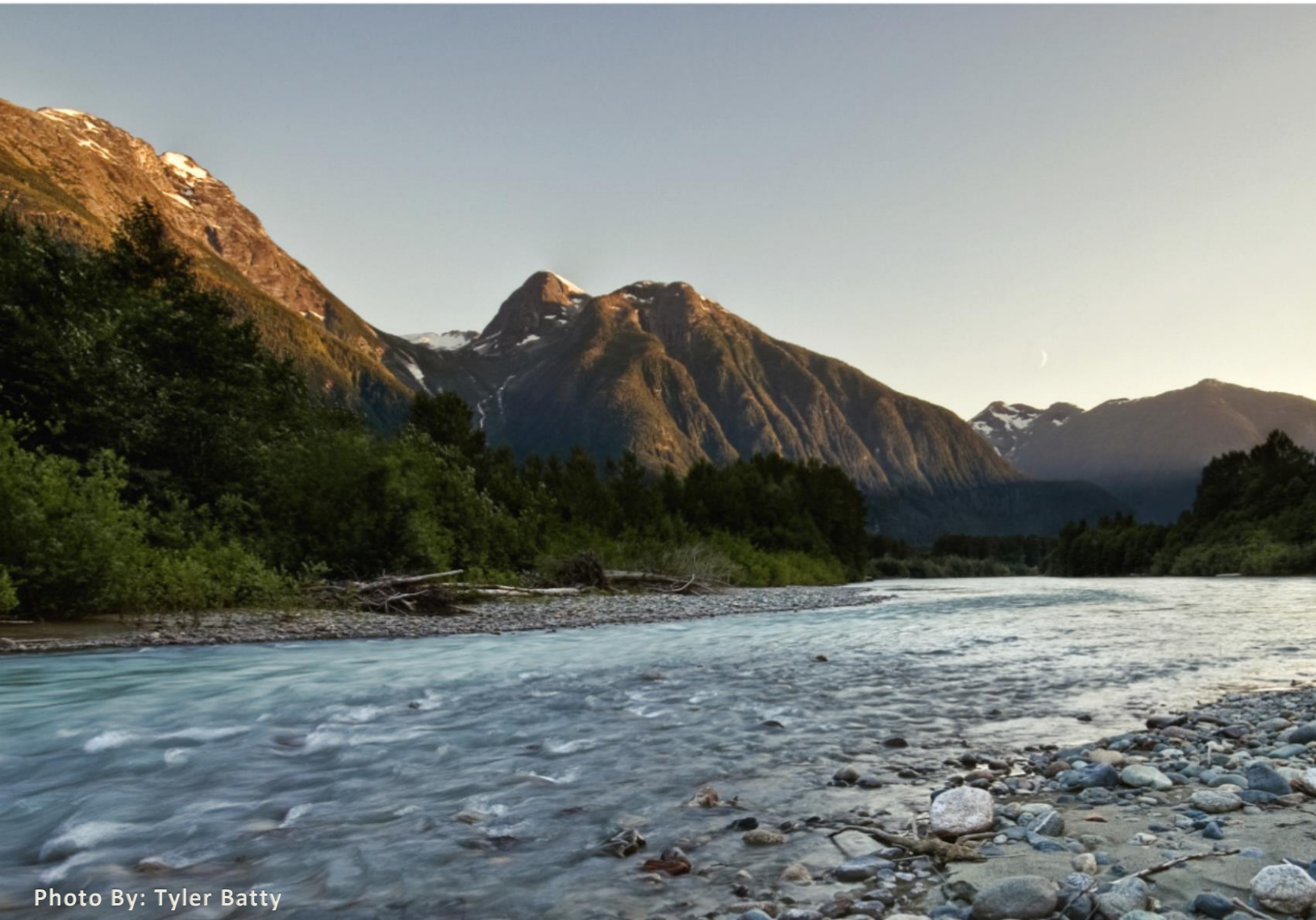
When Should Projects Get an Environmental Assessment?

A Backgrounder on BC's Proposed Changes to the Reviewable Projects Regulation

September 2019 | Gavin Smith, Staff Lawyer, West Coast Environmental Law



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BC is asking for public input on what projects should be subject to environmental assessment

In November 2018, BC passed a new *Environmental Assessment Act*[1] as part of its commitment to revitalize environmental assessment ("EA") in the province. BC plans to bring the new *Act* into force by the end of 2019, once it has developed a number of important regulations that determine how the *Act* will work in practice. One of the most crucial elements of the entire EA regime is the *Reviewable Projects Regulation* (the "RPR"), which determines the projects that are subject to assessment under the *Act*. West Coast has outlined elsewhere why the EA regime – including the RPR – needs reform[2], and argued that more assessments are needed[3] to better protect the environment and enhance public confidence.

The BC Government has now released a discussion paper[4] outlining its proposed approach to reforming the RPR, and is seeking public input[5] until October 7, 2019.

Summary of BC's proposed model for determining whether a project gets assessed

Pages 9-11 of BC's discussion paper provide a good description of the model BC proposes for the RPR, but in summary, the model can be broken down into four basic components. The first two components exist under the current RPR, while the second two components are in large part new additions.

1. Prescribed categories of projects

The RPR lists (or "prescribes") the categories of projects or activities that can be subject to assessment. If a certain type of activity is not listed as a category in the RPR, then it is not subject to assessment unless the Minister designates the project as reviewable. For example, forestry harvest operations and upstream oil and gas extraction are two types of activities that are not listed as categories in the RPR (either the current or new proposed version), so they would never automatically trigger an EA, even if they exceed one of the thresholds described below (e.g.

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[1] https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/third-reading/gov51-3

[2] https://www.wcel.org/publication/why-its-time-reform-environmental-assessment-in-british-columbia

[3] https://www.wcel.org/sites/default/files/publications/2018-04-blueprintforrevitalizingeainbc-final-v2.pdf

[4] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/rpr-engagement/reviewable_projects_regulation_intentions_paper_final.pdf

[5] https://epic-lime-survey-esm.pathfinder.gov.bc.ca/index.php/299578?newtest=Y&lang=en

disturbing more than 600 hectares). The only substantial change BC is proposing to the existing project categories is to remove food processing projects (which had never surpassed the threshold to require an assessment anyway).

2. Project design thresholds

For each category of activity, the RPR sets thresholds that determine whether a project (or project expansion) is reviewable, with reference to the specific design or production capacity of that type of activity. For example, the amount of ore processed each year by a mineral mine is a project-specific design threshold. BC is proposing a number of smaller adjustments and clarifications to existing design thresholds, as well as significant substantive changes in some cases; however, in the majority of cases the project design thresholds are not substantially altered.

3. Project effects thresholds

In addition, BC is proposing to add a series of four new effects-based thresholds that generally apply across categories of prescribed projects: (i) clearing more than 600 hectares of land; (ii) clearing corridors of land more than 60 kilometres in length; (iii) directly emitting more than 382,000 tonnes of greenhouse gases per year (i.e. more than 1% of BC's 2030 climate target); or (iv) overlap with a prescribed protected area. While some other effects-based thresholds already exist under the RPR (e.g. withdrawing over 10 million cubic metres of water a year), this new set of effects thresholds is, in theory, a welcome and important addition that responds to the recommendation[6] of the province's EA Advisory Committee that the RPR needs to "move away from strictly production capacity-based outputs, to criteria that more accurately reflect the potential for a given project to result in adverse impacts." However, as the examples in this backgrounder demonstrate, these proposed effects thresholds appear unlikely to make much difference in practice because they are set so high and would not apply to categories of activities that are not already listed as a prescribed project.

4. Notification Thresholds

Notification is a welcome provision in the new *Act* that requires proponents of certain "non-reviewable" projects to nonetheless notify the EAO, so that their proposal can be considered for designation by the Minister to undergo assessment. BC's discussion paper proposes to require

[6] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/revitalization_eaac_report.pdf

notification whenever: (i) a project is within 15% of a threshold; (ii) a federal assessment is required; or (iii) a project would directly employ more than 250 people. BC is also considering a fourth notification requirement whenever an existing project that originally did not undergo an assessment (because it was not large enough or it pre-dates the first *Environmental Assessment Act*) proposes a modification that would result in the project exceeding the threshold for new projects in that category.

What will the proposed new RPR mean on the ground for whether projects get assessed?

In the absence of real-life examples, it can be hard to picture what the numbers of these proposed RPR thresholds will actually mean on the ground. Would they lead to more assessments? Would they require assessment of activities that have been the subject of public concern in the past because they avoided assessment?

It is usually straightforward to know when projects *are* subject to assessment, because they are listed on the Environmental Assessment Office ("EAO") website database[7]. With some exceptions, the RPR discussion paper generally does not propose scaling back existing thresholds, so projects that were assessed in the past would usually still be subject to assessment under the new proposed RPR. However, what about controversial past projects and activities that *did not* receive an environmental assessment? Would those types of activities now require an EA under the proposed new RPR? This backgrounder seeks to address that question by considering a series of controversial projects and activities that previously did not undergo an EA, and analyzing whether the proposed new RPR would be any stronger in terms of requiring an EA for those types of activities.

The short answer: most prominent examples of past activities that have been in the public eye for escaping assessment would still not be subject to assessment under the proposed new RPR.

[7] https://projects.eao.gov.bc.ca/api/document/5b4e1845124af20024f7a052/fetch/Progress Energy_Town Dam_Section 10%281%29%28b%29 Order.pdf

1. Case Study: Banks Island Yellow Giant Gold Mine

Project Summary:

The Yellow Giant Mine was a gold mine on Banks Island (about 110 kilometres south of Prince Rupert) approved under the Mines Act in 2014, without an environmental assessment. The mine was operated by Banks Island Gold Ltd. for a short period until it received a pollution abatement order in 2015 for releasing tailings and effluent into water bodies, forest and wetland, and was shut down by provincial order shortly thereafter due to non-compliance with the Mines Act. The controversy ultimately led to 35 provincial and federal charges alleging, among other things, that the company was dumping mine waste into the surrounding woods and wetland. After Banks Island Gold Ltd. went bankrupt in January 2016, the provincial government had to step in to conduct remediation of the polluted site, and in 2019 the company's CEO was found guilty of one violation under the federal Fisheries Act and one violation under the provincial Environmental Management Act.

Would the Yellow Giant Mine have been subject to assessment under the proposed new thresholds?

A project like the Banks Island Yellow Giant Gold Mine would not be subject to assessment under the proposed new RPR.

When BC's first Reviewable Projects Regulation was enacted in 1995, it stated that a mineral mine would be reviewable if it proposed production of more than 25,000 tonnes per year of ore. This was weakened in 2002, when the threshold was tripled to 75,000 tonnes per year of ore. The Yellow Giant Mine was permitted[8] to process 200 tonnes of ore a day which, at maximum production, would be 73,000 tonnes per year, falling below the current RPR production threshold (but, notably, exceeding the previous threshold that was in place from 1995-2002). BC is not proposing to change the current production threshold for mineral mines, opting to maintain the weaker 75,000-tonne threshold in the new RPR, thus the Yellow Giant Mine would still not classify as a reviewable project. The Yellow Giant Mine would have required a notification under the proposed new RPR because it is within 15% of the production threshold.

The proposed additional RPR threshold of newly disturbing 600 hectares would have been far too high to apply to the Yellow Giant Mine, which according to its Mines Act Permit M-241 anticipated a mining disturbance area of 12.8 hectares (a subsequent 2014 report anticipated a total disturbance area of 25 hectares, but in either case the number is nowhere near the proposed RPR threshold).

[8] https://news.gov.bc.ca/releases/2014MEM0005-000253

It is worth noting that a summary review of some other mineral mines supports the notion that a 600 hectare new-disturbance threshold is so high that it is unlikely to make a difference for mines. In other words, a mine must be very large to surpass the threshold of 600 hectares of new disturbance, and such very large mines would generally be subject to assessment anyway by virtue of the existing production threshold of 75,000 tonnes of ore per year. University of Montana research scientist Christopher Sergeant has produced a table[9] of past and current mining projects in BC, which identifies disturbance area by hectares for six of the listed mines. According to the data (which West Coast has not independently verified), only one of the six mines would have crossed the proposed threshold of 600 hectares disturbed (Red Chris Mine). In contrast, five of those same six mines would have crossed the existing 75,000 tonnes/year production threshold.

2. Case Study: Davie Bay Limestone Quarry

Project Summary:

Lehigh Hanson Materials Ltd. proposed to construct a limestone quarry at Davie Bay on Texada Island, with an estimated production amount that fell shy of the RPR threshold for a reviewable project by 4%. A community group argued that an EA was required because the maximum production rate that the proposed project infrastructure could potentially sustain (as opposed to what the proponent stated in its application that it intended to produce) would exceed the RPR threshold. The EAO disagreed, relying on the proponent's stated rate of production as the basis for determining whether an EA was required. (The Minister also refused the group's request to designate the project as reviewable). The community group challenged the EAO's position, but was unsuccessful in the BC Supreme Court and also lost an appeal in 2012[10]. The Davie Bay limestone quarry did not undergo an EA.

Would the Davie Bay Quarry have been subject to assessment under the proposed new thresholds?

A project like Davie Bay Limestone Quarry would not require assessment under the proposed new RPR. The proposed production threshold for such quarries remains unchanged. The proposed additional threshold of newly disturbing 600 hectares is far too high to catch the Davie Bay Quarry, which had a stated mining disturbance area of 75.6 hectares.

A project like Davie Bay Quarry would require a notification under the proposed new RPR because it is within 15% of a threshold. The purpose of notification, however, is to enable the

[9] https://www.salmonbeyondborders.org/status-of-bc-mining-projects.html
[10] https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca293/2012bcca293.html?resultIndex=1

Minister to better consider a project for designation for assessment, yet in the case of Davie Bay the Minister explicitly refused to require an assessment.

3. Case Study: Holmes Hydro

Project Summary:

The Holmes Hydro proposal consisted of ten run-of-river hydroelectric power plants to be built simultaneously on ten tributaries of the Holmes River, over a distance of approximately 40 kilometres, and connected by an existing forest service road and the construction of a new transmission line. Each individual plant fell below the megawatt threshold to be a reviewable power project, but counted together the facilities exceeded the threshold and would require assessment.

The proponent and the EAO treated each of the ten plants as a series of ten individual projects, each of which did not require assessment. This was challenged by environmental organizations alleging the approach constituted "project splitting," which artificially avoided the conclusion that the ten plants were interconnected and constituted a single reviewable project. The BC Supreme Court decided in 2013[11] that: "the advice the EAO provided to Holmes Hydro clearly falls within the range of possible, defensible interpretations of its governing legislation" and dismissed the legal challenge, meaning that Holmes Hydro did not receive an environmental assessment.

Would Holmes Hydro have been subject to assessment under the proposed new thresholds?

A project like Holmes Hydro would likely still avoid assessment under the proposed new RPR. The 50-megawatt EA threshold for hydroelectric power plants has not changed, and a proposed modified threshold for power transmission lines would not capture the Holmes Hydro line.

The proposed EA threshold of newly disturbing 600 hectares would almost certainly be too high to make a difference in the case of Holmes Hydro. According to provincial mapping data, the total area of all eleven Licenses of Occupation granted for Holmes Hydro is approximately 632 hectares. However, the company would not disturb every inch of the areas for which it received Licenses of Occupation, rather a significantly smaller area would be disturbed. While there does not appear to be public data regarding the intended area of disturbance for Holmes Hydro, it is safe to assume it would be less than 600 hectares, and thus would not trigger assessment. The proposed new threshold of 60 kilometres of new linear disturbance would similarly be too high to

[11] https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc874/2013bcsc874.html?searchUrlHash=AAAAAQAMaG9sbWVzIGh5ZHJvAAAAAAE&resultIndex=1

trigger assessment (note also that some of the Holmes Hydro linear area was previously-disturbed, e.g. by an existing road).

There are otherwise no new measures proposed for the RPR that would require assessment in a "project-splitting" example like Holmes Hydro. Since none of the individual plants' proposed capacity exceeded 15 megawatts, a project like Holmes Hydro would likely not even require a notification under the proposed new RPR, because no individual plant came within 15% of the 50-megawatt hydroelectric threshold.

It is worth noting that, if it were significantly lower, the proposed new threshold of causing disturbance to land could be one tool to help address examples of "project splitting" like Holmes Hydro. That is, assuming the land disturbance threshold is interpreted in a manner consistent with the underlying impacts-based purpose for which it is being introduced, namely to apply to all interconnected activities that would cause land disturbance together (as opposed to improperly applying the land disturbance threshold ten times to each individual plant, in the case of Holmes Hydro). The RPR needs more clarity in this regard, which is why later in this backgrounder we recommend the RPR specify that a new project includes all proposals that are functionally interconnected.

4. Case Study: Komie North Frac Sand Pit

Project Summary:

The Komie North Mine was proposed to extract silica or "frac" sand for use in hydraulic fracturing to extract natural gas in northeast BC. The two principal concerns about the RPR underlined by the Komie North example are: (i) project splitting or phasing; and (ii) whether the triggers for EA are counted based on the amount of material extracted from the environment, or only based on what the proponent intends to sell.

As noted by the BC Supreme Court[12], "In addition to the Komie North Mine, CSI [the proponent] may eventually seek to develop up to five other new sand and gravel mines." Fort Nelson First Nation, in whose territory the proposals were located, expressed concern with this approach:

> "It would appear these applications have been designed and submitted in such a fashion as to avoid triggering an EA through project splitting, by ensuring that the estimated production capacity for each application "split off" from the whole (all applications taken together) falls just short of the EA threshold for projects of this

[12] https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1180/2015bcsc1180.html?resultIndex=2

type in the Regulation. It is our view that the four Komie North applications for licenses of occupation are all a single reviewable project for the following reasons (summarized here but as set out in more detail above):

- Three applications are contiguous and a fourth is only 1.9 km. away;
- All are proposed by the same proponent – Bond-CSI;
- All are for the same industrial activity – quarrying sand and gravel; and
- All of the product quarried will be processed at the same facility.

Further, the proponent has explicitly stated in correspondence to us that their applications in Komie North "*may all be considered effectively as one application*" and their application materials note that each application complements the others (e.g. the 8015443 application notes "*this application compliments [sic] our Komie North, Cabin-Komie North and Brandt-Komie North applications that were previously submitted...").*

The Province responded that it was "premature" to determine whether the proposals were reviewable, and the Minister refused to designate the various projects for assessment. Yet, soon afterward, the proponent sought to commence development of one application (Komie North), before the others, and this application was considered as a single project by BC.

This is troubling in itself because it appears that the proponent's approach of breaking its activities into chunks and phases was successful in avoiding the activities being considered together as a reviewable project. However, the relevant question that ultimately went to Court was how to do the math for deciding when the threshold is crossed. The proponent and the BC EAO decided that Komie North (the single application, considered in isolation from the proponent's other related frac sand proposals) was not a reviewable project because its production of sand and gravel "for sale and use" fell somewhat below the threshold. Fort Nelson First Nation, on the other hand, noted that the proponent excluded "waste" rock from its tally, and that including the proponent's estimate of "waste" materials in the calculation would mean that Komie North was reviewable.

Fort Nelson First Nation took this issue to Court and initially won its case in 2015[13], but the decision was overturned on appeal in 2016[14]. The appeal decision had two important implications: (i) calculating the tonnage threshold for when a mine project is reviewable under the RPR is currently based on the product to be sold, not on what is extracted from the ground;

[13] https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1180/2015bcsc1180.html?resultIndex=2#document
[14] https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca500/2016bcca500.html

and (ii) the Court found that, based on the way the law is structured, it is not legally possible to bring an early court challenge about whether a proposed project is reviewable under the RPR because the regulation leaves that determination with the proponent (i.e. there is no government "decision" to challenge in Court) – rather, litigation over whether a project is reviewable can only be launched when the government later makes a decision on permits to construct or operate the project, without having required an assessment. From a practical perspective, this means legal wrangling about whether a project requires an EA is postponed to a stage where more money has been invested by the proponent and more project planning and design has occurred without assessment requirements being met.

Would Komie North have been subject to assessment under the proposed new thresholds?

A project like Komie North would likely still avoid assessment under the proposed new RPR. According to materials filed in the BC Supreme Court, Komie North's area of disturbance was approximately 78 hectares, nowhere near BC's proposed new EA threshold of 600 hectares. Even all four of the interconnected quarry proposals referenced by Fort Nelson First Nation, counted together, would be unlikely to exceed the high threshold of 600 hectares of new disturbance. While we do not know the intended disturbance area of the other three proposals, we know that the disturbance area of Komie North (78 ha) was approximately 39% of the total License of Occupation area (199.9 ha). If the other three Licenses of Occupation (which according to provincial mapping data are 158.4 ha, 286.3 ha and 460.1 ha) are presumed to have similar ratios of disturbance, then all four quarries would hypothetically disturb about 430 hectares in total.

The tonnage threshold for sand and gravel pits is not proposed to change in the new RPR, and the EAO is doubling down on the notion that production thresholds should be counted based on what is sold, not what is extracted. In the Mines section of the Discussion Paper, under the heading "Proposed change: Clarity of definitions," the EAO proposes: "Production capacity for mine projects means the quantity of product that has value, expected from a given mining operation. It does not include waste materials generated."

For similar reasons discussed in the Holmes Hydro example above, BC has not proposed a new mechanism that would have otherwise addressed the concern about project splitting or phasing by requiring the various frac sand mine proposals to be considered together as a single reviewable project for the tonnage threshold.

A project like Komie North would require a notification under the proposed new RPR because it is within 15% of a threshold. However, like in the Davie Bay example, such a notification would not have changed the outcome for Komie North because the Minister explicitly refused to require an assessment.

Lastly, BC has not proposed changing the legal structure for how decisions are made about whether a threshold is met; the current approach would be maintained, which relies on the

proponent deciding whether its proposed project meets the criteria making it reviewable (often in consultation with the EAO). Therefore in a scenario like Komie North, where there is a dispute about whether a RPR threshold is met, there is no way to seek a formal decision from BC. Pursuant to the BC Court of Appeal judgment, it would still be necessary to wait and challenge BC's subsequent decision on construction or other operational permits for the project. This delayed-litigation approach seems contrary to everyone's interests – proponent, public and decision-making jurisdictions (including BC and Indigenous nations) – all of whom would benefit from early resolution of any legal disputes about whether an assessment is required.

5. Case Study: North Tsea Lake Water Withdrawal

Project Summary:

Frac sand mines were not the only issues affecting Fort Nelson First Nation at the time. The Nation also brought a challenge in 2012 regarding the issuance of a provincial water licence, which as summarized by the Environmental Appeal Board[15]: "authorizes Nexen to divert water from North Tsea Lake for storage in dugouts and industrial use in oilfield injection. Nexen's use of the water in oilfield injection is for shale gas fracturing, also known as fracking." Although this proposed freshwater withdrawal was very large, there was never any question that it did not require an assessment under the RPR. Nexen initially proposed to withdraw up to 4 million cubic metres of water per year from North Tsea Lake, however this was later revised to 2.5 million cubic metres of water per year. To put this in perspective, 2.5 million cubic metres of water is equivalent to about one thousand Olympic swimming pools. The RPR threshold requiring assessment for water diversion projects, however, is 10 million cubic metres per year. Thus it was always clear the North Tsea Lake water withdrawal would not trigger an EA.

Fort Nelson First Nation nonetheless had significant concerns with the impacts of the licence, and brought a challenge before the Environmental Appeal Board. The Nation won its challenge in 2014 when Board overturned BC's approval of the licence[16], finding that, among other things, aspects of the licence and related supporting materials were "fundamentally flawed and lacking in technical merit" and "[t]here remains considerable risk that the licensed water withdrawals could cause harm to aquatic and riparian habitat and species that the First Nation depends on for the exercise of its treaty rights."

[15] http://www.eab.gov.bc.ca/water/2012wat013c.pdf
[16] http://www.eab.gov.bc.ca/water/2012wat013c.pdf

Would the North Tsea Lake Water Withdrawal have been subject to assessment under the proposed new thresholds?

A project like the North Tsea Lake water withdrawal would not require assessment or notification under the proposed new RPR. The threshold for assessing water diversion projects is proposed to stay the same at 10 million cubic metres per year. Also worth noting is the fact that this threshold would only apply to longer-term water licences. As is the case with the current RPR, shorter-term authorizations for such water use – which last up to two years and can be granted back-to-back – would never trigger an EA under the RPR as proposed, regardless of size.

6. Case Study: Upstream Oil and Gas Activities

Issue Summary

While assessments of pipelines and export terminals grab the headlines, upstream oil and gas development (the actual production of oil and gas through well pads, fracking, etc.) does not trigger an assessment under the current RPR because upstream oil and gas activities are not listed as a category of project in the RPR. Certain categories of activities listed in the RPR, such as waste disposal or withdrawing or storing water, may relate to upstream oil and gas activities, but in the event that these activities trigger an assessment, the assessment is focused on the listed activities themselves (e.g. the storing of water or disposing of waste) and does not provide a fulsome assessment of the upstream oil and gas development to which the activities relate.

In any event, it is rare for projects related to upstream oil and gas development to trigger an assessment under the RPR, and when this does occur such projects have often been exempted from assessment by the EAO. For example:

1) Encana Corporation's saline groundwater extraction project was exempted from assessment[17] in 2011;
2) Four natural gas processing plants were exempted from assessment between 2014-2015 – the Progress Town North Gas Project[18], Encana 4-26 Refrigeration Project[19], Encana 8-

[17] https://projects.eao.gov.bc.ca/api/document/5887e0fbf64627133ae5b2bd/fetch/Order issued under Section 10%281%29%28b%29 dated Jun 1_11 for the Debolt Saline Water Project.pdf

[18] https://projects.eao.gov.bc.ca/api/document/5886a948e036fb01057693fb/fetch/Order 10%281%29%28b%29.pdf

[19] https://projects.eao.gov.bc.ca/api/document/5d2fa4a274b62d0021ef110a/fetch/Encana 4-26 Refrigeration - Exemption Order - 2014-01-13.pdf

21 Refrigeration Project[20] and Encana Saturn 15-27 Sweet Gas Plant Project[21] – which later became a cause of controversy[22] given the lack of public involvement; and

3) Two dams were built without a legally-required assessment, the Progress Energy Lily Dam[23] and the Progress Energy Town Dam[24], and then retroactively issued exemptions in 2018 – a decision that has been the subject of much criticism[25] and is currently being challenged in court[26].

Would upstream oil and gas activity be subject to assessment under the proposed new thresholds?

The EAO is clear at page 26 of its Discussion Paper that BC does not plan to add upstream oil and gas activities as a new RPR category that requires assessment. The EAO's rationale is that upstream oil and gas activity is not a "major project" for which environmental assessments are intended because upstream oil and gas is a "diffuse activity across the landscape", which in BC's view is already adequately regulated by the Oil and Gas Commission.

BC is also proposing scaling back assessment requirements that indirectly relate to upstream oil and gas under the RPR, in three ways:

1) Under water management projects, BC is "proposing that the extraction of deep groundwater, as defined in the *Water Sustainability Regulation*, by the oil and gas industry, not be a reviewable activity." BC provides a rationale for this proposed exemption at page 17 of the discussion paper, which includes the fact that deep groundwater is generally non-potable, and that the exemption may incentivize the oil and gas industry to use deep groundwater instead of more accessible freshwater.

2) For assessments of hazardous waste projects, BC proposes to "Clearly exclude the treatment of drilling mud with a mobile thermal treatment facility, that is located at either a drilling pad or a secure landfill. The process involves treating drilling mud, which is classified as a hazardous waste, in a closed loop system (minimal effluent and emissions). The process is considered beneficial; however, there is a reluctance among

[20] https://projects.eao.gov.bc.ca/api/document/5886a8a0e036fb01057693d3/fetch/Order.pdf

[21] https://projects.eao.gov.bc.ca/api/document/5886b0aae036fb01057695d4/fetch/Order under Section 10%281%29%28b%29 signed July 29%2C 2015..pdf

[22] https://vancouversun.com/opinion/op-ed/ben-parfitt-secret-deals-exempting-some-projects-from-environmental-review-need-to-stop

[23] https://projects.eao.gov.bc.ca/api/document/5b4e161a124af20024f7a002/fetch/Progress Energy_Lily Dam_Section 10%281%29%28b%29 Order.pdf

[24] https://projects.eao.gov.bc.ca/api/document/5b4e1845124af20024f7a052/fetch/Progress Energy_Town Dam_Section 10%281%29%28b%29 Order.pdf

[25] https://theprovince.com/opinion/op-ed/ben-parfitt-environmental-violations-being-ignored-by-b-c-govt-in-rush-to-develop-lng

[26] https://sierraclub.bc.ca/ecojustice-sierra-club-bc-launch-legal-challenge-of-decision-to-exempt-unauthorized-dams-from-environmental-assessments/

industry proponents to use it because the EA requirement is currently unclear" (discussion paper page 18).

3) Again regarding assessments of hazardous waste projects, BC proposes to "Clearly exclude the disposal of produced water (water or brine that is brought to the surface with the natural gas or oil from a well) by injecting it into deep wells" (discussion paper page 18).

7. Case Study: Placer Mining

Issue Summary:

Placer mines are a type of activity that is currently listed as subject to assessment under the RPR, but the threshold of 500,000 tonnes of pay dirt per year is so high that, despite considerable placer mining activity in BC, no placer mine has ever triggered an assessment since the threshold first came into effect 24 years ago. West Coast has addressed elsewhere[27] the impacts of placer mining and why it should be better addressed by the environmental assessment regime.

Would placer mines be subject to assessment under the proposed new thresholds?

BC has acknowledged the need to better provide for assessment of placer mines, and makes the following proposal in the discussion paper: "Given that no placer mines have entered the EA process at the current reviewability threshold, we recognize that the current threshold may not be an accurate indication of the potential for significant adverse effects. The Environmental Assessment Office (EAO) is proposing to lower the threshold for placer mines from 500,000 to 250,000 tonnes of pay dirt per year."

This is a welcome acknowledgement. However, when it comes to the question of whether the lower threshold of 250,000 tonnes of pay dirt per year would in fact subject any placer mines to assessment, the best answer we can give, based on the information currently available, is that we do not know because, apparently, BC does not know either. Based on responses from multiple officials in different provincial Ministries, BC does not appear to have data readily available to answer the question: "what are the five largest placer mines currently operating in British Columbia, by tonnes of pay dirt per year?"

That BC apparently does not systematically record this type of data on proposed pay dirt during permitting begs the question of how the BC government would know if a proposed placer mine met the (current or proposed) production threshold to be a reviewable project under the RPR. It also calls into question whether there is a better measurement unit than pay dirt (which the EAO

[27] https://www.wcel.org/sites/default/files/publications/2018-01-bc-eareform-backgrounder-web-final.pdf

defines as “Mined placer gravel that is, or could be processed in a sluice box, wash plant, or other device for extracting precious metals”) to be used for determining whether placer mines are subject to assessment.

While in theory the proposed new disturbance-based threshold of 600 hectares could also catch placer mines, again, BC has not yet provided any data to indicate whether any placer mines currently in operation have disturbed over 600 hectares (as a basis for comparison). It seems likely, however, that 600 hectares of disturbance would generally be too high to catch placer mines.

As a relatively large example, for context, a series of three contiguous placer mineral titles near Harrison Lake, currently owned by Platinate Minerals & Industries Ltd., collectively cover 832.71 hectares (title 545027 “Zyrox66” is 520.3 ha, title 555097 “Yellow Gold 1” is 250 ha, and title 555098 “Yellow Gold 2” is 62.41 ha). However, West Coast does not have data at hand regarding the extent of that area that has been or is intended to be disturbed. Any intended area of disturbance would likely be significantly smaller than the mineral title area, therefore it seems reasonable to assume that this example probably would not cross a threshold of 600 hectares of new disturbance – although ultimately we simply do not have enough information for a firm conclusion. Again, data on proposed pay dirt per year is not publicly available, so we cannot evaluate how this example would compare to the proposed RPR production threshold of 250,000 tonnes of pay dirt per year.

The EAO acknowledges in the Discussion Paper at page 14 that more work needs to be done on assembling the information necessary to evaluate what if any impact the proposed RPR thresholds would have on placer mines, noting that the regulatory framework for placer mining is under evaluation: “As those discussions continue and as the EAO assesses whether the proposed threshold is a more effective indication of the potential for significant adverse effects from placer mines, the EAO will make further adjustments to the placer mine threshold as appropriate.” It is unfortunate that not enough information has been provided to the public to provide meaningful feedback on how the proposed RPR thresholds will affect placer mining. Ultimately, the key point is that new RPR thresholds must actually lead to placer mines being assessed, and it is incumbent upon BC to collect and furnish the information necessary to evaluate whether this will be the case.

Recommendations to improve the Reviewable Projects Regulation

West Coast will be making submissions on how to improve the proposed RPR that include points in a number of key areas summarized below.

1. Strengthen impact-based thresholds

The addition of impact-based thresholds is welcome and important, however the thresholds are too high to make much difference. The impact-based thresholds should be strengthened, including the following changes:

- **Strengthen the greenhouse gas threshold.** In the federal context, **West Coast has proposed[28] a threshold of 50,000 tonnes of greenhouse gas emissions annually, but at absolute minimum, the threshold should require assessment of any project that exceeds 1% of BC's 2050 climate target** (i.e. directly emitting more than approximately 127,000 tonnes of greenhouse gases per year) rather than using the 2030 target. **Apply the greenhouse gas threshold to all projects of any type, not just the categories of projects already listed in the RPR**.

Rationale: Most projects approved under the new *Act* will continue operating beyond 2030, thus using the 2030 target will not ensure that projects impacting BC's ability to meet its legislated climate targets over the long term undergo assessment. Moreover, BC's proposed threshold of 1% of the 2030 target (382,000 tonnes) is massive and will be too high to apply to many projects that impact provincial climate targets. For example, the Woodfibre LNG plant (which required assessment under other criteria) would emit 129,400 tonnes of greenhouse gases per year, which is well below BC's proposed 382,000-tonne threshold. In contrast, Woodfibre would be captured by a 50,000-tonne threshold (and would just exceed a threshold of 1% of the 2050 target, i.e. 127,000 tonnes). Not only should the threshold be stronger, it should apply to any project that causes such GHG emissions, not just those types of project already listed in the RPR. Uniformly requiring assessment of all projects that emit similar large quantities of GHGs would promote regulatory consistency and demonstrate a strong and coordinated approach to ensuring BC meets its legislated climate targets.

[28] https://www.wcel.org/publication/regulatory-and-implementation-framework-impact-assessment-act

- **Significantly lower the proposed disturbance-based threshold for prescribed projects; we recommend 75 hectares.**

Rationale: In the examples provided in this backgrounder, the proposed disturbance-based threshold of 600 hectares is so high that it would not require assessment of any of the projects discussed, all of which were sources of substantial public concern. The disturbance-based threshold can only provide a useful tool to help address project-splitting, and capture projects with significant impacts that "slip through the cracks" of the project design thresholds, if it is low enough to actually apply to such projects. A 75-hectare new disturbance threshold would have captured a number of the case studies discussed above. This is still a very large area; for context, 75 hectares is roughly equivalent to 140 American football fields (and, in contrast, 600 hectares is over 1,120 football fields).

- **Apply the new (strengthened) impact-based thresholds to upstream oil and gas activities.**

Rationale: The EAO has been clear in its view that assessments under the *Act* are not intended to apply to diffuse activities across the landscape. However, BC's proposed new impact-based thresholds are designed to capture only those activities with large and potentially significant effects; they would not require assessment of smaller, diffuse activities. These impact-based thresholds would apply to many other prescribed categories of activities in BC, and they should similarly apply to require assessment of oil and gas activities with particularly large impacts (i.e. impacts that rise to the level of the proposed impact-based thresholds).

- **Remove the provision exempting water uses approved under section 10 of the *Water Sustainability Act* from the assessment requirement for water withdrawals**.

Rationale: Approvals under section 10 of the *Water Sustainability Act* are intended to be short term, however they last up to two years and, importantly, may be granted back-to back (i.e. in practice the same proponent could withdraw the same amount of water for longer than two years by obtaining back-to-back approvals). This creates an incentive for proponents to seek multiple shorter-term water approvals rather than a longer-term water licence, in order to avoid assessment. Furthermore, 10 million cubic metres is a truly massive amount of water to divert in a year, and warrants assessment regardless of the period of years over which it is intended to occur.

- **Remove the requirement to determine significant adverse effects from the threshold that would require EA for prescribed projects that overlap with a listed protected area.**

Rationale: The draft language[29] of the RPR says that a new project requires assessment if it is located, in whole or in part, in a listed protected area, but only if "the project will have a significant adverse environmental, economic, social, cultural or health effect in the area." This language puts the cart before the horse because it necessitates a determination of whether a project's effects are significant as a basis to decide whether the project requires an assessment, when it is through the assessment that the information and analysis necessary to make such a determination would be generated. Further, under the current RPR proposal it is the proponent that decides if its proposed project surpasses a threshold in the RPR, thus leaving with the proponent the determination as to whether its project, located in a protected area, would cause significant adverse effects. Lastly, a determination of "significant" adverse effects inherently includes a subjective component, introducing considerable uncertainty in RPR thresholds that are supposed to be "knowable" in advance, and weakening the effect of the protected area threshold generally.

2. Strengthen project design thresholds

- **Restore the "original" thresholds (i.e. those enacted in 1995 under the first *Environmental Assessment Act*) for mineral mines and coal mines, namely 25,000 tonnes/year of mineral ore for mineral mines and 100,000 tonnes/year production of coal**.

Rationale: The Banks Island Yellow Giant Mine example demonstrates that some mines approved without assessment are having significant and unacceptable impacts. Provincial officials have estimated during stakeholder consultation that restoring these "original" thresholds for mineral mines and coal mines would have led to approximately five additional environmental assessments from 2002 to present. This would not be an overwhelming increase and, importantly, one of the mines that would have been assessed is the Yellow Giant Mine, suggesting that such a threshold would have tangible benefits by requiring assessment of projects that have proven in the past to be harmful.

[29] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/rpr-engagement/appendix_iv_proposed_reviewable_projects_criteria.pdf

- **Calculate production thresholds based on what is extracted from the environment, not what the proponent intends to sell.**

Rationale: Counting production thresholds based on what is extracted from the environment is much more consistent with the purpose of assessing a project based on its effects, which is intended to be a principle guiding the reform of the RPR. Impacts are caused by what is extracted, not by what the proponent sells.

- We urge BC to provide the data necessary to evaluate whether the proposed new threshold for placer mines would actually result in assessment of any placer mines. **Ultimately, the threshold must ensure that placer mines with potentially significant impacts undergo assessment.**

- **Abandon the proposal to exempt oil and gas proponents from assessments for extracting deep groundwater and disposing of contaminated water in deep wells.**

Rationale: The fact that deep groundwater may not be potable does not mean that extracting over 10 million cubic metres of it per year does not stand to have potentially significant adverse effects – again, this is a massive quantity of water to divert (and rarely triggers assessment anyway for this reason). Similarly, there is no indication in the discussion paper as to why disposing of contaminated water in deep wells does not stand to have potentially significant adverse effects. In the alternative, if BC disregards this recommendation, we would propose at minimum a class assessment of such activities, rather than an exemption.

- **We propose a class assessment of mobile thermal treatment of drilling mud, rather than exempting it from assessment.**

Rationale: The discussion paper does not cite sources or otherwise provide further information to support the assertion that mobile thermal treatment of drilling mud is "considered beneficial." In our view a detailed assessment, with the ability to impose conditions, would be important to ensure this is the case. At minimum, a class assessment (in full or in part) could be a way to address this.

3. Better address project-splitting and project-phasing

While the addition of the land-disturbance effect threshold can provide one tool to discourage project-splitting, particularly if the threshold is lowered, the examples above demonstrate that this is not enough.

- **Define a "new project" for the purposes of the RPR to include multiple, contemporaneous proposals or applications by the same proponent for activities that are functionally interconnected.**

Rationale: The examples above demonstrate that it has been possible for proponents to successfully "project split" by proposing functionally interconnected activities at the same time as separate applications. Wording in the new RPR that explicitly includes contemporaneous proposals for functionally interconnected activities in the definition of a single "new project" would be a welcome tool to discourage project-splitting.

- **Require assessment for any expansion of a project that would cause the project to exceed the threshold for a reviewable project in that category, if the expansion is proposed within ten years of the date that the EAO determines the project is substantially started[30].**

Rationale: This provision would discourage project "phasing" – where a project is proposed in phases in order to avoid an environmental assessment that would have been required were all the phases proposed together – by requiring assessment of any expansion proposed within a decade from the project's construction that would surpass the original threshold for a new project.

- **Require that any amendment to an existing EA Certificate to expand production capacity (or that would exceed any of the impact thresholds on its own) be subject to public participation.**

Rationale: The discussion paper sets out that a proponent with an existing EA Certificate that wishes to expand its project does not undergo a second EA, rather it seeks an amendment to its Certificate under the *Act*. However, the *Act* includes no provisions to ensure public participation in such an amendment process. This creates the risk that a substantial expansion could be pursued via the amendment process without a meaningful opportunity for public input. While public participation would not be warranted in every routine amendment, it should be required

[30] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/eao-guidance-certificate-holder-substantially-started-determinations.pdf

for significant expansions (we also recommend that the EAO develop a policy for when public participation will be included in other amendment processes).

4. Provide for a decision on whether thresholds are met

- **Provide that any person may request a formal determination from the EAO on whether a specific project proposal constitutes a reviewable project under the RPR.**

Rationale: The current state of the law under the BC Court of Appeal's judgment in *Fort Nelson First Nation* is that there is no "decision" to be made by the EAO about whether a proposed project meets a threshold in the RPR, and consequently there can be no legal challenge about whether a project is or is not subject to assessment until the proponent later applies for an operational permit or otherwise tries to build the project. This serves no one's interests, since proponents, jurisdictions and the public alike benefit from resolving such disputes earlier rather than later. Providing for an ability to request such a formal decision would address this issue.

5. Geographically-specific thresholds

- **Provide an ability for another jurisdiction (including Indigenous nations and local governments) to request that the Minister recommend to Cabinet that one or more thresholds in the RPR (for project design, impacts or notification) be lowered in a region impacting that jurisdiction, in order to account for cumulative impacts, a particularly sensitive area or important habitat, with a requirement for the Minister to issue a public response to that request.**

Rationale: The EAO notes at page 27 of the discussion paper: "One of the ways in which reviewable projects may be categorized is on the basis of geographic location. We have heard from some interested parties that they would like to see this authority used more frequently to modify project design thresholds on a regional basis. This would provide a tool to account for specific context of the human or physical environment in a particular location." The EAO goes on to propose that later amendments to the RPR down the road could address this. While we agree with the EAO that regional thresholds are an important tool worth considering, we believe that more needs to be done to ensure that regional thresholds are actually developed. A request-and-response provision in the RPR would still allow BC flexibility to decide if and where regional thresholds are appropriate, while providing an avenue to ensure that Indigenous nations and the public (through their local government) can continue to advance this important issue in a timely way.

6. Strengthen notifications

The notification provision is a welcome addition to the new *Act* in terms of providing a tool that can potentially help address project splitting and projects with potentially significant impacts that may fall just below a threshold. We generally support the notification provisions proposed in the discussion paper, and further propose the following:

- **The RPR should require that all notifications are promptly posted online.**

Rationale: The EA regime is an important way for the public to find out about proposed projects that may affect them, and when projects do not undergo an EA this information can be much harder to access. In the Holmes Hydro example, for instance, the petitioners before the Court did not find out about the project until several years after it was proposed. Notifications are therefore an important tool to alert the public about proposed projects, and this will also enable the public to weigh in on particularly concerning proposals that they believe should be subject to a designation by the Minister. Requiring notifications to be promptly posted online furthers the transparency purpose of revitalizing the EA regime and helps the public stay informed and, where appropriate, get involved.

- We support the additional notification provision being considered by the EAO, which would **require notification for any modifications of existing projects that would cause the project to exceed the threshold for a new project in that category**.

This provision would complement our recommendation above to require *assessment* for any expansion that would cause a project to exceed the threshold for a new project in that category, if the expansion is proposed within ten years of the date the project is substantially started.

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