

Obtaining and Securing Project Approvals North of 60: Understanding the Environmental Regulatory Regime by W.K. McNaughton; Summary by Duncan Finley

1.0 Introduction

The environmental regulatory regime North of 60 is, like in the rest of Canada, based on statutory and regulatory requirements imposed by government. Accordingly, similar to the rest of Canada, federal and territorial legislation and regulations enacted or passed by the governments of Canada, the Yukon, the Northwest Territories and Nunavut are applicable, and the decisions made by tribunals and regulatory boards empowered by those laws are binding on activities North of 60.

However, the regulatory regime North of 60 differs from the regulatory regime South of 60 in one important manner: federal legislation has a much more significant relative impact North of 60 than it does South of 60. There is a far greater proportion of federal lands in the Territories than there are in the Provinces. For example, federal lands in British Columbia constitute 1.1% of the land base, and include Indian reserves, areas leased by Port Authorities to third parties, and national parks. In contrast, some 94% of lands in the Northwest Territories are owned by the federal Crown or held by the Crown for Aboriginal groups. As a result, it is vital that any entity operating North of 60 has a firm grasp of the federal environmental regulatory regime, as well as the territorial environmental regulatory regimes.

It is also important for project approvals to recognize the impact of land claim settlement agreements in the North, the (federal) legislation that implements those agreements and the multitude of regulatory Boards and Tribunals, and required consultation processes, that have resulted.

Set out below are the most important federal, Yukon, Northwest Territories and Nunavut statutes with respect to regulation of the environment, as well as a discussion of the major regulatory boards that deal with environmental matters.

2.0 Canadian Federal Legislation

2.1 *Arctic Waters Pollution Prevention Act, R.S.C. 1985, c.A-12*

The *Arctic Waters Pollution Prevention Act* was enacted in light of developments relating to the exploitation of natural resources in the Arctic and the transportation of those resources. Under this Act, no one shall deposit waste of any type in Arctic waters or on the mainland or islands of the Canadian Arctic if there is a chance that the waste deposited will enter Arctic waters. Anyone who is developing or exploiting any natural resources, or carrying on an undertaking on the mainland or in Arctic waters, is liable for all costs to repair any damage caused by a deposit of waste and for all actual damage incurred by other people.

2.2 *Canada Oil and Gas Operations Act, R.S.C. 1985, c.O-7*

The *Canada Oil and Gas Operations Act* applies to any exploration, drilling, production, processing, and transportation of oil and gas in the Northwest Territories and Nunavut.

2.3 *Canada Wildlife Act, R.S.C. 1985, c. W-9*

The *Canada Wildlife Act*, which is complementary to the *Species at Risk Act*, provides the federal Minister of the Environment with the authority to purchase, lease or accept through donation lands for research, conservation and interpretation of wildlife. The Minister may, in cooperation with the provinces,

“take such measures as the Minister deems necessary for the protection of any species of wildlife in danger.”

2.4 Canadian Environmental Assessment Act, S.C. 1992, c. 37

The purpose of the *Canadian Environmental Assessment Act* (“*CEAA*”) was to create a process that would provide federal authorities with information regarding the environmental implications of their decisions. The *CEAA* requires the federal government to conduct an environmental assessment of any project in which the federal government has an interest as described in section 5 of the Act. Thus, the *CEAA* applies to projects involving federal authorities as proponents, as vendors of land and landlords, as donors of financial aid to the project, and, in designated cases, as a licencing or regulatory authority.

From a project proponent’s perspective, the *CEAA* contains a number of aspects that may cause concern, particularly the lack of mandatory time periods within which the various stages of the process must be completed, the large measure of discretion involved in the decision-making process, and the potential for the review process to be influenced by public protests regardless of whether the potential environmental effects of the project are of concern.

However, the *CEAA* also has a number of advantageous features for project proponents. First, the circumstances in which the review process will be applied has been clarified. Second, the legislation contains provisions that provide the basis for the federal and provincial governments to carry out joint review processes, which will prevent challenges to a project on the grounds that it was not subject to review under both processes. Finally, the legislation indicates that certain types of projects will be excluded from its application.

2.4.1 Territorial Processes

Much of the application of the *CEAA* is superceded in the North by specific federal territorial assessment legislation. In the Yukon refer to the *Yukon Environmental and Socio-Economic Assessment Act* and the processes and Board set up to administer assessments. In the Northwest Territories refer to the *Mackenzie Valley Resource Management Act*, the Land and Water Boards and the Environmental Impact Review Board that do the administration. In Nunavut, the Nunavut Impact Review Board was set up under the Nunavut Lands Claims Agreement. Each is discussed below under the applicable territorial section even though based on federal legislation.

2.5 Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33

CEPA 1999 repealed and replaced *CEPA* 1985, which was a grand statement with little practical effect and no application to most local spills, contamination problems or pollution discharges.

CEPA 1999 contains provisions regarding fuels, international air pollution, motor emissions, environmental emergencies, disposal of wastes and other matter at sea, the export and import of wastes and provisions to regulate the environmental effects of ‘federal’ operations. However, the most important aspects of *CEPA* 1999 can be summarized in the following eight points:

1. The “Environmental Protection Alternative Measures Program” permits violators who have not caused serious or irreversible harm or who are not repeat offenders to negotiate with the federal government to correct the violation, thus avoiding a lengthy court process.
2. The imposition of a positive duty on corporate officers and directors to avoid contraventions of *CEPA* 1999.

3. The use of enforcement officers to enforce *CEPA* 1999, which includes the authority to serve summons and secure search warrants.
4. Broad sentencing criteria for judges when they deal with environmental offenders.
5. Access to information for possible suits through the *CEPA* Environmental Registry, which contains information on proposed regulations, codes and guidelines, producers and users of toxic chemicals.
6. The public right to sue for damage to the environment when the government fails to enforce its environmental laws.
7. Enhanced “whistle-blower” protection provisions designed to encourage more Canadians to report *CEPA* violations; and
8. The ability of the public to compel the Minister of Environment to investigate alleged offences.

2.6 *Criminal Code of Canada*, R.S.C. 1985, c. C-46

Although the *Criminal Code* creates offences against persons and property, not the natural environment itself, a number of its offences can in principle be used to penalize “crimes against the environment”. In some instances a regulatory statute may provide that an offender is subject to prosecution and punishment under the *Criminal Code*. For example, a person may be prosecuted under the *Criminal Code* for criminal negligence for violating section 274(2) of *CEPA*, 1999. Furthermore, the *Criminal Code* now more readily attributes criminal liability to an organization for the acts of its representatives because it permits the two necessary components of a crime, the illegal act and the accompanying guilty state of mind, to be established through different representatives of the company.

2.7 *Fisheries Act*, R.S.C. 1985, c. F-14

Under subsection 91(12) of the *Constitution Act, 1867*, the federal government has exclusive legislative jurisdiction over Canada’s fisheries in coastal and inland waters. The *Fisheries Act* is the federal legislation that protects fish and fish habitat throughout Canada’s waters. It is also the federal statute under which the greatest number of environmental prosecutions has been brought.

The key environmental provisions of the *Fisheries Act* are section 35(1), which prohibits the harmful alteration, disruption or destruction of fish habitat, and section 36(3), which prohibits against the deposit of deleterious substances into waters frequented by fish. The Act requires all reasonable measures be taken to prevent such deposits. In the event that a deleterious substance is deposited into such waters, the Act requires that as soon as possible, all reasonable measures be taken to counteract, mitigate, or remedy any adverse effects that may result. Finally, the Act imposes civil liability for loss of income incurred by commercial fishermen and clean-up costs incurred by the Crown.

2.8 *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22

The *Migratory Birds Convention Act* regulates the hunting and use of migratory birds, provides for the establishment of migratory bird sanctuaries, and operates to prohibit the trafficking and commercialization of migratory birds.

2.9 *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22

Although its application has evolved over the years, the primary purpose of the *Navigable Waters Protection Act* is still the protection of the public right of navigation. Any individual, company or government agency that proposes to construct, repair or modify any work in the navigable waters of Canada must acquire approval through the Navigable Water Protection Program. Once it is established that a waterway is indeed navigable, there are two main types of processes that can be followed: a formal

approval, where the work is considered to “substantially interfere” with navigation, or a work assessment process, which generally applies to smaller projects where the work does not substantially interfere with navigation.

This somewhat obscure statute has recently emerged as one of critical importance for environmental protection. Its newfound importance is due to its secondary application, as its formal approval mechanism pursuant to section 5(1) triggers the federal environmental assessment process under the *Canadian Environmental Assessment Act*.

2.10 *Species At Risk Act*, S.C. 2002, c. 29

The primary objective of the *Species At Risk Act* is to help birds, fish, mammals, insects and plants at risk of extinction to recover to sustainable levels. *SARA* is part of a three-part federal government strategy for the protection of wildlife species at risk and aims to prevent wildlife species from becoming extinct by securing the necessary actions for their recovery. *SARA* applies to all federal lands in Canada, all wildlife species listed as being at risk, and their critical habitats.

The process by which species at risk are listed is the keystone of *SARA*. Listing triggers development of recovery plans, protection against harmful activities and penalties for contravention of *SARA*.

3.0 Northwest Territories Legislation

3.1 *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7

The *Environmental Protection Act* (“*EPA*”) governs the release, transport and care of contaminants in the Northwest Territories. The Act takes a preventative approach by focusing on prohibiting the release of substances that would adversely effect the environment or endanger the health of people or animal life. Contaminants cannot be discharged into the environment unless the discharge is authorized by the *EPA* or by regulation. Unauthorized discharges must be reported and measures must be taken to stop the discharge, repair any environmental damage and notify people who may be affected. The Chief Environmental Protection Officer has the authority to order a person to install safeguards to prevent a discharge of contaminants, stop a discharge that has occurred or to repair the damage caused to the environment.

The *EPA* also contains a number of guidelines that regulate used oil and waste fuel, management of hazardous waste, industrial waste discharges, and contaminated site remediation.

3.2 *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83

The *Environmental Rights Act* establishes rights for all Northwest Territories residents in respect of the environment. The Act grants all residents the right to a healthy environment and the right to protect the integrity, biological diversity and productivity of ecosystems. Residents enjoy the ability to launch an investigation, file an information and commence an action in the Supreme Court under the *Environmental Rights Act*.

3.3 *Wildlife Act*, R.S.N.W.T. 1988, c. W-4

The *Wildlife Act* governs hunting and related activities, wildlife management, and the possession and use of wildlife in the Northwest Territories.

4.0 Nunavut Legislation

4.1 Environmental Protection Act, R.S.N.W.T. 1988, c. E-7, as duplicated for Nunavut by s. 29 of the Nunavut Act, S.C. 1993, c. 28

Nunavut adopted the Northwest Territories' environmental legislation and the accompanying regulations. As a result, the Nunavut *Environmental Protection Act* and *Environmental Rights Act* are the same as those of the Northwest Territories discussed above.

4.2 Wildlife Act, S. Nu. 2003, c. 26

The government of Nunavut enacted its own *Wildlife Act* in 2003. The purpose of the *Wildlife Act* is to establish a comprehensive regime for the management of wildlife and habitat in Nunavut, including conservation, protection and recovery of species at risk, in a manner that implements the provisions of the *Nunavut Land Claims Agreement* and respects both wildlife habitat and the rights of the Inuit in relation to wildlife and habitat. For example, the *Wildlife Act* provides that Inuit do not need a licence to harvest wildlife and have access to all lands in the territory, subject to law, except lands that are held in fee simple or are leased. The *Wildlife Act* further provides for habitat management by allowing certain areas to be designated as "critical habitats".

5.0 Yukon Legislation

5.1 Environment Act, R.S.Y. 2002, c. 76

The *Environment Act* ("EA") governs a broad range of environmental matters. The EA provides residents of the Yukon with environmental rights and remedies, governs project approvals, prohibits the release of contaminants and regulates special waste and hazardous waste.

With respect to project approvals, when issuing permits and approving projects the EA distinguishes between major and minor developments. Accordingly, obtaining permitting and project approval for a major project is a more onerous task than for a minor project.

The EA also contains regulations with respect to air emissions, contaminated sites and special waste.

5.2 Yukon Environmental and Socio-Economic Assessment Act, S.C. 2003 c. 7

The *Yukon Environmental and Socio-Economic Assessment Act* ("YESAA") sets out the process for assessment of the environmental and socio-economic effects of all projects or activities in the Yukon. YESAA does not distinguish between projects of different sizes.

YESAA was enacted to provide a comprehensive, neutrally conducted assessment process, to protect and maintain the environment and resources of the territory, and to provide for the well-being and traditions of the Yukon First Nations as well as for the best interests of other Canadians.

YESAA is a federal Canadian statute rather than a statute passed by the Yukon Legislature. It was developed in concert with Canada and Yukon First Nations and, generally speaking, the YESAA process supersedes or replaces the federal CEAA assessment process.

Under YESAA, a proposed project will require an assessment if three conditions are met:

1. The project is located in the Yukon.

2. The *YESAA* regulations list the project activity as subject to assessment and do not exempt it, or a declaration is made under section 48 that it is subject to assessment. Listed activities may include mining and related exploration, oil and gas exploration and operations, coal production, pulp and paper production, use of explosives, steel and chemical products production and power generation projects.
3. One or more of the following circumstances is present:
 - a) The proponent has applied for financial assistance for the project to a federal agency;
 - b) The proponent requires an authorization or grant of an interest in land from a government agency, an independent regulatory agency, a municipal government or a First Nation;
 - c) The proponent is a federal agency or federal independent regulatory agency; or
 - d) The proponent is a First Nation, territorial agency or municipal government and an authorization or grant of interest in land would be required for the project to be undertaken by a private individual.

5.3 *Wildlife Act*, R.S.Y. 2002, c. 229

The *Wildlife Act* is very similar to the Northwest Territories' *Wildlife Act* discussed above. It provides a comprehensive licencing and permit scheme for hunting, trafficking and possession of wildlife.

6.0 Canadian Federal Regulatory and Assessment Boards

6.1 Canadian Environmental Assessment Agency

The Canadian Environmental Assessment Agency is a federal body that administers the *Canadian Environmental Assessment Act*. The CEAA is accountable to the federal Minister of the Environment and its role is to provide high quality environmental assessments to ensure that informed decisions are made with regards to environmental impacts.

The CEAA does not actually conduct environmental assessments, but rather provides support during the assessment process. For example, the CEAA advances the science and practice of environmental assessments through research and development, and promotes high quality assessments through training and guidance.

6.2 Mackenzie Valley Land and Water Board

The Mackenzie Valley Land and Water Board (MVLWB) was created by the *Mackenzie Valley Resource Management Act* ("MVRMA") to create a series of co-management boards which enable the residents of the Mackenzie Valley to participate in the management of the region's resources. A co-management board is a board where half the members are nominated by Aboriginal land claim organizations and the other half are nominated by federal and territorial governments.

The MVLWB's mandate is to regulate the use of land and water and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit to residents of the aboriginal settlement areas, the Mackenzie Valley, and to all Canadians. It has three main functions: First, it is responsible for issuing land use permits and water licences in the unsettled claims area until the balance of the land claims are settled in the Mackenzie Valley; second, it is responsible for processing transboundary land and water use applications in the Mackenzie Valley; third, it ensures consistency in the application of the legislation throughout the Mackenzie Valley and generally replaces the CEAA process.

6.3 Gwich'in, Sahtu and Wek'eezhi Land and Water Boards.

In addition to the MVLWB, the MVRMA created the Gwich'in Land and Water Board, the Sahtu Land and Water Board and the Wek'eezhi Land and Water Board. These three regional boards operate in concert with the MVLWB. They have authority over land and water use within their respective settlement areas, and have the authority to issue, amend, suspend and renew Land Use Permits and Water Licences throughout their respective settlement areas, including on Crown, settlement and private lands.

6.4 Mackenzie Valley Environmental Impact Review Board

The Mackenzie Valley Environmental Impact Review Board ("MVEIRB"), which was also created by the MVRMA, is a co-management board responsible for the environmental impact assessment process in the Mackenzie Valley. Its function is to conduct quality environmental impact assessments that protect the environment and the social, economic and cultural well-being of the residents of the Mackenzie Valley and of all Canadians. The MVEIRB has authority to conduct environmental assessments and reviews of development activities throughout the Mackenzie Valley and generally replaces the CEEA process.

The environmental process has three stages:

1. Preliminary Screening – This is a quick review of a development's application to determine if it may have significant adverse effects on the environment or might be a cause of public concern. The applicable Land and Water Board or other regulatory agency runs this process, not the MVEIRB.
2. Environmental Assessment – Projects that are flagged after preliminary screening are referred to the MVEIRB for an environmental assessment, which is a thorough study of the proposed development. Once the assessment is completed, the MVEIRB issues a recommendation that the project proceed to permitting and licencing as is, the project proceed provided some measures to mitigate the concerns are in place, or that the project be rejected.
3. Environmental Impact Review – This is a more comprehensive examination of a proposed development conducted by an independent panel appointed by the MVEIRB. At the end of the process, the panel makes a recommendation as to whether the project should be allowed or not.

7.0 Northwest Territories Regulatory and Assessment Boards

7.1 Northwest Territories Water Board

The Northwest Territories Water Board ("NWTWB") was established under the *Northern Inland Waters Act* and now operates under the *Northwest Territories Waters Act*. The NWTWB is responsible for the conservation, development and utilization of all of the Northwest Territories' water resources (outside the Mackenzie Valley) in a manner that will provide the optimum benefit to both residents of the Northwest Territories and to the residents of Canada.

In order to use any waters or dispose of any waterborne waste, an application must be made to the NWTWB for a licence prior to any actions. The only exclusions to this are the use of water for domestic purpose, in stream users such as boaters or fishers, or, in an emergency, controlling or preventing floods.

8.0 Nunavut Regulatory and Assessment Boards

8.1 Nunavut Impact Review Board

The Nunavut Impact Review Board ("NIRB") is an environmental assessment agency established under the *Nunavut Land Claims Agreement*. The NIRB determines whether development projects proposed for

Nunavut should proceed and, if so, under what terms and conditions generally replacing the CEAA process. The NIRB's primary objective is to protect and promote the existing and future well-being of the residents of Nunavut and to protect the integrity of the settlement area's ecosystem.

The NIRB determines whether project proposals have the potential to significantly impact the environment through environmental and socio-economic assessments. If a project may significantly affect the environment, cause public concern, or involves technological innovations for which effects are unknown, the NIRB will conduct a comprehensive examination of the proposed development. On the basis of that review, the NIRB will determine whether the proposal should be approved.

8.2 Nunavut Planning Commission

The Nunavut Planning Commission ("NPC"), which was established under the *Nunavut Land Claims Agreement*, is responsible for developing land use plans for Nunavut. Government departments and agencies are responsible for implementing the land use plans, and the NPC is responsible for monitoring compliance.

8.3 Nunavut Water Board

The Nunavut Water Board ("NWB"), which was also established under the *Nunavut Land Claims Agreement*, manages and regulates water to ensure conservation and optimum use. The NWB has responsibilities and authority over the use, management, and regulation of inland waters in Nunavut. A water licence is required for all uses of water and all disposal of waste into water with the exception of domestic or emergency use.

The NWB can issue, renew, amend or cancel a water license. Cancellation of a water licence can, depending on the type of activity detailed in the licence, be carried out with or without a public hearing. However, the NWB does not have enforcement powers. Once a license has been issued, its jurisdiction ceases. The compliance with and enforcement of water licenses falls under the jurisdiction of the Department of Indian Affairs and Northern Development.

8.4 Nunavut Wildlife Management Board

The Nunavut Wildlife Management Board ("NWMB") has responsibility over wildlife and wildlife habitat under the *Nunavut Land Claims Agreement*. Its mandate is to ensure adequate protection and wise use of wildlife and wildlife habitat for the long-term benefit of the Inuit and of the rest of the people of Nunavut and Canada. Its responsibilities include all land and marine mammals, birds, fish and plants. The NWMB establishes and manages critical habitats, within which development is severely restricted.

9.0 Yukon Regulatory and Assessment Boards

9.1 Yukon Environment and Socio-Economic Assessment Board

The Yukon Environment and Socio-Economic Assessment Board ("YESAB") was established under the *Yukon Environmental and Socio-Economic Assessment Act* ("YESAA") in 2003. The YESAB administers the environmental and socio-economic assessment process that is carried out by designated officers, an Executive Committee of the Board and by Board panels. The assessment process aims to maintain environmental quality, protect heritage resources, promote the well-being of Yukon residents and to ensure that projects foster socioeconomic change without undermining ecological and social systems. The YESAB also recognizes and attempts to enhance the traditional economy of Yukon Aboriginal persons.

Upon carrying out an environmental assessment, YESAB can make several recommendations. It can note that a project does not have significant adverse effects on the environment and thus recommend that the project proceed. It can recommend that a project should proceed subject to certain terms and conditions that will mitigate any effects. The YESAB can also recommend that a project not go ahead because its serious adverse effects cannot be mitigated against. Finally, a designated office and the Executive Committee can also recommend that the project be reviewed at a higher level, through an Executive Committee Screening or through a Panel of the Board Review respectively. The recommendations are forwarded to the federal government, territorial government or First Nation that has the authority to determine whether a project should proceed. The appropriate body can accept, reject or vary a recommendation.

9.2 Yukon Water Board

The Yukon Water Board (“YWB”) is an independent administrative tribunal established under the *Waters Act*. The YWB’s mandate is to provide for the conservation, development and utilization of Yukon waters in a manner that will provide optimum benefit for Yukon residents in particular, and for all Canadians.

The YWB is responsible for the issuance of water use licences for the use of water and/or the deposit of waste into water. Licenses are issued for a variety of undertakings, including quartz and placer mining, municipal use, power generation, agricultural activities, industrial undertakings and recreational activities.

9.3 Yukon Fish and Wildlife Management Board

The Yukon Fish and Wildlife Management Board (“YFWMB”) ensures the continued well-being of fish and wildlife populations in the Yukon. The YFWMB makes recommendations to the appropriate Minister, Yukon First Nations or Renewable Resource Councils on all matters related to fish and wildlife management, legislation, research, policies and programs.

The YFWMB works to ensure that communities are aware of the potential impacts of oil and gas development on fish and wildlife. It is the YFWMB’s mandate to ensure that communities can make informed decisions with respect to development in their areas. In addition, the YFWMB works with communities and governments to ensure the development of a fair, open and informed public process for determining how and where oil and gas development will occur in the Yukon.