

Federal Court



Cour fédérale

Date: 20180216

Docket: T-728-16

Citation: 2018 FC 188

Toronto, Ontario, February 16, 2018

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

DAVID MALONEY

Applicants

and

**MARC GARNEAU *es qualité*
MINISTER OF TRANSPORT OF CANADA
AND TRANSPORT CANADA C/O
ATTORNEY GENERAL OF CANADA AND
AÉROPORTS DE MONTRÉAL**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] David Maloney [Mr. Maloney] challenges the decision of Aéroports de Montréal [ADM] to develop lands previously leased to the City of Dorval by ADM [Lot #7]. ADM constitutes an “authority” as contemplated by subsection 66(b) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [*CEA Act*]. As an authority under that subsection, ADM was

required to determine whether its development project on federally-owned Lot #7 was likely to cause significant adverse environmental effects. If it determined the project was not likely to cause such effects, it could proceed; if it determined t the project was likely to cause adverse environmental effects, it would have been required to consult the Governor in Council, who would decide whether those effects were justified in the circumstances. ADM ultimately determined that its project was not likely to cause significant adverse environmental effects and proceeded with the development project, which was completed by the time this matter was heard. The development project included the construction of a non-passenger and vehicle screening checkpoint [checkpoint], which is required by the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318 [*Aviation Regulations*]. Until December 31, 2015, the City of Dorval had operated part of Lot #7 as a municipal golf course. The development project has resulted in the closure of the golf course.

[2] In this application for judicial review, Mr. Maloney disputes the constitutionality of section 67 of the *CEA Act* by contending it unlawfully delegates ministerial powers to ADM. In the alternative, Mr. Maloney contends the decision to proceed with the project was unreasonable in the circumstances and that Transport Canada [TC] has failed to exercise its jurisdiction over federal lands. He requests this Court quash the decision to proceed with the project. Since the project has already been completed, he requests an order that the checkpoint be removed, and the lands be restored to their original state, to the extent possible.

[3] For the reasons set out below, I find the impugned legislation constitutionally valid, there being no unlawful delegation of power to ADM. I also find the decision to proceed with the

project to be reasonable in the circumstances and there to have been no failure to exercise jurisdiction by TC. The application for judicial review is dismissed.

II. Relevant Timelines

[4] Pursuant to a lease entered into with Her Majesty the Queen in Right of Canada (represented by the Minister of Transport) on July 31, 1992, ADM is the lessee of the federally-owned lands on which Lot #7 is situated. In accordance with the terms of the lease, ADM is responsible for the management, operation and development of Lot #7, as well as of Montreal's Pierre Elliott Trudeau International Airport and other lands and premises adjacent thereto.

[5] Until December 31, 2015, ADM leased Lot #7 to the City of Dorval, who used the lands as a municipal golf course. On December 1, 2014, ADM advised the City of its intention not to renew the lease and of its plans to develop lot #7. During oral argument counsel advised the City of Dorval did not provide ADM with access to the lands until December 2015.

[6] In March 2016, ADM completed a report entitled *Projet d'aménagement CNPV (lot numéro 7) : Évaluation des effets environnementaux potentiels* [Report], which evaluated the negative environmental effects that were likely to result from the development project. In the Report, ADM concluded the project would not likely result in significant adverse environmental effects. In reaching this conclusion, the Report addressed, among other things, issues pertaining to soil quality, vegetation cover, hydrological impact, impact upon migratory birds, noise impact assessment and other issues, including mitigation efforts.

[7] The project commenced on April 8, 2016 with the cutting of trees on Lot #7. Work continued until construction of the checkpoint was complete.

[8] On May 6, 2016, Mr. Maloney, as well as the City of Dorval and the *Coalition pour la sauvegarde des espaces verts Dorval*, filed the within application for judicial review. The City of Dorval and *Coalition pour la sauvegarde des espaces verts Dorval* have since discontinued their claims. Mr. Maloney then filed a Notice of Constitutional Question in February 2017, which has been served on all provinces and territories. No other party has joined in this litigation.

III. Relevant Provisions

[9] For the purposes of the present analysis, I consider the most relevant provisions of the *CEA Act* to be sections 5(1), 66 and 67, as well as section 1 of Schedule 3. These are found in Appendix I attached to these reasons.

IV. Issues

[10] M. Maloney contends there are three issues to be considered by the Court. They can be summarized as follows:

1. He questions the constitutional validity of section 67 of the *CEA Act*. He sets out the following in his Notice of Constitutional Question:

Article 67 of the *Canadian Environmental Assessment Act (2012)* (the “*Act*”) delegates arbitrary discretion regarding the applicability of the law to private entities such as Aéroports de Montréal (ADM), which arbitrary powers have been used by ADM to exclude an expansion project from the scope of the *Act*.

Neither Ministerial discretion nor the Crown prerogative can be freely delegated to third parties, therefore, if such delegation was granted, article 67 of the *Canadian Environmental Assessment Act (2012)* is *ultra vires* and unconstitutional and should be declared such by this Court.

2. He contends TC has failed to exercise its jurisdiction and environmental stewardship over federal lands managed by ADM by failing to supervise ADM's actions.
3. He further contends ADM's decision to develop Lot #7 in order to install a checkpoint was unreasonable given the "late and grossly inadequate environmental assessment process which ignored available facts".

V. Analysis

A. *The constitutional question*

[11] M. Maloney contends that section 67 of the *CEA Act* delegates a discretionary power belonging to the Minister of Transport [Minister] to private parties without providing any direction on how the power should be exercised. He says that, absent ministerial supervision and limits on the exercise of discretionary power, this delegation of power is unconstitutional. He refers to *Morton v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 575, [2015] F.C.J. No. 566 [*Morton*] and *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58, 17 D.L.R. (2d) 81 [*Vic Restaurant Inc.*].

[12] For the reasons set out below, I respectfully reject Mr. Maloney's thesis. In my view, there is no constitutional question to be decided, since section 67 of the *CEA Act* does not constitute a

delegation of discretionary power. Furthermore, in the event there is a delegation of power, it is not unlawful.

(1) Is there a constitutional question to be decided?

[13] In framing his constitutional question, it seems Mr. Maloney confuses principles of administrative law with those of constitutional law. I would note that, while it is the Governor in Council who confers upon ADM the status of a designated airport authority (on the recommendation of the Minister and the Treasury Board) (see P.C. No. 1992-1131, referred to in the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5), it is Parliament who has chosen the means by which an authority must consider the environmental effects caused by projects on federal lands. Section 67 clearly states that an “authority” must not carry out a “project” absent certain conditions. Therefore, it is Parliament, not the Minister, who has entrusted authorities to undertake projects on federal lands. It is also Parliament who has determined the conditions under which those activities may be carried out. For this reason, the Minister cannot be said to have delegated his power.

[14] Under the circumstances, Parliament has not delegated its power to legislate or to decide anything; it has merely put in place a structure to ensure environmental effects are considered by authorities undertaking projects on federal lands. In the absence of section 67 of the *CEA Act*, an authority would be under no obligation to take such steps. Furthermore, it is important to note that projects are not “designated projects” under the legislative scheme of the *CEA Act*, and Parliament has decided no “environmental assessments” are required for projects. I fail to appreciate how the Minister has delegated any function or power to ADM. To create a

constitutional issue, the delegation conferred upon a body (in this case, ADM) must be one that is not authorized by the enabling statute or regulations. Neither circumstance exists in this case.

- (2) Did TC unlawfully delegate a discretionary power to ADM or refuse to exercise its jurisdiction?

[15] As I have already indicated, I am not satisfied that there has been any delegation of power by the Minister to ADM. It is Parliament who has contemplated that ADM, as well as other authorities, would play a defined role in the enforcement of environmental standards on the federal lands they manage. This does not amount to an improper delegation of legislative or regulation-making power.

[16] Mr. Maloney's contention that section 67 of the *CEA Act* is *ultra vires* is, in my view, founded upon a misinterpretation of *Vic Restaurant Inc.* The issue in *Vic Restaurant Inc.* concerned the validity of subsection 2(B) of municipal by-law 1862, which purported to delegate to the City Manager the authority to decide conditions relating to the acquisition of liquor licences. In *Vic Restaurant Inc.*, the Court declared the provision *ultra vires*, not because of an abdication of authority by the City of Montréal, but because the City tried to delegate a power it did not possess. Pursuant to the *Loi des Liqueurs Alcooliques de Québec*, S.R.Q. 1941, c. 255, the exclusive jurisdiction to regulate such matters rested with the *Commission des Liqueurs de Québec*. In the present case, there has been no challenge to Parliament's power to legislate environmental protection measures on federal lands. There is also no serious challenge to the means of enforcement Parliament chose to employ. *Vic Restaurant Inc.* is, with respect, of no assistance to Mr. Maloney.

[17] Mr. Maloney also contends, seemingly based on the terms of the lease between Her Majesty the Queen and ADM, that TC has refused to exercise its jurisdiction over the federally-owned Lot #7 by not requiring an environmental assessment. He says this constitutes an error of law or jurisdiction reviewable on the standard of correctness. The difficulty with this argument is that Parliament has clearly legislated against the need for environmental assessments in the case of projects undertaken by authorities on federal lands. If TC had attempted to require ADM to carry out an environmental assessment, ADM could have quite properly pointed to section 67 of the *CEA Act* and replied that TC was acting beyond its jurisdiction. I find no merit to the argument that TC failed to exercise its jurisdiction or failed to supervise ADM's compliance with environmental laws.

B. *Were the results of the Report, and hence the decision to construct the checkpoint, unreasonable in the circumstances?*

[18] M. Maloney contends the decision by ADM to proceed with the development of Lot #7 to construct a checkpoint was unreasonable given the nature of the investigation that resulted in the Report, as well as the conclusions contained within the Report. For the reasons set out below, I respectfully reject this position.

(1) Standard of Review

[19] The parties agree that the applicable standard of review is that of reasonableness, requiring a degree of deference as outlined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at par. 51, 53, 164, [2008] 1 S.C.R. 190). The decision must be justifiable, transparent and

intelligible and must fall within a range of acceptable outcomes that are defensible in respect of the facts and the law.

- (2) Was the decision to proceed with the project unreasonable under the circumstances?

[20] Language is important; accordingly, it is worth noting Mr. Maloney often refers, in his submissions, to the need for an “environmental assessment”. As already noted, no “environmental assessment”, as defined in the *CEA Act*, was required in this case. As already indicated, section 67 makes no reference to an “environmental assessment”. It simply requires a determination by the relevant authority (in this case, ADM) on whether significant adverse environmental effects are likely to be caused by a project. For the sake of clarity, I will refer to the process required under section 67 as an “environmental study” or “study” rather than an “environmental assessment”.

[21] Mr. Maloney claims that the decision was unreasonable based on the inadequacy of the study undertaken to determine whether the project was likely to cause significant adverse environmental effects. He states that his position is supported by:

- i. The delay in preparing the Report, which was completed only a few weeks before construction began;
- ii. The fact that the study was undertaken in winter, when the majority of the animals and migratory birds were not on site. Mr. Maloney colourfully described the situation as one where migratory birds would have left their home in the Fall, only to return to no home in the Spring. How, he asks, could one conduct a proper

study of the effects caused by a project on residents when the residents are not present;

- iii. The fact that the Report lacks data and information to prove its conclusion that the project was not likely to cause significant adverse environmental effects;
- iv. The failure to set out the qualifications of those who undertook the study and prepared the Report.

[22] Concerning the timeliness, or lack thereof, of the report, I would make the following observations. ADM was under an increasingly tight timeline within which to install the checkpoint in order to meet its national and international obligations in relation to airport security. The lease with the City of Dorval did not expire until the end of December 2015. Even though there would be very limited golfing in Montréal in November, ADM was not allowed on the site until December 2015. Although ADM had data available to it regarding migratory bird populations in the area and other matters, it could not commence any on-site study until it gained access to the site. The study was carried out as soon as possible once access was obtained. I find nothing unreasonable about the timeliness of the study or the Report.

[23] With respect to the fact the study and the Report were completed in the winter when many of the “residents” were in southern climes, I would note that the Report set out the methodology employed during the study and disclosed that it was based on more than a site visit. In addition to the site visit, the authors reviewed literature, internal data, and observations from ADM’s employees who were familiar with the site.

[24] Finally, concerning the reasonableness of the Report as a whole, I note the term “significant adverse environmental effects” as found in section 67 is not defined in the *CEA Act*. However, “environmental effects” is defined in section 5, which is set out in Appendix I. Furthermore, a guide with which to assess whether an activity or project is likely to cause significant adverse environmental effects is found in the Canadian Environmental Assessment Agency’s November 2015 *Operational Policy Statement Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012* [Policy], which is set out in Appendix II.

[25] While the Policy, which applies specifically to environmental assessments of designated projects, is clearly not binding on the ADM in relation to its project, it is instructive to the extent it can be used to assist in the interpretation of the term “significant adverse environmental effects” under section 67 of the *CEA Act*.

[26] With this in mind, I conclude that a reasonable determination of whether a project is likely to cause significant adverse environmental effects under section 67 of the *CEA Act* must consider the potential negative impact of a project on aquatic life and migratory birds, the possibility of contaminants or pollutants that could have a negative impact on the environment, habitat fragmentation, as well as the magnitude, geographic extent, timing, frequency, duration, and reversibility of such factors, among others. This includes a consideration of mitigating factors that could serve to minimize the adverse impacts of the project. The determination must also consider, where relevant and available, knowledge and experience with similar past environmental effects.

[27] While the study and eventual Report could have been more detailed in this case, I conclude that ADM's decision was reasonable, it having considered these factors, where relevant. It benefited from an on-site study (albeit limited), as well as knowledge and experience with similar past projects. It considered issues of soil quality, vegetation cover, hydrological structure, bird population and other factors. It sought advice from employees familiar with the site and the animal life in the area. It considered that a golf course is not land in its original and natural state. It considered mitigation efforts.

VI. Conclusion

[28] As a result of the study undertaken, the contents of the Report, and the mitigation efforts proposed therein, I am satisfied the Report's conclusion and ADM's decision to proceed with the projects meets the reasonableness standard set out in *Dunsmuir*.

[29] For all of these reasons, the application for judicial review is dismissed. The Respondents are not requesting costs, therefore none are awarded. In addition, I will also order that the style of cause be amended to remove two of the original applicants given that they have filed Notices of Discontinuance.

JUDGMENT in T-728-16

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove **CITÉ DE DORVAL** and **COALITION POUR LA SAUVEGARDE DES ESPACES VERTS DORVAL** as Applicants; and,
2. The application for judicial review is dismissed without costs.

"B. Richard Bell"

Judge

APPENDIX I

*Canadian Environmental
Assessment Act, 2012, S.C.
2012, c. 19, s. 52*

*Loi canadienne sur
l'évaluation
environnementale (2012),
L.C. 2012, ch. 19, art. 52*

Environmental effects

Effets environnementaux

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

5 (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :

(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:

a) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :

(i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,

(i) les poissons et leur habitat, au sens du paragraphe 2(1) de la Loi sur les pêches,

(ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,

(ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril,

(iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and

(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention concernant les oiseaux migrateurs,

(iv) any other component of the environment that is set out in Schedule 2;

(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;

(b) a change that may be caused to the environment that would occur

b) les changements qui risquent d'être causés à l'environnement, selon le cas :

(i) on federal lands,

(i) sur le territoire domanial,

(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or

(ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,

(iii) outside Canada; and

(iii) à l'étranger;

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :

(i) health and socio-economic conditions,

(i) en matière sanitaire et socio-économique,

(ii) physical and cultural heritage,

(ii) sur le patrimoine naturel et le patrimoine culturel,

(iii) the current use of lands and

(iii) sur l'usage courant de terres et

resources for traditional purposes, or

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

de ressources à des fins traditionnelles,

(iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

[...]

Definitions

66 The following definitions apply in sections 5 and 67 to 72.

authority means

(a) a federal authority;
and

(b) any other body that is set out in Schedule 3. (autorité)

project means a physical activity that is carried out on federal lands or outside Canada in relation to a physical work and is not a designated project. (projet)

Project carried out on federal lands

67 An authority must not carry out a project on federal lands, or exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a project

[...]

Définitions

66 Les définitions qui suivent s'appliquent aux articles 5 et 67 à 72.

autorité

a) Autorité fédérale;

b) tout autre organisme mentionné à l'annexe 3. (authority)

projet Activité concrète qui est réalisée sur un territoire domanial ou à l'étranger, est liée à un ouvrage et n'est pas un projet désigné. (project)

Projet réalisé sur un territoire domanial

67 L'autorité ne peut réaliser un projet sur un territoire domanial ou exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient

to be carried out, in whole or in part, on federal lands, unless

permettre la réalisation en tout ou en partie du projet sur un tel territoire que si, selon le cas :

(a) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;

(b) the authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances under subsection 69(3).

b) elle décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants et le gouverneur en conseil décide, au titre du paragraphe 69(3), que ces effets sont justifiables dans les circonstances.

[...]

[...]

**SCHEDULE 3
(Section 66 and paragraph 83(a))**

**ANNEXE 3
(article 66 et alinéa 83a))**

Bodies

Organismes

1 Designated airport authority as defined in subsection 2(1) of the *Airport Transfer (Miscellaneous Matters) Act*.

1 Administration aéroportuaire désignée au sens du paragraphe 2(1) de la *Loi relative aux cessions d'aéroports*.

APPENDIX II

Canadian Environmental Assessment Agency, *Operational Policy Statement Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012*, November 2015

Document Information

Disclaimer

This Operational Policy Statement (OPS) is for information purposes only. It is not a substitute for the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) or its regulations. In the event of an inconsistency between this OPS and CEAA 2012 or its regulations, CEAA 2012 or its regulations would prevail.

For the most up-to-date versions of CEAA 2012 and regulations, please consult the Department of Justice website.

Updates

This document may be reviewed and updated periodically. To ensure that you have the most up-to-date version, please consult the Policy and Guidance page of the Canadian Environmental Assessment Agency's website.

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Alternative formats may be requested by contacting: info@ceaa-acee.gc.ca.

This document is also available in Adobe's Portable Document Format [PDF - 192 KB].

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If you have used or consulted the *Operational Policy Statement: Determining Whether a Project is Likely to Significant Adverse Environmental Effects under the Canadian Environmental Assessment Act, 2012*, we would like to hear from you.

Please submit your comments through the User Feedback webpage.

Thank you for taking the time to contribute. Your feedback is appreciated.

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1.0 Purpose

This document supports the implementation of *Canadian Environmental Assessment Act, 2012* (CEAA 2012) provisions related to determining whether a designated project is likely to cause significant adverse environmental effects. Specifically, it provides guidance on how to apply the provisions when the Canadian Environmental Assessment Agency (the Agency) is the responsible authority.

The document informs the preparation of Agency documents such as the Environmental Impact Statement (EIS) Guidelines and the Environmental Assessment (EA) report. It is intended to support proponents of designated projects in the preparation of an EIS, in conjunction with other Agency policy and guidance instruments. It also provides direction to Agency employees throughout the EA of a designated project in their interactions with those engaged in federal EAs, such as proponents, review panel members, federal authorities, other jurisdictions, Aboriginal groups and the public.

2.0 Application

This document is intended for use in an EA of a designated project for which the Agency is the responsible authority, including EAs by review panel.

When the National Energy Board (NEB) is the responsible authority, direction and guidance can be found in the NEB filing manual. Applicants seeking guidance on nuclear projects should refer to the Canadian Nuclear Safety Commission's regulatory framework.

The term "project" refers to designated projects under CEAA 2012 for which the Agency is the responsible authority, and "project EA" refers to the EA of designated projects conducted under CEAA 2012 for which the Agency is the responsible authority.

Throughout the document, the term "environmental effects" refers to environmental effects as described in section 5 of CEAA 2012.

This guidance replaces the Agency's 1994 *Reference Guide: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects* and is for application under CEAA 2012. The 1994 reference guide will continue to apply for project EAs initiated under the former *Canadian Environmental Assessment Act* and are being completed under the transitional provisions of CEAA 2012.

3.0 Relevant Provisions of CEAA 2012

Section 5 of CEAA 2012 describes the environmental effects that must be considered in the implementation of the legislation.

Section 19 specifies the factors to be taken into account in the EA of a designated project, including the environmental effects described in section 5 and the significance of these effects. This includes cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, as well as environmental effects of accidents and malfunctions that may occur in relation to the designated project. Section 19 also requires that the EA of a designated project take into account mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects.

For projects where the Agency is the responsible authority, subsection 52(1) requires the Minister of the Environment (the Minister) to decide if, taking into account the implementation of any mitigation measures the Minister considers appropriate, the project is likely to cause significant adverse environmental effects referred to in section 5. Should the Minister decide that a project is likely to result in significant adverse environmental effects, subsection 52(2) calls for referral to the Governor in Council for a decision on whether those effects are justified in the circumstances.

As per section 54 of CEAA 2012, the Minister must issue an EA decision statement to the proponent of a designated project. The decision statement includes the decision of whether significant adverse effects are likely to occur and any conditions, established under section 53 with which the proponent must comply.

4.0 Determination of Significance under CEAA 2012

Determining whether a project is likely to cause significant adverse environmental effects (often referred to as determination of significance) is central to the practice of project EA. The determination of significance includes considering whether the predicted environmental effects are adverse, significant and likely. A proponent, the Agency or a review panel may make a determination of significance in the course of a project EA. Such determinations of significance are separate from, but may inform, the decision made by the Minister under subsection 52(1) of CEAA 2012.

When a project is predicted to have adverse environmental effects, as defined in section 5 of CEAA 2012, the EA examines whether the project is likely to cause significant adverse environmental effects after taking into account the implementation of technically and economically feasible mitigation measures.

This OPS describes how the determination of significance is nested within the environmental assessment framework (EA framework) and explains the approach recommended by the Agency for reaching a determination on significance. Guidance is also provided on information requirements, documentation needed to support the determination of significance and on roles relative to decision-making.

Environmental Assessment Framework

Environmental effects are commonly identified by comparing the current state (health, status or condition) of a Valued Component (VC) to the predicted future state of the VC with the project in place. VCs are selected to focus the assessment of section 5 environmental effects, taking into account direction provided by the Agency, or in the case of an EA by review panel, by the Agency or the Minister.

The information collected and considered for each VC (including information from Aboriginal communities and the public) is processed through the EA framework. This iterative framework consists of the following steps: scoping, analysis, mitigation, significance, and follow-up (further described in Appendix 1).

The determination of whether a project is likely to cause significant adverse environmental effects (step 4 in the EA framework) relates to the residual adverse environmental effects. A residual adverse environmental effect is an adverse environmental effect of a project that remains, or is predicted to remain, after mitigation measures have been implemented.

Significance is determined for each residual adverse environmental effect using VCs to focus information gathering on each effect.

Proponents are expected to determine whether their project is likely to cause significant adverse environmental effects in their EIS with respect to the residual adverse environmental effects. This requirement is outlined in the EIS Guidelines issued by the Agency for each project EA.

Such determinations must be made for project-specific effects and for any cumulative environmental effects. Both of these determinations, documented in the EA report or panel

report, are taken into account in the decision made by the Minister under section 52 of CEAA 2012.

The determinations must take into account uncertainties. All project EAs involve some level of uncertainty, and observed results will often deviate, to some degree, from predictions made in the EA. Uncertainty could be related to a number of factors such as: project design and components, baseline environmental conditions, VC response, effectiveness of mitigation, overall scope of effects, and natural and human causes of accidental events.

The level of effort applied to the determination of significance is established on a case-by-case basis using the same factors as the overall EA, i.e.:

- the characteristics of the project;
- the potential environmental effects;
- the state (health, status or condition) of VCs that may be impacted by the environmental effects;
- the potential for mitigation and the extent to which mitigation measures may address potential environmental effects; and,
- the level of analysis required to address issues raised by Aboriginal groups or the public.

5.0 Approach

This approach is nested within the significance step of the EA framework (see Appendix 1, step 4)

The recommended approach to determining if a designated project is likely to cause significant adverse environmental effects consists of three stages:

- Stage 1: Determining whether the residual environmental effects are **adverse**;
- Stage 2: Determining whether the residual adverse environmental effects are **significant**;
- Stage 3: Determining whether the significant adverse environmental effects are **likely**.

This approach is carried out for each potential environmental effect.

Stage 1: Adverse

Only residual environmental effects that are adverse are considered in the determination of significance under CEAA 2012. Identification of these effects is the result of the scoping, analysis and mitigation steps of the EA framework (steps 1-3 in Appendix 1). The identification of residual adverse environmental effects applies to the full life cycle of the project: construction, operation, decommissioning and abandonment of the project.

An adverse environmental effect can be described in qualitative or quantitative terms. Examples of adverse environmental effects for generic VCs that may be linked to section 5 of CEAA 2012 are listed below.

Examples:

- Loss of fish or fish habitat
- Migratory bird mortality
- Decline in the health, status, or condition of marine plants
- Reductions in species diversity or abundance of marine animals
- Reduction in air quality on federal lands or in another province during project operation
- Loss of, or damage to, habitats, including habitat fragmentation that would affect the current use of lands and resources for traditional purposes by Aboriginal peoples
- Negative impacts on human health, such as contamination of country food relied upon by Aboriginal peoples
- Loss of, or damage to, physical and cultural heritage resources of Aboriginal peoples (e.g., changes to sites of cultural importance) during project construction
- Loss of, or damage to, Aboriginal historical, archaeological, paleontological, or architectural resources

Stage 2: Significant

This stage involves considering if the residual adverse environmental effects identified in stage 1 are significant for each potentially affected VC.

Key criteria (further described in Appendix 2) that should be considered in this stage include:

- Magnitude;
- Geographic extent;
- Timing;
- Frequency;
- Duration; and
- Reversibility.

Other criteria may also be considered provided that they are described and a rationale for their use is documented. In the case of a proponent seeking to ensure proper documentation of such project-specific criteria, discussion with Agency staff is recommended.

The extent to which an individual criterion will influence the determination of significance will vary depending on the VC under consideration, the nature of the project and its potential environmental effects, as well as the context.

Example: A migratory bird may interact with the construction phase of a project during a short period of time every year and within a small portion of its habitat. If the interaction occurs during its breeding period and in its breeding habitat, it may be more harmful than an interaction occurring during other times of the year or in other parts of its habitat.

The ecological and social context within which potential environmental effects may occur should be taken into account when considering the key criteria above in relation to a particular VC, as the context may help better characterize whether adverse effects are significant. For example, information on the context is useful when it reveals:

- a unique characteristic of the area (e.g., proximity to park lands, ecologically critical or fragile areas, valuable heritage resources);
- unique values or customs of a community that influence the perception of an environmental effect (including cultural factors);
- a VC that is important to the functioning of an ecosystem, ecological community or community of people; or
- a VC for which a target has been established.

Activities over the life-cycle of the project should be considered. For example planned decommissioning activities may influence the criteria. As well, it is important to note that the environmental effects may extend beyond the period of physical interaction between the project activity and VC.

Stage 3: Likely

The determination of likelihood is based on consideration of probability and uncertainty, and is considered only when it is established through stage 2 that one or more predicted residual adverse effects are significant.

The probability of an environmental effect occurring may be based on knowledge and experience with similar past environmental effects. The full life cycle of a project, including its various stages and lifespan, should also be considered in determining the probability of occurrence of an effect.

6.0 Implementation Guidance

The following guidance is provided to assist in clarifying information requirements, documentation, and how the determination of significance informs decision-making.

Information requirements

The Agency issues EIS Guidelines to proponents specifying the nature, scope and extent of the information and analysis required for the preparation of the EIS. In an EA by review panel, the Minister determines the scope of the factors to be taken into account. The Agency, Minister or review panel may also issue information requests to a proponent seeking additional clarification, the collection of information, and the undertaking of studies, if necessary.

Community knowledge and Aboriginal traditional knowledge can contribute to the determination of significance. The public and Aboriginal groups can provide information, offer a different interpretation of the facts or question the conclusions put forward during an EA process.

EA practitioners should use qualitative or quantitative information in determining the confidence level associated with a prediction that supports the determination of significance, e.g. the range within which a predicted value lies within a stated degree of probability.

Documentation

Practitioners are expected to develop clear descriptions of what would be considered a significant adverse environmental effect on a VC. The determination of significance should be presented in a rational, defensible way, and the reasons for the determination should be clearly documented, including the following:

- A residual environmental effect should take into account the predicted effectiveness of proposed mitigation measures and any uncertainties associated with these measures.
- Practitioners should submit analysis of each of the key criteria presented in Appendix 2, as well as any other criteria used in the determination of significance. A rationale must be presented if a particular criterion is deemed not relevant.
- The analysis of likelihood of the significant adverse environmental effects should provide sufficient detail, to substantiate how conclusions were reached.
- The degree of scientific uncertainty related to the data and methods used within the framework of the environmental analysis should be described.

Decision-making: Roles and Responsibilities

The proponent is responsible for providing the necessary information to assess significance and to provide conclusions on determination of significance. This is done through the EIS, as well as subsequent responses to information requirements, where applicable.

The Agency or review panel examines the proponent's information and conclusions on determination of significance, as well as other perspectives on significance received during the EA process. The Agency or review panel then outlines its rationale and conclusions on determination of significance in the EA report or the panel report. These conclusions may align with, or may differ from, those presented by the proponent.

The EA report or panel report is considered by the Minister in making the decision under subsection 52 (1) of CEAA 2012.

Appendix 1: Environmental Assessment Framework

Step 1: Scoping

Identification of the initial focus of an environmental assessment including: the identification of VCs, potential environmental effects, and spatial and temporal boundaries; and the examination of other physical activities that may contribute to cumulative environmental effects.

Step 2: Analysis

Data collection or generation through means such as surveys, literature reviews, on-site testing, community knowledge and Aboriginal traditional knowledge, and a clear description of methods used to predict environmental effects.

Step 3: Mitigation

Identification of technically and economically feasible measures to mitigate any significant adverse effects by reduction, elimination or control or, when these forms of mitigation are not possible, restitution measures such as replacement, restoration or compensation.

Step 4: Significance

Development of conclusions about whether a project is likely to result in significant adverse effects, taking into account the implementation of any mitigation measures.

Step 5: Follow-up

Development of a program to verify the accuracy of the EA of a designated project and/or the effectiveness of mitigation measures.

Appendix 2: Key Criteria for Determination of Significance

As outlined in stage 2 of the approach for determining significance, in addition to the criteria outlined below, EA practitioners should also consider the ecological and social context within which the potential residual adverse environmental effect may occur, in determining significance.

Magnitude

Magnitude refers to the amount of change in a measurable parameter relative to baseline conditions or other standards, guidelines or objectives (e.g., proportion of species habitat affected, number of lost hunting days).

The magnitude of an environmental effect should be expressed in measureable or quantifiable terms, whenever possible. There may be multiple measureable parameters relevant to a VC. When using quantitative or qualitative descriptions of magnitude, clear definitions of terms should be provided. The definition of these terms may vary according to the VC under consideration. For example, if using categories such as “low”, “moderate” or “high” each category should be clearly defined, and the rationale for identifying an environmental effect as being a low, moderate or high magnitude should be clearly documented.

Some considerations that may influence the evaluation of the magnitude of an effect include:

- natural variability, normal fluctuations, or shifts in baseline conditions;
- scale at which magnitude is considered (for example, the percentage of a population affected may represent 80% at a local level and 5% at the regional level);
- resiliency of the VC and surrounding area to change (for example, considering whether especially vulnerable segments of the VC are affected); and
- whether the VC has already been adversely affected by other physical activities or natural change.

Geographic extent

Geographic extent refers to the spatial area over which the environmental effect is predicted to occur. Typical qualitative scales for characterizing geographic extent include site specific, local, regional, provincial, national or global. Prediction of the geographic extent should be quantitative whenever possible (e.g. hectares of habitat change). The traditional territories of potentially affected Aboriginal groups should be considered where relevant.

Depending on the VC, it may be important to take into account the extent to which adverse environmental effects caused by the project may occur in areas far removed from it (e.g. the long-range transportation of atmospheric pollutants).

Timing

Timing considerations should be noted when it is important in the evaluation of the environmental effect (e.g. when the environmental effect could occur during breeding season, or during a period of species migration through the area). It may also be relevant to discuss variation in timing of project activities, such as reservoir level fluctuations, and how that may cause varying environmental effects.

For non-biophysical environmental effects, it is important to take into account seasonal aspects of land and resource use and whether timing is related to Aboriginal spiritual and cultural considerations.

Frequency

Frequency describes how often the environmental effect occurs within a given time period (e.g., alteration of aquatic habitat will occur twice per year).

Frequency should be described using quantitative terms where possible, such as daily, weekly or number of times per year. It may also be described qualitatively as rare, sporadic, intermittent, continuous, or regular. If using qualitative terms, these should be defined for each VC.

Duration

Duration refers to the length of time that an environmental effect is discernible (e.g. day, month, year, decade, permanent). This can refer to the amount of time required for the VC to return to baseline conditions, through mitigation or natural recovery (e.g. vegetation re-colonization, return of wildlife to an area where habitat was avoided due to disturbance).

The duration of the environmental effect may be longer than the duration of the activity that caused the environmental effect. For example, the discharge of a substance into a water body may occur only during operation of a project, but the environmental effect to aquatic biota may last beyond the operational lifespan of the project. In this example, if the discharge is continuous throughout operation and results in reduced fish populations, then the frequency of the environmental effect is continuous and the duration spans operation and post-operation up to the point where fish populations return to baseline.

Environmental effects may not occur immediately following the activity causing them, but these effects still need to be considered. For example when a new reservoir is created there will be a delay before increases in methyl mercury concentrations occur in fish. Similarly, the effect on the intergenerational transfer of knowledge in an Aboriginal community may not be observed for many years after a project disrupts a specific traditional use of the land.

Reversibility

A reversible environmental effect is one where the VC is expected to recover from the environmental effects caused by the project. This would correspond to a return to baseline conditions or other target (e.g., a population management objective, remediation target), through mitigation or natural recovery within a reasonable timescale.

Reversibility is influenced by the resilience of the VC to imposed stresses and the degree of existing stress on that VC.

FEDERAL COURT

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SAUVEGARDE DES ESPACES VERTS DORVAL
DAVID MALONEY v MARC GARNEAU ES QUALITÉ
MINISTER OF TRANSPORT OF CANADA AND
TRANSPORT CANADA C/O ATTORNEY GENERAL
OF CANADA AND AÉROPORTS DE MONTRÉAL

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