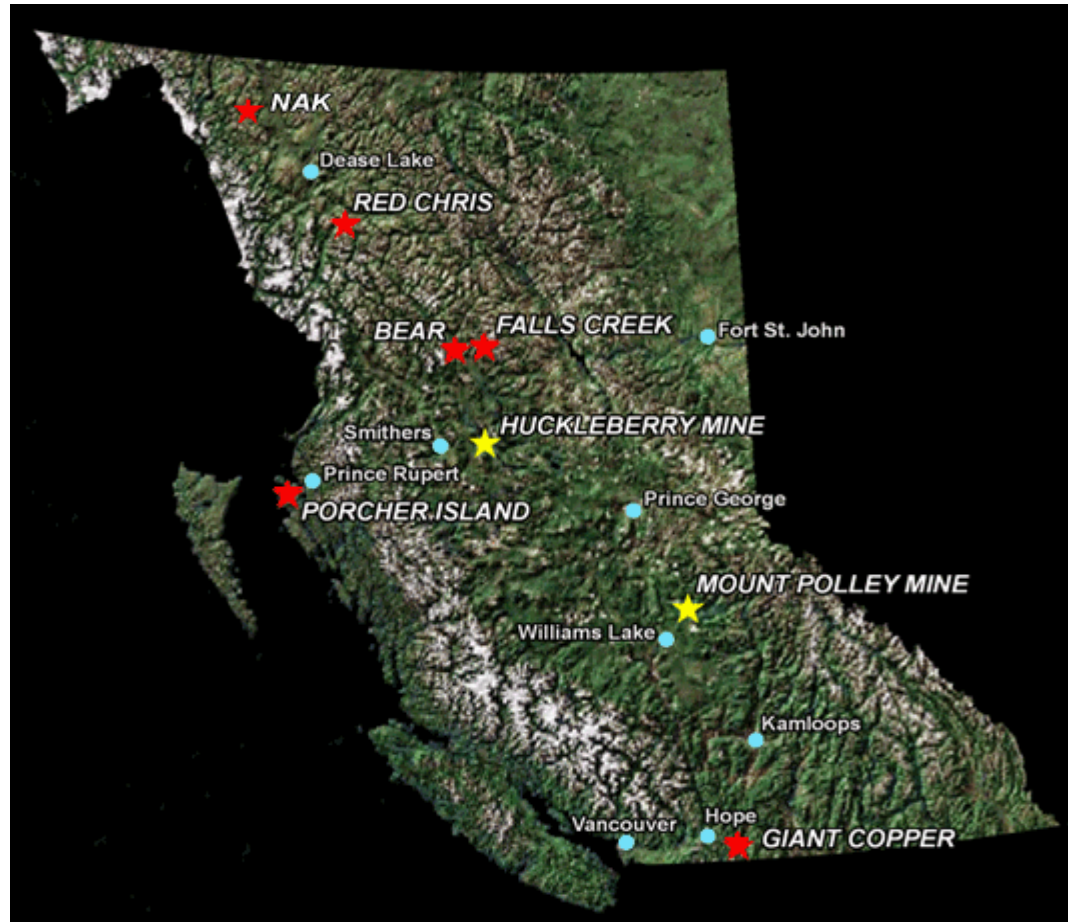
s. 15 (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by ... the responsible authority

Scope of the Environmental Assessment Factors to Be Considered in Relation to the Project

s. 16 (3) The scope of the factors to be taken into consideration ...shall be determined by the responsible authority

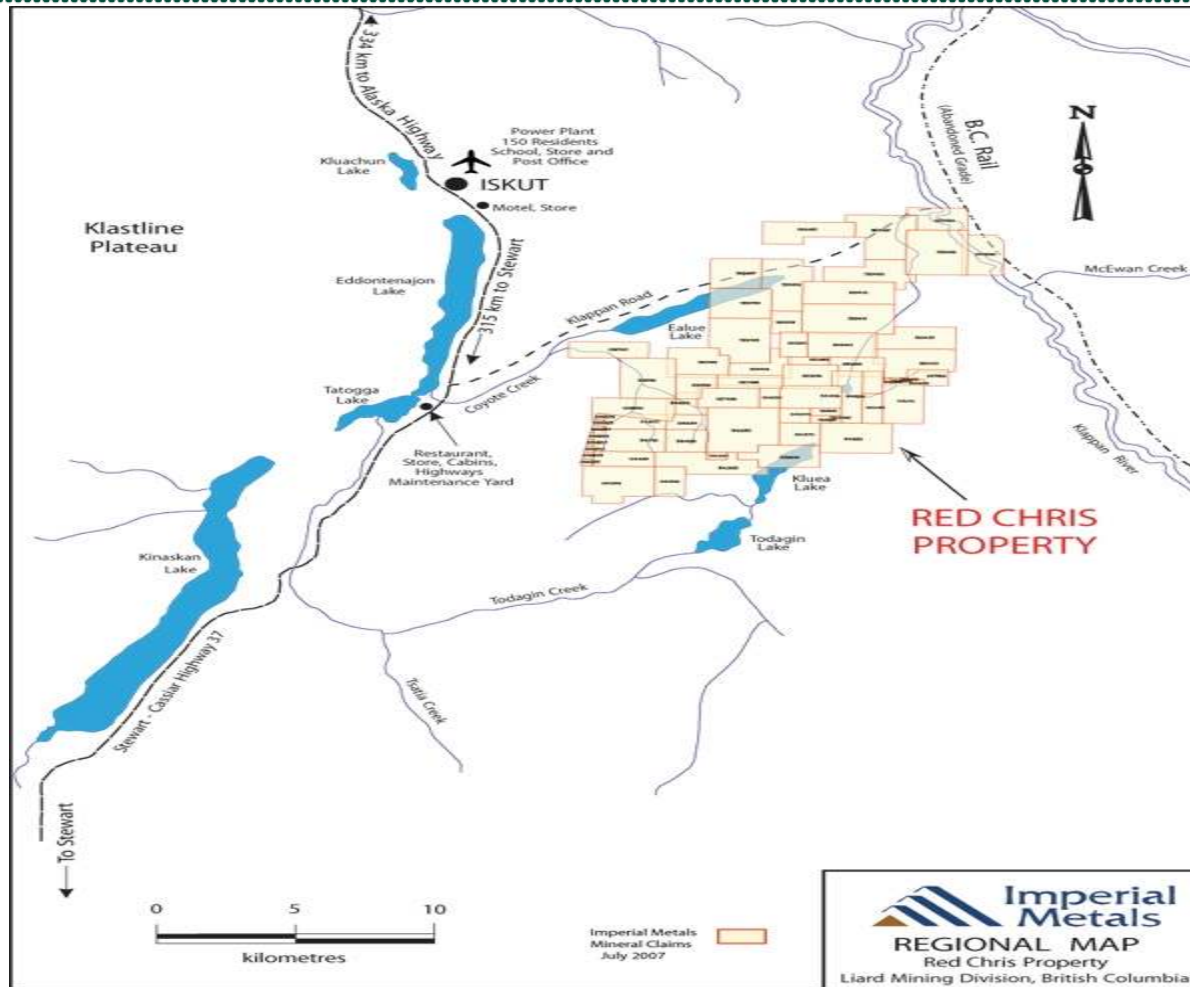


BCPropertyMap2007





Regional Map





Comprehensive Study List Regulation

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.





MiningWatch v. AG – Federal Court Judgment

**Citation: 2007 FC 955 / Ottawa, Ontario, September 25, 2007 /
The Honourable Mr. Justice Martineau**

[50] In the case at bar, an EA is mandatory under paragraph 5(1)(d) and 5(2)(a) of the CEAA because the Project requires:

- 1) an authorization from the minister of Fisheries and Oceans pursuant to subsection 35(2) of the Fisheries Act for the HADD of fish habitat;
- 2) the issuance of a licence by the minister of Natural Resources under paragraph 7(1)(a) of the Explosives Act for the contemplated explosives factory and magazine; and,
- 3) an amendment by the Governor in Council of Schedule 2 of the Metal Mining Effluent Regulations taken under the authority of subsection 36(5) of the Fisheries Act to include the headwaters of Trail Creek as a Tailings Impoundment Area





MiningWatch v. AG – Federal Court Judgment

[96] ...“DFO has determined that the proposed project will require a Comprehensive Study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under Section 16(c) of CEAA’s Comprehensive Study List Regulations”. [emphasis added]

[14] On or about December 9, 2004, DFO wrote to the Agency outlining how at first, DFO felt that the scope of the project, taken at face value from the application, required a comprehensive study; however, upon further review and as a result of new fisheries information and the decision of the Federal Court in *TrueNorth* (cited as *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265), it was determined that the scope of the project required only a screening report.



Supreme Court of Canada (cont'd)

Citation: MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 **Date:** 20100121
SCC 2 **Docket:** 32797

[41] I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (s. 58(1)(c) and (d)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the *CEAA* (see s. 12(4)).





Supreme Court of Canada

Citation: MiningWatch Canada v. Canada (Fisheries and Oceans), 2010

SCC 2

Date: 20100121

Docket: 32797

[40] ... The Act assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. However, as noted by the government, a proponent could engage in “project-splitting” by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations (see Government factum, at para. 73).



Supreme Court of Canada

Citation: Quebec (Attorney General) v. Moses,
2010 SCC 17

Date: 20100513

Docket: 32693

A mining project within the territory covered by the Agreement that results in the harmful alteration, disruption or destruction of fish habitat is not exempted from any independent scrutiny by the federal Fisheries Minister by virtue of the Agreement. While there is no doubt that this project, considered in isolation, falls within provincial jurisdiction, a mining project anywhere in Canada that puts at risk fish habitat cannot proceed without a permit from the federal Fisheries Minister, which he or she cannot issue except after compliance with the *CEAA*.



Canadian Council of Ministers of the Environment

Canada-wide Accord on Environmental Harmonization

The [Canada-wide Accord on Environmental Harmonization](#) envisions governments working in partnership to achieve the highest level of environmental quality for all Canadians. Under the accord, each government will retain its existing authorities but will use them in a coordinated manner to achieve enhanced environmental results. Each government will undertake clearly defined responsibility for environmental performance and will report publicly on its results.





Panels

Current

- [EnCana Shallow Gas Infill Development Project in the Suffield National Wildlife Area](#)
- [Joslyn North Mine Project, Townships 94-96, Ranges 11-13 West of 4th Meridian](#)
- [Northern Gateway Pipeline Project](#)

Ongoing Follow-up Program

- [Glacier Power Ltd.'s Dunvegan Hydroelectric Project](#)
- [Kearl Oil Sands Project - Mine Development](#)
- [Muskeg River Mine Expansion \(MRME\) - Albian Oil Sand Project](#)



Panels (cont'd)

Pending

- [Highwood Storage and Diversion Plan](#)

Completed

- [Cheviot Coal Mine Project](#)
- [Express Pipeline Project](#)
- [Horizon Oil Sands Project](#)
- [Jackpine Oil Sands Project](#)
- [Little Bow Project/Highwood Diversion Plan](#)





Comprehensive Studies

Current

- [Little Bow Reservoir Rehabilitation and Upgrading Project](#)

Completed

- [Alliance Pipeline Project](#)
- [Decommissioning of CFB Calgary](#)
- [Grizzly Extension Pipeline and Weejay Lateral](#)
- [Local Access Road - Highway 58, Fox Lake and Garden River](#)
- [Marmot Basin \(Eagle Ridge\) Ski Development](#)
- [Millennium Oil Sands](#)
- [Valley South Water Project](#)





Potential Legislative Amendment – Restoring Discretion

Bill C-9 An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures

2155. The [Canadian Environmental Assessment] Act is amended by adding the following after section 15:

15.1 (1) Despite section 15, the Minister may, if the conditions that the Minister establishes are met, determine that the scope of the project in relation to which an environmental assessment is to be conducted is limited to one or more components of that project.

(2) The conditions referred to in subsection (1) must be made available to the public.

(3) The Minister may, in writing and subject to any conditions that the Minister may specify, delegate to a responsible authority in relation to a project the power conferred on the Minister by subsection (1) in respect of that project.

(4) The delegation may be in respect of a project or a class of projects.





SCC Decision - Impact on Federal Environmental Assessments

- The Supreme Court also concluded that whenever any component of a project, as described by the proponent includes an element described in the *Comprehensive Study List Regulations*, a comprehensive study is required.
 - In addition, the Court underscored the value of cooperative assessment provisions set out in the *Canadian Environment Assessment Act* to minimize duplication with provincial processes.
 - This decision provides clarity to responsible federal authorities and will contribute to a more timely overall environmental assessment and regulatory process.
 - The proponent's development proposal will determine the type of environmental assessment to be conducted under the Canadian Environmental Assessment Act (the Act). If any component of the proposal is listed on the Comprehensive Study List Regulations, a comprehensive study will be required.
 - Given that the Court has established that the project as proposed by the proponent must be assessed, the scope of future projects is expected to be confirmed promptly and efficiently.
-





Conclusions

For projects on the comprehensive study list
(including oil sands mines in Alberta):

- several more comprehensive studies or joint panels
- more timely federal coordination
- federal-provincial co-operation in environmental assessment further emphasized
- Future Challenges: Aboriginal Consultation in the environmental assessment & regulatory review process

