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IN BRIEF



Federal Environmental Law and Local Development Proposals

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FEDERAL ENVIRONMENTAL LAW AND LOCAL DEVELOPMENT PROPOSALS

1 INTRODUCTION

Local development projects – such as a quarry, a liquefied natural gas plant, a refinery, a housing development or a wind farm – often cause controversy among stakeholders, who may attach different values to the project. When it appears that a development project may have a negative impact on the environment, people opposed to the project sometimes ask whether federal environmental legislation could be used to stop the project. The short answer is that, unless a development is planned for federal land, the provincial or territorial government is usually the primary regulator. Federal power to stop or even influence a project on non-federal land is limited by a lack of jurisdiction.

This paper discusses two aspects of environmental protection that come under federal jurisdiction – environmental assessment and protection of species under federal jurisdiction – that are commonly raised in calls for federal intervention in local development projects.¹

2 ENVIRONMENTAL ASSESSMENT

An environmental assessment is a process followed to avoid or minimize a project's impact on the environment by incorporating environmental considerations into the project's design and planning. In general, an environmental assessment involves a project's proponent documenting the project and its impacts on the environment in an environmental impact statement. This statement then forms the basis of some type of public review before the relevant authority decides whether the project may proceed and what terms and conditions will apply if it goes forward. Whether an environmental assessment is required, and the types of possible environmental effects examined in the assessment, depend on the legislation governing the process.

Both federal and provincial legislation may require that a development proposal undergo an environmental assessment.² At the federal level, an environmental assessment may be required if a proposed project is of a type listed in regulations made under the *Canadian Environmental Assessment Act, 2012*.³ The types of projects listed in these regulations are “major projects that have the greatest potential to cause significant adverse environmental effects in areas of federal jurisdiction.”⁴

If such a proposed project involves activities regulated under the *Nuclear Safety and Control Act*, the *National Energy Board Act* or *Canada Oil and Gas Operations Act*, then the project is automatically required to undergo a federal environmental assessment. Such assessments are carried out by either the Canadian Nuclear Safety Commission or the National Energy Board.⁵ For all other types of projects listed in the regulations, the Canadian Environmental Assessment Agency conducts a screening process to decide whether a federal environmental assessment of the project will be required.⁶ When one is required, generally the agency is responsible for carrying it out.⁷

If a proposed project does not fall under the types listed in the regulations, the Minister of the Environment may nevertheless order that the project undergo a federal environmental assessment if “in the Minister’s opinion, either the carrying out of [the project] may cause adverse environmental effects or public concerns related to those effects may warrant the [order].”⁸

Federal assessments generally examine environmental effects stemming from the project that are within federal jurisdiction, such as:

- changes affecting aquatic species, fish habitat or migratory bird species covered under the *Migratory Birds Convention Act, 1994*;
- changes to the environment on federal lands or extending beyond the borders of a single province; and
- effects on Aboriginal peoples of environmental changes caused by the project.

In addition to the environmental effects described above, when a project requires a federal permit or other federal authorization or action before proceeding, the federal environmental assessment also includes an examination of environmental changes directly linked to the federal authorization or action as well as any resulting physical, cultural, social or economic effects.

Federal environmental assessments rarely result in a project being rejected outright. Since 2005, 74 environmental assessments have been completed for the types of projects that may require a federal environmental assessment under current legislation, and only five of these projects have been rejected.⁹ All of the rejected projects were subjected to the most rigorous type of assessment, panel review,¹⁰ which is generally used only when there is already a great deal of public concern about the project.¹¹ Most often, an environmental assessment results in the approval of a project subject to terms or conditions designed to reduce its environmental impact.

3 SPECIES PROTECTION

Provincial governments have jurisdiction to manage most wild species within their borders. The federal government’s protection of wild species is almost exclusively reserved for species under federal jurisdiction, namely:

- species on federal land, such as in national parks or on military bases;
- aquatic species, including fish, shellfish, crustaceans and marine mammals, but not amphibians and reptiles; and
- migratory birds covered under the *Migratory Birds Convention Act, 1994*.¹²

Additional protection for these three types of “federal species” is provided for species listed under the federal *Species at Risk Act* (SARA).

3.1 SPECIES ON FEDERAL LAND

As part of its responsibility for managing the lands it owns, the federal government is responsible for all the wild species on its lands.¹³

3.2 AQUATIC SPECIES

The federal government is responsible for managing aquatic species throughout Canada, primarily under the *Fisheries Act*. Sections 35 and 36(3) of the *Fisheries Act* are relevant to local development proposals.

Under section 35 of the *Fisheries Act*, a federal permit is often required before any work, undertaking or activity that kills fish or results in permanent alteration or destruction of fish habitat may be carried out.¹⁴ However, this requirement applies only to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery. Fish habitat is defined broadly in the Act to mean “spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.”¹⁵

Before 25 November 2013, when changes to the *Fisheries Act* came into force,¹⁶ protection of fish habitat under section 35 of the Act was broader and applied to all types of fish. The conclusions of a preliminary analysis of the general implementation of the amended section 35 would suggest that the section may have less influence on local development projects than it did before it was amended.¹⁷

Section 36(3) of the *Fisheries Act* is also relevant to development proposals. This section contains a general prohibition – subject to numerous exceptions – against depositing a “deleterious substance” in fish-bearing water.¹⁸

These two sections of the *Fisheries Act* – sections 35 and 36(3) – may affect the manner in which a development project is carried out by requiring measures to reduce its impact on certain types of fish and fish habitat.

3.3 MIGRATORY BIRDS

Species of migratory birds listed in the *Migratory Birds Convention* with the United States are under federal jurisdiction. The convention is implemented in Canada by the *Migratory Birds Convention Act, 1994*, which primarily regulates the hunting of migratory birds. However, it also contains general prohibitions – subject to exceptions – against possessing, buying or selling a migratory bird, its eggs or its nest.¹⁹ In addition, the Act prohibits depositing a substance that is harmful to migratory birds in waters or an area frequented by migratory birds, subject to exceptions.²⁰

These prohibitions may, for instance, affect the timing of a project so that it does not conflict with a migration or nesting period. The prohibitions may also affect the manner in which a project is carried out and operated in order to reduce its impact on migratory birds.

3.4 SPECIES AT RISK

A federal species (a species on federal land, an aquatic species or a migratory bird) receives additional federal protection if it is a species at risk listed in Schedule 1 of SARA. Specifically, it is an offence under the Act to kill, harm, harass, capture, take, possess, collect, buy, sell or trade a federal species that is classified as extirpated, endangered or threatened under the Act, or to damage or destroy the residence of such a species.²¹ Further, the federal government is obliged to protect these species' critical habitat, as identified in a recovery strategy or action plan for the species.²²

However, protection of wild species other than federal species is primarily the responsibility of the province in which the species is located. If a non-federal species is listed in Schedule 1 of SARA, it will not be protected under that Act unless the Minister of the Environment is of the opinion that provincial laws do not effectively protect the species or its critical habitat.²³ No federal Minister of the Environment has ever arrived at such a conclusion about any species.²⁴

4 CONCLUSION

Federal environmental legislation is unlikely to result in the rejection of a local development proposal that is not on federal land. However, a federal environmental assessment and protections afforded to federal species may require the development be carried out in a more environmentally conscious way.

NOTES

1. This paper does not present an exhaustive summary of environmental matters under federal jurisdiction that could justify the federal government's intervention in a local development proposal. For example, the federal government may become involved if polluted water from a Canadian source flows into the United States, and it will be involved if an environmental concern is related to nuclear energy. Neither of these circumstances is addressed in this paper. For a more comprehensive discussion about environmental matters under federal jurisdiction, see Penny Becklumb, [Federal and Provincial Jurisdiction to Regulate Environmental Issues](#), Publication no. 2013-86-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 24 September 2013.
2. Federal legislation may require that a project undergo an environmental assessment, despite the project's being primarily under provincial jurisdiction, because certain aspects of the environment that may be affected by the project are under federal jurisdiction. See section 5 of the [Canadian Environmental Assessment Act, 2012](#), S.C. 2012, c. 19, s. 52, for a list of the environmental effects under federal jurisdiction that are to be taken into account in a federal environmental assessment. When both federal and provincial legislation require that a single development proposal undergo an environmental assessment, the two assessments are often coordinated into a single process. Environmental assessment provisions may also be included in Aboriginal treaties and self-government agreements.
3. See the [Regulations Designating Physical Activities](#), SOR/2012-147, made under the [Canadian Environmental Assessment Act, 2012](#), S.C. 2012, c. 19, s. 52.

4. [“Regulatory Impact Analysis Statement”](#) contained in the *Regulations Amending the Regulations Designating Physical Activities*, SOR/2013-186, 24 October 2013, in *Canada Gazette*, Vol. 147, No. 23, 6 November 2013, p. 2356. Examples of such major projects include the construction of a major new dam or dyke, oil sands mine, oil refinery, liquefied natural gas plant, uranium mine, nuclear reactor, petroleum storage facility, sour gas processing facility or electrical transmission line.
5. The schedule in the *Regulations Designating Physical Activities* lists the types of projects for which the Canadian Nuclear Safety Commission is responsible for carrying out environmental assessments (items 31 to 38) and for which the National Energy Board is responsible for carrying out such assessments (items 39 to 48).
6. *Canadian Environmental Assessment Act, 2012*, ss. 8–12.
7. See section 15 of the *Canadian Environmental Assessment Act, 2012*. An exception occurs when the Minister of the Environment refers the environmental assessment of a project to a review panel under section 38 of the *Canadian Environmental Assessment Act, 2012*. For more information about review panels, see sections 38 to 51 of the Act as well as Penny Becklumb and Tim Williams, [Canada’s New Federal Environmental Assessment Process](#), Publication no. 2012-36-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 28 August 2012.
8. *Canadian Environmental Assessment Act, 2012*, s. 14(2).
9. Under section 52 of the *Canadian Environmental Assessment Act, 2012*, a project is rejected if it is likely to cause significant adverse environmental effects that are not justified in the circumstances.
10. For more information about review panels, see sections 38 to 51 of the Act as well as Becklumb and Williams (2012).
11. *Canadian Environmental Assessment Act, 2012*, s. 38 and [Canadian Environmental Assessment Act](#), S.C. 1992, c. 37, s. 20(1)(c)(iii) and s. 25(b).
12. For a list of migratory birds protected under the [Migratory Birds Convention Act, 1994](#), S.C. 1994, c. 22, see article 1 of the *Migratory Birds Convention*, which is set out in the [Schedule](#) to the Act.
13. The government protects species on its lands under legislation such as the [Species at Risk Act](#), S.C. 2002, c. 29, and by carrying out environmental assessments of certain projects before allowing them to proceed. Species in federal protected areas, such as national parks and national wildlife areas, receive additional protections under legislation such as the [Canada National Parks Act](#), S.C. 2000, c. 32 or the [Canada Wildlife Act](#), R.S.C. 1985, c. W-9.
14. See [Fisheries Act](#), R.S.C., 1985, c. F-14, s. 35.
15. *Ibid.*, s. 2(1).
16. [Order Fixing November 25, 2013 as the Day on which Certain Provisions of the Act Come into Force](#), SI/2013-116, 24 October 2013, in *Canada Gazette*, Part II, Vol. 47, No. 23, 6 November 2013.
17. Martin Olszynski and Alex Grigg, [“Assessing Canada’s Habitat/Fisheries Protection Regime: A Near Total Abdication of Responsibility?”](#), *ABlawg.ca*, 15 May 2015.

18. A “deleterious substance,” as defined in section 34(1) of the *Fisheries Act*, is, in essence, a substance that, if added to any water, would alter the quality of the water so that it is rendered or is likely to be rendered deleterious to fish, to fish habitat or to human use of fish. Various regulations have been made under the Act prescribing certain substances as deleterious substances for the purposes of authorizing the deposit of those deleterious substances in specific industrial contexts, subject to specified conditions and within set limits. In addition, courts have interpreted the term “deleterious substance” in various prosecutions. As summarized in Department of Justice Canada, [A Practical Guide to the Fisheries Act and to the Coastal Fisheries Protection Act](#), n.d.:

The word deleterious includes lethal and sublethal effects which would result in damage to an aquatic organism and this may include matters such as growth, respiration, reproduction, larval survival or abnormal development. The added phrase “or is likely to be rendered” denotes “potential deleteriousness.” *R. v. Suncor Inc.* (1985), 4 F.P.R. 409 (Alta. Prov. Ct.).
19. *Migratory Birds Convention Act, 1994*, s. 5. Exceptions to the prohibitions are set out in the [Migratory Bird Regulations](#), C.R.C., c. 1035. They provide for hunting migratory birds; using them for scientific, educational or avicultural purposes; killing nuisance migratory birds, including those posing a danger at an airport; possessing migratory birds for the purposes of taxidermy; and handling eiderdown.
20. *Migratory Birds Convention Act, 1994*, s. 5.1. Under section 5.1(3), exceptions are provided for deposits authorized under other federal statutes, including under the *Canada Shipping Act, 2001*, or authorized by the Minister of the Environment for scientific purposes.
21. *Species at Risk Act*, ss. 32 and 33. Under section 2(1), an “‘extirpated species’ means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.” Note that, under section 33, the damage or destruction of the residence of an extirpated species is an offence only if a recovery strategy has recommended the reintroduction of the species into the wild in Canada. See [Schedule 1](#) of the Act to determine whether a species at risk is classified as extirpated, endangered, threatened or of special concern.
22. *Species at Risk Act*, s. 58. Note that the government is obliged to protect the critical habitat of an extirpated species only if a recovery strategy has recommended the reintroduction of the species into the wild in Canada. As of December 2014, critical habitat had been identified for less than half of the species for which a recovery plan had been finalized (personal communication from Environment Canada, 5 January 2015). To determine whether a recovery or action plan has been finalized for a species, and whether that plan identifies the critical habitat of the species, click on the link for the species provided in the [Species at Risk Public Registry](#) and then click on the link for “Documents.”
23. See *Species at Risk Act*, ss. 34, 35 and 61.

24. Note that the *Species at Risk Act*, in section 80, also provides the Governor in Council with the power to make an emergency order to provide for the protection of a listed wildlife species, including a non-federal species, if the competent minister is of the opinion that “the species faces imminent threats to its survival or recovery.”

This power to make an emergency order was made for the first and only time in 2013 to protect the Greater Sage-Grouse. The emergency order applies only on Crown lands; it does not restrict any activities on privately owned lands. See [Emergency Order for the Protection of the Greater Sage-Grouse](#), SOR/2013-202. The Greater Sage-Grouse is a bird indigenous to North America that lives in the sagebrush grasslands of south-eastern Alberta and south-western Saskatchewan. In 2012, the estimated total Canadian adult population of the species was 93 to 138. The emergency order was made following a 2012 legal action against the federal Minister of the Environment for failure to protect the birds under the *Species at Risk Act*.

After the order was issued, the City of Medicine Hat and an oil company filed a legal application to have the order quashed or suspended. See EcoJustice, [Fighting for emergency protections for the greater sage-grouse](#), 23 April 2015; Environment Canada, [Working Together to Protect the Greater Sage-Grouse](#), 2 April 2014; Alberta Wilderness Association, [Sage-grouse – History](#), n.d.