

Clean Water Primer #2

An Introduction to Canadian Environmental Law and Tools

Review Draft. Please send changes to news@waterkeeper.ca

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Research by Kent Elson
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Use Access to Information to obtain documents possessed by the federal Government of Canada.

The purpose of the *Access to Information Act* (“AIA”) is to “provide a right of access to information in records under the control of a government institution¹ in accordance with the principles that a) government information should be available to the public, b) that necessary exceptions to the right of access should be limited and specific and c) that decisions on the disclosure of government information should be reviewed independently of government.” Subject to certain restrictions discussed below, the AIA grants access to any “record” (correspondence, book, recording etc.) under the control of a federal government institution.

In 2004 over 25,000 requests were made. Of those requests, 27% were completed in full, 43% were partially disclosed and 24% could not be processed for lack of information. Of the many grounds for withholding information, “Personal Information” was the most common in 2004.

Steps to Access Information [s. 6-1 2]

1. Determine the name and address of the institution that controls the record. - Info Source publications (www.infosource.gc.ca) contain (1) names & addresses of government institutions and their Information Officer (2) descriptions of their file holdings and (3) reading room locations.
2. Fill out a request form, available at www.tbs-sct.gc.ca/tbsf-fsct_e.html.² When describing the record you want, provide enough detail to help the Information Officer to identify the record.
3. Send the completed form and \$5 to the Access to Information Officer at the appropriate institution.
4. In 60% of all requests, the institution must respond within **30 days** of receiving the request. The response should contain the following information:
 - a) whether access is granted
 - b) reasons if access is not granted

¹ “Government institution” means any department or ministry of state of the Government of Canada listed in Schedule I or any body or office listed in Schedule I. These lists are available online: http://www.tbs-sct.gc.ca/atip-airpr/apps/coords/index_e.asp

² Alternatively, you may send a letter including: (1) a statement that you are requesting information under the Access to Information Act (2) name of the institution you believe has the information you want (3) description of the records you want (4) preferred method of seeing the records (e.g. do you want to receive photocopies of the original documents or see the originals in the government office where they are located?) (5) your name, address, telephone number(s) and signature (6) the date of your request; and 7) the \$5 application fee.

- c) the estimated total reproduction costs
- d) the deposit required before access is given.

The response time limit may be extended if the request must be transferred to another institution, third party consent is required or if otherwise necessary (e.g. large number of records requested). Charges may include \$0.20 per page and \$2.50 per person per quarter hour for every hour beyond five hours that is spent by any person on search and preparation. [s. 30]

5. If access is granted: Send the deposit and request the records (you may ask for only part of the information if you choose).
6. If access is granted but the fees are too high: You may request,
 - a) the information be sent on a CD-ROM to avoid copying costs;
 - b) that the fees be waived because the information is normally provided for free, there is a public benefit, or your unique circumstances warrant it;
 - c) that your request be narrowed and then re-assessed;
 - d) to view the information at the institution reading room and select only the documents you need;

You may also appeal to the Information Commissioner.

7. The institution will then send the records.

If Access is Refused [s. 10,13]

A large number of records are exempt [s. 13-26] or excluded [s. 68-69.1] from the AIA. However, an institution must provide any *part* of a record that can reasonably be severed from the portions containing excluded or exempted information. The list of exceptions is extensive, but it includes information:

- * that contains trade secrets
- * obtained through research whose disclosure would disturb priority of publication
- * that is published and available for purchase
- * of a personal nature protected by the *Privacy Act*
- * from a third party that contains: a) trade secrets, b) technical information given in confidence, and c) information that could cause financial loss if disclosed

Otherwise unattainable third party information may be accessed if :

- * the public interest (including “environmental protection”) in disclosure clearly outweighs the prejudice to the third party
- * it contains the results of environmental testing carried out by or on behalf of a government institution – unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

If an institution denies a request for information you may appeal if you believe that it did not have sufficient grounds for refusal. [s. 30-37, 41-53] An institution must provide notice that a) the record does not exist or b) the section of the AIA on which refusal was based. This is an overview of the appeal process. You should always call the Information Commissioner's (the "Commissioner") office and get detailed instructions for the appeal process from them.

1. You have up to **one year** from the date the request for information was made to file a written complaint to the Information Commissioner).
2. The Information Commissioner's office will help you determine if you have valid grounds for complaint.
3. You, the third party (if any), and the institution will make representations (written submissions) to the Commissioner explaining your point of view.
4. The Commissioner will then issue a finding and a recommendation.
 - a) If the Commissioner denies your request for the documents, you may appeal to Federal Court within **45 days**. You will need a lawyer to help you through this process
 - b) If the institution does not comply with the Commissioner's order, you can apply to a Court for a review. You will need a lawyer to help you through this process.

In Court, the institution will bear the burden of proving that it is authorized to refuse to disclose the record. Costs of the proceedings may be awarded to the successful party. Where an important new principle in relation to the AIA is raised the Court will order that costs be awarded to the applicant even if the applicant has not been successful in the result.

When to complain

You may complain to the Office of the Information Commissioner about any matter related to the *Access to Information Act*, not just if access is refused. For example:

- * if the institution's response to your request has taken too long;
- * if the charges are too high;
- * if you didn't receive the information in the official language of your choice;

The Office of the Information Commissioner will investigate your complaint at no cost if it is filed **within one year** of the date the government department received your written request.

Other Information

- * In most instances (see Info Source), cheques should be made out to the Receiver General of Canada.
- * If the requested information is provided by a third party, they have strong rights to notice and appeal – this can slow the process.

- * It is an offence under the act to destroy, alter, or conceal a record with the intent to deny a right of access under the AIA.

Links

Department of Justice on AIA: canada.justice.gc.ca/en/ps/atip/index.html

Info Source (contains a series of publications containing information about the Government of Canada, its organization and information holdings): infosource.gc.ca

Office of the Information Commissioner of Canada: infocom.gc.ca

Provincial access to information: infocom.gc.ca/links/default-e.asp

Treasury Board of Canada: canada.justice.gc.ca/en/ps/atip/index.html

Use this to stop or prevent discharges from ships into Canadian Waters

Although the majority of the *Canada Shipping Act* (“CSA”) is aimed at promoting marine safety and the efficiency of marine shipping, it is also meant to “protect the marine environment from damage due to navigation and shipping activities.” Part XV of the CSA concerns pollution prevention. Many aspects of this part, such as the oil emergency planning sections, do not allow for public participation. By section 664, it is an offence to violate any regulations regarding discharges from ships made under the CSA (see s. 656). Unless done in accordance with a permit granted under Division 3 of Part 7 of the Canadian Environmental Protection Act, the regulations state that:

- * No ship may discharge any one of 400 prescribed pollutants into Canadian waters south of the 60th parallel or into waters in the fishing zones of Canada.
- * No ship may discharge a noxious liquid substance into prescribed waters
- * No ship may discharge garbage (food, paper, plastics, glass, metal, junk etc.) into Canadian Waters
- * No ship (excluding those used solely for pleasure) may discharge sewage (i.e. human waste) into the Great Lakes
- * No ship may discharge oily mixtures except in prescribed locations and in prescribed concentrations

Shipping dangerous materials must be done in accordance with the International Maritime Organization’s codes of practice and other prescribed requirements - for example, every ship carrying dangerous materials must thoroughly clean cargo spaces of loose debris, dunnage, and oil. Ships carrying dangerous chemicals or noxious liquid substances must follow certain procedures (including tank washing and ballast discharge procedures) and often require a certificate.

The Act does not create public participation mechanisms, so you would most likely enforce these rules with other processes such as prosecutions, petitions, or citizen submissions.

Canadian Environmental Assessment Act

Use this to comment on proposed projects that will be undertaken, approved, or financed by the federal government.

The purpose of the *Canadian Environmental Assessment Act* is to ensure that projects are carefully considered before they are undertaken in order to avoid “significant adverse environmental effects.” [s. 4] Although you may participate in many aspects of the assessment process, the government is given very wide discretion in setting the scope of assessment, deciding to allow public participation, and making final decisions.

When an assessment is required

The need for an assessment depends on the type of project proposed and the role of a Federal Authority in relation to that project. An assessment is required for:

A Project ...

- * Including: (a) Any physical work, proposed construction, operation, modification etc. and (b) an activity listed in the *Inclusion List Regulations*, such as a project requiring DFO authorization for the harmful alteration, disruption, and destruction of fish habitat.
- * Excluding: (a) An activity described in the *Exclusion List Regulations* such as maintenance in a national park, certain water projects not likely to release pollutants into water, and small scale construction and (b) projects carried out in response to an emergency

... where a federal authority

- * proposes a project OR
- * provides financial assistance to a proponent to enable a project to be carried out OR
- * transfers interest in or control of federal land to enable a project to be carried out OR
- * provides a licence, permit or approval listed in the *Law List Regulations*, such as a license under certain sections of the *Fisheries Act*

Who's who in an Environmental Assessment

Agency: The Canadian Environmental Assessment Agency helps to administer the *CEAA* through activities such as coordinating public notice and comments.

Minister: The Minister of the Environment has a number of discretionary powers under the *CEAA*.

Proponent: The person, body, federal authority, or government who proposes the project.

Responsible Authority: The federal authority who is required to undertake an assessment by virtue of proposing, financing, or authorizing the project. The Responsible Authority usually issues the final decision regarding a project.

Factors considered in an assessment

A screening study will consider [s. 16(1)]

- * Effects of the project, cumulative effects, possible accidents, and the significance of those effects
- * Public comments
- * Technically and economically feasible mitigation measures
- * Other matters, such as the need for the project and alternatives, that the Responsible Authority may require

A comprehensive study, mediation and review panel will consider the above factors, PLUS

- * The purpose of the project
- * Alternative means that are technically and economically feasible
- * Need for follow-up programs
- * The capacity of effected renewable resources to meet the needs of the present and future

Types of Environmental Assessment

Type	Public Participation & follow-up	Factors that must be considered	Outcome	Additional duties of the Minister	Participant funding
Screening	Discretionary	Effects & mitigation	Decision or sent to mediation/ panel	N/A	No
Comprehensive Study	Mandatory	+ purposes, alternatives, follow-up	Decision unless cabinet intervenes	Decides whether adverse effects are likely	Yes – with restrictions
Mediation/ Review Panel	Mandatory	+ purposes, alternatives, follow-up	Decision	Determines terms of reference	Yes – with restrictions

How to participate:

Each project will have different opportunities for public participation. Check the CEAA registry to see what opportunities exist for projects that you are interested in. When a project is first proposed, there will be an announcement on the Registry. This may be your only invitation to participate in an environmental assessment. If you know a project is going to be subject to an Environmental Assessment at some point, you should contact the Proponent in advance and ask for notice of the project's commencement.

The CEAA requires that a participant funding program be created. [s. 58(1.1)] The guidelines regarding this program can be found on the Agency's website.

- Funding is only available for participation in comprehensive studies, mediation, review panels, and joint review panels
- Generally, the availability of funding will be announced when a comprehensive study or review panel is commenced – this announcement explains what funding is available and gives a deadline for applications
- Application forms and funding announcements can be found on the Agency's website
- To be eligible for funding you must (a) have a direct, local interest in the project, such as living or owning property in the project area (b) have community or Aboriginal knowledge relevant to the assessment OR (c) plan to provide expert information

If you feel that a screening assessment should be “bumped-up” to a review panel, you can ask the Responsible Authority and/or the Minister to do this. [s. 25-28] If you are appealing to the Minister, you may want to use the Environmental Petitions process.

More information

Harbour commissions and port authorities (established by *The Hamilton Harbour Commissioners' Act*, *Harbour Commissions Act*, or *Canada Marine Act*) are excluded from CEAA requirements unless regulations state otherwise [s. 9]

- Regulations have only been written for port authorities established under the *Canada Marine Act*

It is the duty of the responsible authority to ensure the implementation of mitigation measures [s. 20(2), 37(2)]

An assessment may be undertaken in formal cooperation with provincial authorities [s. 40-45, 54]

The Canadian Environmental Assessment Registry [s. 55], administered by the Agency, must contain notices regarding (a) the commencement of an assessment, (b) scope of a project, (c) assessment termination, (d) decisions, (e) reports, (f) follow-up program descriptions etc.

- A record must be posted even if it would normally be confidential by the *Access to Information Act* if disclosure is in the public interest because it is required for effective public participation [s. 55.5]

- Draft guidelines, codes of practice, agreements, etc made under the *CEAA* must be posted to the registry and the public must be given the opportunity to comment on them [s. 58(3)]

A comprehensive review of the *CEAA* must be undertaken every five years [s. 72]

Links

The Canadian Environmental Assessment Agency website contains the Registry, guidance documents, contacts, etc: ceaa-acee.gc.ca

Canadian Environmental Protection Act

Use this to (1) challenge a permit to dispose at sea, (2) prosecute someone disposing at sea without a permit or in non-compliance with a permit, (3) request that a new chemical be classified as toxic, or (4) prosecute violations of CEPA that are incidental to water pollution.

Unlike the *Fisheries Act*, this Act does not have a general prohibition against pollution.

The *Canadian Environmental Protection Act* allows Environment Canada to set national (mostly non-binding) environmental standards and regulates a narrow field of activities under federal jurisdiction. With the goal of “pollution prevention”, the Act recognises the importance of sustainable development, the ecosystem approach, the precautionary principle, the polluter pays principle, biodiversity, and national standards. The majority of the Act authorizes the federal government to make environmental agreements and to issue guidelines, substance lists, and pollution regulations.

Requesting an Environmental Investigation (s. 17 - s. 21)

Section 17 allows you to request an investigation of an alleged violation (see offences below) of CEPA. You must send an application, including a concise statement of the evidence supporting your allegations, to the Minister. The Minister must acknowledge receipt **within 20 days** and must investigate all matters necessary to determine the facts. The Minister must report on the progress of the investigation of the offence **every 90 days** until it is either discontinued or charges are laid. If the investigation is discontinued, the Minister must prepare a report that includes (a) a description of the information obtained during the investigation and (b) the reasons for its discontinuation.

Going to Court (s. 22 - s. 38)

You may commence an environmental protection action (“go to court”) if you applied for an investigation and (a) the Minister failed to conduct an investigation and report within a reasonable time OR (b) the Minister’s response to the investigation was unreasonable. The action may be brought against the alleged offender if they “caused significant harm to the environment.” A court may order any appropriate relief to prevent continuation of the offence or mitigate the harm to the environment. The offence need only be proved on a balance of probabilities. However, section 30 provides for a number of defences such as official authorization and due diligence. In awarding costs, the court will consider special circumstances, such as whether the action is a test case. You always need a lawyer to proceed with an action.

Offences

By section 272, it is an offence to contravene any provision of CEPA or any CEPA regulation, order, or direction. Amongst other things, CEPA states that:

- * a person importing, making, or distributing a substance must provide the Minister with any information they obtain that reasonably supports the conclusion that the substance is toxic or is capable of becoming toxic (CEPA s. 70)
- * no person may dispose of a substance (not incidental or derived from the normal operations of a ship) into the sea or load a ship or aircraft in Canada for the purpose of disposal at sea except by a valid permit (CEPA s. 123-126)

CEPA regulations contain a wide variety of very issue-specific prohibitions. They prohibit:

- * the discharge of some contaminants from pulp and paper mills beyond prescribed levels
- * the manufacture, use, sale, or import of prescribed toxic substances
- * the discharge of certain substances beyond prescribed levels
- * operating a PCB storage site contrary to prescribed standards

Board of Review Proceedings

By section 332, the Minister must publish in the Canada Gazette any proposed:

- * orders or regulations to be made under CEPA (s. 77(8))
- * permits to dispose at sea (s. 30) – these must be posted at least 30 days before the authorized disposal can begin
- * agreements with another government (i.e. provincial or Aboriginal) with respect to the administration of the act (s. 9(3))
- * agreements with another government stating that CEPA does not apply where equivalent legislation exists (s. 10(5))
- * regulations pertaining to international air and water pollution (s. 167, 177)*
- * guidelines, environmental plans, etc (Part 9)*
- * regulations for the purpose of preventing or reducing the growth of aquatic vegetation that is caused by the release of nutrients in waters (s. 118)*

By section 333, you may formally object to any of the above actions by serving notice to the Minister within a prescribed period (usually 30-60 days) after the proposal is published in the Gazette. In all instances the Minister may establish a board to “inquire” into the matter. For those marked with a “*” the Minister must establish a board.

You may also object if the Minister fails to determine if a substance is toxic if it has been listed on the Priority Substances List for five years. (s. 78) The Minister then must establish a board.

More Information

By section 16, any person is protected when reporting information to an enforcement officer relating to a likely CEPA offence. If requested, their identity will be kept confidential and they cannot be dismissed or demoted by reason of making a report.

Links

Environment Canada's CEPA web-page contains permit notices, guidelines, plans, policies, and Canada Gazette notices: ec.gc.ca/CEPARRegistry

Canadian Environmental Network's CEPA review web-page contains NGO evaluations and commentary on CEPA: cen-rce.org/eng/cepa

Use citizen submissions to the Commission for Environmental Cooperation to address chronic and long-term failures to enforce a federal environmental law.

The North American Agreement on Environmental Cooperation (“NAAEC”) is between Canada, Mexico and the United States. It is the environmental side agreement to the North American Free Trade Agreement (“NAFTA”). Unlike most international agreements, the NAAEC includes a process for public involvement: the Citizens Submissions on Enforcement Matters process. You can make a written submission to the Commission for Environmental Cooperation (“CEC”) alleging that the federal government is failing to effectively enforce an environmental law. The CEC will ask the government to respond. If it is not persuaded by the government's explanation, the CEC will create a “factual record” concerning the issue you raise.

All private remedies must be exhausted before a submission can be made to the CEC. That means that you should only make a submission once you have tried all the other tools available to remedy the problem.

The Submission Process

The environmental petitions process is outlined in Articles 14 and 15 of the NAAEC and in the Guidelines passed by CEC Council, Bringing the Facts to Light. Generally speaking, your submission must pass four stages (1) initial screening (2) decision to require Governmental response (3) decision to create factual record (4) CEC council vote.

STAGE ONE: INITIAL SCREENING

During initial screening, the CEC Secretariat will review your submission to ensure the following:

1. You assert that your Government is failing to effectively enforce its environmental law. This does not include a “reasonable exercise of discretion” or a “bona fide” decision to allocate resources. An environmental law has the “primary purpose” of protecting the environment. See Article 45 of the NAAEC for more information;
2. You provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence;
3. You are promoting enforcement rather than harassing industry;
4. You indicate that the matter has been communicated in writing to your Government and indicates the Government's response, if any, and

5. It is filed by a person or organization residing in the territory of the Government.
6. Your submission identifies the applicable legislation and addresses the four factors considered in deciding if a response is required (see below).

If the initial criteria are not met, the Secretariat will explain why and provide an opportunity for the Party (you) to re-submit within 30 days. If the Secretariat determines that the revised submission does not meet the initial criteria then the process is terminated with no opportunity of appeal.

STAGE 2: DECISION TO REQUIRE A RESPONSE

In deciding whether a response from your government is required, the Secretariat will consider whether:

- * your submission alleges harm to you³;
- * your submission raises matters whose further study in this process would advance the goals of this Agreement;
- * private remedies available under your Government's law have been pursued⁴; and
- * your submission is drawn exclusively from mass media reports.

If the Secretariat decides that a factual record is not merited, you may submit new or supplementary information **within 30 days**. If the Secretariat determines that the new information does not merit a response then the process is terminated with no opportunity of appeal.

STAGE 3: FACTUAL RECORD REQUIRED

If the Secretariat decides that the submission merits a response, it will provide notice to the relevant Government advising it to respond **within 30 or sometimes 60 days**. The Secretariat will decide whether to recommend a factual record in light of the following information provided by your Government:

- * if the matter is the subject of a pending judicial or administrative proceeding, in which case the process is terminated
- * if the matter was previously the subject of a judicial or administrative proceeding
- * if private remedies are available to you and whether they have been pursued.

³ See also CEC Guidelines, s. 7.4: "In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether: (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement."

⁴ See also CEC Guidelines, s. 7.5: "In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether: (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases."

- * if policies or actions in connection with the matter have been taken

If the Secretariat recommends that a factual record not be created then the process is terminated with no opportunity of appeal.

CEC COUNCIL VOTE AND CREATION OF A FACTUAL RECORD

The Secretariat will prepare a factual record only if the Council, by a two-thirds vote, instructs it to do so. The CEC Council is composed of the environment ministers of each country. If the Council decides not to order a factual record then the process is terminated with no opportunity of appeal.

If a factual record is ordered then the Secretariat will consider a variety of information, including submissions from NGOs. After a draft has been submitted to Council you may comment on its accuracy **within 45 days**. Such comments must be incorporated into the record where appropriate. The Council may make the final record publicly available.

More information

Some people have complained that the process is not effective in preventing environmental harm. Reasons for complaints include:

- * without binding deadlines the process is far too slow;
- * too few human and financial resources are available (submissions are assessed by a staff of two people);
- * Council has too much discretion in not ordering/publishing a factual record;
- * there are no penalties if the CEC finds that environmental laws are being broken;
- * many important decisions cannot be appealed or reviewed.

Links

CEC website: www.cec.org

Environmental Petitions

Use the petitions process when you want a federal agency to publicly answer a question, explain a policy, or make a decision. (Use the Access to Information Act to obtain information/documents that already exist.)

A petition can be more effective than a traditional letter to government, because a minister **MUST answer your question. Additionally, your questions may affect the content of the Attorney General's annual report.**

In 1995, amendments were made to the Auditor General Act (“AGA”) that created the Commissioner of the Environment and Sustainable Development (the “Commissioner”). “The purpose of the Commissioner is to provide sustainable development monitoring and reporting...” The amendments also created a formal environmental petitions process for Canadians to bring concerns about the environment and sustainable development to the attention of federal ministers, and obtain a timely response.

In this context, a petition is not a collection of signatures. Rather it is a written set of questions asking a federal agency to explain policy, make a decision, or provide information.

Steps to Make a Request

- I. Draft a petition. The petition must meet the requirements set out in the AGA. These standards include:
 - a) It must be made by a Canadian resident (a Canadian address is sufficient proof)
 - b) Its topic must be “an environmental matter in the context of sustainable development.” (essentially any environmental matter)
 - c) Its topic must be the responsibility of one of the federal organizations subject to the petitions process, such as Environment Canada or the Department of Fisheries and Oceans (see http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/federal_e.html)

The Auditor General also recommends that a petition include:

- a) A cover letter indicating that you are submitting a petition under the AGA.
- b) Background information: This will be used by the Commissioner to determine if your petition qualifies and by the Minister in formulating a response. Information on Federal involvement and responsibilities is considered helpful.
- c) The petition question(s), including: The kind of information requested and what actions you think federal organizations should take.
- d) Names of relevant federal organizations.
- e) Supporting information such as relevant reports.

f) Signature, date, mailing address, e-mail address, and telephone number.

A petitions officer can help you draft your petition, so please contact the Commissioner's office early in the process.

2. Send the petition to: Office of the Auditor General of Canada, Commissioner of the Environment and Sustainable Development, Attention: Petitions, 240 Sparks Street, Ottawa, ON K1A 0G6, Tel: 1-888-761-5953 Fax: (613) 941-8286
3. If the petition meets the AGA requirements, the Commissioner will forward the petition to the appropriate Minister **within 15 days** of receiving the petition,
4. **Within 15 days** of receiving the petition, the Minister will send an acknowledgment to the petitioner and the Auditor General.
5. The Minister will send a reply that "responds to" the question **within 120 days**. The Minister may receive an extension.
6. The Commissioner must make any examinations and inquiries necessary in order to monitor the replies by Ministers, but no formal appeals process is outlined in the AGA.

Valid Requests

The Auditor General suggests that you may ask federal departments and agencies to:

- * investigate whether a federal law or regulation is being enforced or contravened;
- * explain a federal policy or their involvement on a particular issue;
- * review and improve an environmental law, regulation, or policy;
- * detail what action their minister has taken to fulfill a public commitment; and
- * provide specific information on what they are doing to reduce the environmental impact of their operations and practices.

The Auditor General says that "some requests may not result in an informative response. For example, departments and agencies:

- * may not be able to respond if they are involved in legal proceedings on the same subject as the petition;
- * do not have to disclose legal opinions from the Department of Justice Canada (the Department of Justice Canada cannot provide legal opinions it has prepared for other departments or agencies); and,
- * cannot respond to petitions that are outside federal jurisdiction (e.g., the responsibility of provinces and municipalities.)"

If you are looking for documents that already exist, you should try the Access to Information process instead.

Links

The Auditor General's page on Environmental Petitions:

oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/petitions_e.html

Use this Act to stop toxic discharges into waters where there are fish or to halt the destruction of fish habitat.

The *Fisheries Act* (“FA”), administered by the Department of Fisheries and Oceans (“DFO”), is the most important Federal legislation for the protection of Canadian waters. Amongst other things, it governs the granting of fishery leases and licenses (s. 7-16), lobster fisheries (s. 17-19), the construction of fish-ways (s. 20-22), fish habitat protection and pollution prevention (s. 34-42), the harvesting of marine plants (s. 44-48), and the powers of fishery officers (s. 49-56).

Section 35 and 36 are what make the FA so important. They forbid the destruction of fish habitat and the deposit of a deleterious substance into waters frequented by fish. Waterkeepers can (1) request investigations of alleged violations these offences under the *Auditor General Act* (2) or Ontario’s Environmental Bill of Rights or (3) lay charges in a private prosecution.

It is important to note that successful use of the *Fisheries Act* requires extensive and thorough investigation. You need skills in sampling, note-taking, research, and evidence-gathering.

Elements of the Offences

SECTION 35 - HADD

Section 35 of the Act prohibits the “harmful alteration, disruption or destruction of fish habitat” of fish habitat. A violation of this section occurs if (1) any work or undertaking (2) results in the harmful alteration, disruption or destruction of (3) fish habitat.

(1) Although “work or undertaking” is not defined in the *Fisheries Act*, it will be given a broad interpretation taking into account other sources such as dictionary definitions and provincial policy guidelines. Typical examples are logging, dams, culverts, and construction near water.

(2) “Harmful alteration, disruption or destruction,” (HADD) has occurred if “the accused interfered with the fish habitat in a way that has impaired the value or the usefulness of the habitat for one or more of the purposes described in the definition of “fish habitat”” (see below). For example, HADD includes interference with the ability of part of a stream to act as spawning grounds or as a food source. The DFO’s working definition of HADD is “any change in fish habitat that reduces its capacity to support one or more life process of fish,” by chemical, physical or biological means. Harm to actual fish need not be proven, but it would be construed as “co-gent circumstantial evidence.” According to some cases, HADD must be more than merely trivial and the damage must be somewhat permanent (e.g. lasting longer than 1-2 months).

(3) Fish habitat is defined as “spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.” Fish habitat is more narrow than “waters frequented by fish” because there must be “proof that the area is one on which fish depend to carry out their life processes.” The scope of fish habitat is still open to debate. A judgement by the B.C. Court of Appeal narrowly interpreted the term, holding that fish habitat must be in a “fishery.” However, a decision by the General Division of the Ontario Court of Justice rejected this interpretation and relied on jurisprudence from the Supreme Court of Canada holding that a fishery resource is a “system,” not a unit of geography. By this latter interpretation, fish habitat may include waters that feed a commercial fishery, such as those behind an impassable waterfall.

This offence does not apply where the DFO has authorized the conditions of the undertaking (s. 35(2)). However, it is also an offence to carry on the undertaking in violation of the conditions of DFO authorization (s. 40(3)d.). By DFO guidelines, authorization will only be given where all possibilities for relocation, redesign, and mitigation have been explored. In theory, a project will only be approved if the proponent replaces the damaged habitat with newly created or improved habitat in other areas.

SECTION 36 – DEPOSIT OF A DELETERIOUS SUBSTANCE

Section 36 prohibits the deposit of a deleterious substance into waters frequented by fish. The elements of a section 36 offence are “(1) depositing or permitting the deposit of (2) a deleterious substance (3) in water frequented by fish or where the substance may enter such water.”

(1) Deposit is defined as “any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing.” Depositing or permitting the deposit “can be committed only by those who undertake the activity in question or who are in a position to exercise control over the activity and prevent the pollution from occurring, but fail to do so.”

(2) The definition of “deleterious substance” found in section 34 has been hotly contested. A deleterious substance is defined, inter alia, as a substance that if added to any water, renders any water deleterious to fish, fish habitat, or the use of fish by man. It is now settled that it is sufficient to prove that a substance is of a kind that can harm fish, without proof that the amount of the substance found in the water would actually cause harm.

(3) Water frequented by fish is defined in section 34 as “Canadian Fisheries Waters” which are “waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.” Waters are not frequented by fish if the accused proves that at “all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.”

Other Offences:

Section	Offence
26	Failing to leave 1/3 of a river or 2/3 of a tidal stream open
27	Damaging or obstructing a fish-way or canal used to enable fish to pass any obstruction
32	Destroying fish by any means but fishing
36(1)(a)	Throwing overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on
36(1)(b)	Leaving fish remains on the shore, beach or bank of any water
37(1)	Failing to provide plans of an undertaking likely to result in HADD or the deposit of a deleterious substance when requested by the Minister or where prescribed by regulations
38(4)	Failing to report a deposit of a deleterious substance occurring out of the normal course of events
20, 22, 30	Failing to build a fish-way (20), provide flow for the safe descent of fish (22), or construct a fish guard (30) when the Minister deems it necessary to do so.
35(2)	Violating a HADD permit is not a specific offence. However, a permit is only a defence if the harm is done “under any conditions authorized by the Minister or under regulations”

A violation of section 35 to 38 is an offence by section 40. Any other contravention of the Act is an offence by section 78.

More Information

Section 35 and 36 are strict liability offences, meaning that the Crown does not need to prove a guilty mind (e.g. intent).

The accused may raise the defence of due diligence by proving that s/he acted “as reasonable man would have done in the circumstances” on a balance of probabilities. As usual, the elements of the offence must be proven by the Crown beyond a reasonable doubt.

Half of a fine imposed on conviction is paid to the person who laid the information.

Use this to challenge the actions or decisions of government bodies.

Judicial review describes a very wide variety of court actions aimed at challenging some form of government action or decision. Judicial review is generally available where a government body is exercising statutory powers in a situation where the action has an element of finality. Judicial review is not an appeal. Appeal procedures are usually set out in various statutes as part of a prescribed process. For example, by section 41 of the *Access to Information Act* you may *appeal* a decision of the information commissioner in Federal Court. Judicial review of a federal decision is not allowed if the legislation prescribes a method for appealing the decision.

You are most likely to use judicial review along-side other tools, such as environmental assessments.

Judicial review of a federal authorities' decision is governed mainly by *Federal Courts Act*. This is an extremely nuanced and unpredictable area of law and you will always need a lawyer.

What you can ask for

The remedies available on judicial review at common law include:

Certiorari: quashing an administrative decision, and on occasion, referring the issue back to the administrative body with further directions.

Mandamus: requiring a statutory authority to do something that it has an existing legal duty to do that it has not done or has unreasonably delayed in doing.

Prohibition: forbidding a statutory authority from making a certain decision or action. For example, it may make sense to try to prove “reasonable apprehension of bias” before a decision is actually made.

Habeas Corpus (challenging detention) and **Quo Warranto** (challenging official appointment) have little application in the environmental field.

These common law remedies have by now been codified. Section 18 of the *Federal Courts Act* holds that the Federal Court may order a federal board, commission or other tribunal

- (a) to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) to have a decision, order or act set aside or referred back for determination in accordance with certain directions or
- (c) prohibit or restrain, a decision, order, act.

What errors you can challenge

If you are looking to review a decision it is likely that a mistake has been made. However, only certain errors can be reviewed by the courts. The grounds for judicial review are varied and often overlapping, and in most cases more than one ground is argued.

Some grounds include:

- * lack of jurisdiction, abuse of discretion,
- * reasonable apprehension of bias,
- * failing to provide procedural fairness, and
- * erring in a question of law or of mixed law and fact.

Standards of Procedural Fairness

Procedural fairness is concerned with how and why a decision is made, not with the correctness of the decision itself. Government actions and proceedings can be placed on a sliding scale in terms of the requirements of fairness that they attract. At the top of the scale are criminal proceedings where the full litany of trial model procedural rights is necessary. The higher the standard, the more substantial the rights to fair process. There are many procedural rights, such as the right to receive reasons for a decision or the right to hear the other side.

The Supreme Court of Canada has outlined factors that will determine how stringent a standard of fairness is required:

- * Firstly, required procedural protections become more stringent as a decision making process more resembles judicial decision making.
- * Secondly, the requirements of fairness are increased if a decision is determinative of the issue, such as in the case where the statute does not provide for an appeal procedure.
- * Thirdly, as the impact of the decision on the interests of the parties increases so does the extent of fairness required.
- * Fourthly, decision makers can be held to promises to follow a procedure or regular practices.
- * Finally, when a statute allows a decision making body to choose its own procedure the court will take that into account in deciding if that procedure is fair.

Standards of Substantive Review

Substantive review is concerned with the rightness of the decision or action. Depending on the circumstances, the standard of review can range from “patent unreasonableness” to “correctness.” In meeting the standard of correctness, any substantial error will be enough to challenge the decision. In meeting the standard of “patent unreasonableness,” there must be a glaring er-

ror that is noticeable in the surface of the record. The standard of “reasonableness *simpliciter*” falls somewhere in between.

The Supreme Court has set out a four point test to determine the standard of review in different contexts:

Privative clause: “The presence of a full privative clause is compelling evidence that the court ought to show deference to the tribunal's decision.” This kind of clause is language in a statute that bars the courts from reviewing the decisions of an administrative tribunal.

Experience: “If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.”

Purpose of the act/provision: “Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.”

Question of law or fact: “Courts should be less deferential of decisions which are pure determinations of law.”

In other words, what you need to prove a decision should be changed depends on (a) whether or not the decision can be challenged, (b) whether or not the decision-maker has some special expertise that the Court is not comfortable challenging, (c) whether the decision-making process is meant to protect rights or merely facilitate different interests, and (d) whether the error is a matter of law or a matter of fact.

More information

An application for judicial review may be made by “anyone directly affected by the matter” [s. 18.1(1)]. “Public interest standing” may be granted in some circumstances

An application must be made within **30 days** of the decision or order [s. 18.1(2)]

See the *Federal Court Rules* for more information on the requirements of notice and service, etc.

Migratory Birds Convention Act

Use this Act to stop pollution or destruction of migratory birds habitat.

The purpose of the *Migratory Birds Convention Act* is to implement the Migratory Birds Convention between Canada and the United States by “protecting and conserving migratory birds.” [4] The offences under the *MBCA* are largely untested. The *Fisheries Act* is usually seen as a better alternative to the *MBCA* because it is easier to prove that an effluent is harmful to fish (usually by submerging fish into tanks of the effluent) than to migratory birds and because the *Fisheries Act* has received much judicial consideration.

Offences

By section 13, it is an offence to:

- * deposit or permit the deposit of a substance that is harmful to migratory birds in (a) waters or an area frequented by migratory birds OR (b) in a place from which the substance may enter such waters or such an area. [s. 5.1(1)]
- * deposit a substance OR permit a substance to be deposited if the substance, in combination with one or more substances, results in a substance that is harmful to migratory birds in waters or an area frequented by migratory birds or in a place from which it may enter such waters or such an area [s. 5.1(2)]

Those two offences do not apply if (a) the deposit is authorized by the *Canada Shipping Act* OR (b) the quantity and conditions of deposit of the type of substance are authorized by another federal act. [s. 5.1(3)]

The definition of “substance that is harmful to migratory bird” should be given “wide interpretation,” “depends on the facts of each case,” and, for example, would include millions of tonnes of inert rock deposited into a creek.

Migratory Birds are defined in Article I of the Migratory Birds Convention. They include waterfowl, cranes, larks, wrens, loons etc.

The maximum fine on indictment is \$1,000,000, on summary conviction, \$300,000. For a ship over 5,000 tonnes deadweight or over, the minimum fine on indictment is \$500,000, on summary conviction, \$100,000. [s. 13]

Section 8.1 (3) of the *MBCA* recognises that “the deposit of a substance in contravention of section 5.1 that, together with other deposits made in contravention of that section by one or more persons or vessels, has a cumulative or aggregate effect may cause major damage to the environment.”

Private Prosecutions

Use these to prosecute violations of Canadian laws

This section provides a general overview of private prosecutions. It does not offer legal advice. You will always need to the advice and representation of counsel in a private prosecution.

In the normal course of events a criminal prosecution is commenced when a police officer files an “information” which names the accused and briefly outlines the alleged violation. The court then decides whether to compel the appearance of the accused. Proceedings are then conducted by the office of the Attorney General. However, any member of the public may both commence and conduct a prosecution, in what is called private prosecution. The Law Reform Commission of Canada has said that “the private prosecution has a practical, responsible and real role to play in our criminal justice system.”

The power of any person to commence a prosecution is found in the Criminal Code. Section 504 says that “any one” may lay an information before a justice. The power to conduct a private prosecution is found in the common law, as was unequivocally confirmed in *R. v. Schwerdt*: “Under English law there is, I conclude, not the slightest doubt that a private prosecutor could, on November 19, 1858, and indeed can at the present day in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence.” Added to this, “Prosecutor” as defined in section 2 of the Criminal Code includes “the person who institutes proceedings.”

Steps to Private Prosecutions

1. Gather evidence keeping in mind the rules of evidence (e.g. chain of custody for samples, detailed notes etc) and the fact that almost everything must be disclosed to the accused at a later date.
2. Compile a prosecution brief. This document is a tool to help you organize your case and to easily explain the facts to other people (lawyers, experts, etc) who will be working on the case. Although it will eventually be disclosed, it is primarily an internal document. Your brief should include (1) names the accused (2) a synopsis of the details of the offence (3) a list of the potential witnesses (4) a summary of what potential witnesses will say (5) documentary, photographic or any other evidence.
3. Prepare an "Information". This is a standard court document, obtainable from any court, that sets forth the charges against an accused. Make at least 1 copy of the information - you'll need it later.
4. Present the information and your evidence to a Justice of the Peace at the court house with jurisdiction over the place where the offence occurred.
5. The Justice must then refer the Information to a provincial court judge for a “process hearing.” Contact the court to schedule this hearing; they make ask for a copy of your Informa-

tion and your brief, which you should provide. You should notify the Attorney General of the hearing date and provide them with a copy of your Information and brief.

6. At the hearing, the judge will then hear the allegations and evidence in an *ex parte* motion (the accused is not present) and will issue a summons if s/he considered that the case has been made out.
7. At this point, the provincial Attorney General or the federal Department of Justice may intervene in your case assume control the case. They have the option of prosecuting it without you or staying the case.
8. If the AG does not assume conduct of the case, you are the prosecution.

Intervention by the Attorney General

The Attorney General has wide powers to intervene in a private prosecution. A decision to stay the proceedings may be challenged by judicial review but you must prove “flagrant impropriety”. This standard may be met with “proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.”

Duties of a Prosecutor

Prosecutors have duties extending beyond what is expected of other litigants. The Supreme Court of Canada characterises this as a “public duty” that must be executed fairly:

It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings. (*R. v. Boucher*)

Both the provincial and federal policy guidelines for prosecutors stress the importance of fairness and moderation. This creates certain obligations, such as the requirement that charges be laid only if there is a “reasonable prospect of conviction” and only in accordance with the “public interest.” Your role as investigator and prosecutor increases the importance of fairness.

Prosecutors also have certain obligations regarding their discussions with the media. Federal policy guidelines state that prosecutors should “Give facts, not opinions - Crown counsel should provide information, and they should explain. They should not offer personal opinions about court decisions, or laws or governmental policies. The goal is to foster understanding, not to create sensation.” The guidelines also recommend that Crown counsel speak for attribution, respect journalists’ needs, be responsive, educate the public, be timely, and protect the integrity of the trial.

Use this to (a) petition the Federal Government to add wildlife to the list of protected species, (b) to comment on species protection plans, and (c) to stop harm to species at risk or their residences.

Canada's *Species at Risk Act*, assented to in 2002, is the result of efforts that began in earnest with Canada signing the *UN Convention of Biological Diversity* at the Rio Earth Summit in 1992. The preamble recognises the value of all wildlife, ecosystems, biological diversity, habitat, and Aboriginal and community knowledge. Depending on the species or land in question, SARA is administered by the Minister responsible for Parks Canada (on federal lands), the Minister of Fisheries and Oceans (for aquatic species) and the Minister of the Environment (for other species).

COSEWIC and the SARA list

SARA formally creates the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Its mandate is to assess the status of wildlife in Canada and advise whether a species should be added to the List of Wildlife Species at Risk (the List) [s. 14]. The List is continually updated through an assessment process involving COSEWIC, the public, and the relevant Minister. The List classifies all "species at risk" into four categories [s. 2]:

Extirpated - no longer exists in the wild in Canada, but exists elsewhere in the wild

Endangered - facing imminent extirpation or extinction

Threatened - likely to become an endangered species if nothing is done

Species of special concern - may become threatened or endangered because of a combination of biological characteristics and identified threats

Extirpated, endangered and threatened species (EET Species) are given special protection under SARA. They are protected by general prohibitions and by the creation of remediation plans such as "recovery strategies" and "action plans." The List, regulations, agreements, COSEWIC's assessment criteria, status reports, guidelines, and annual reports must all be published in the public registry.

Offences

The prohibitions contained in SARA generally apply only to those species in areas that are unquestionably within federal jurisdiction. The prohibitions only extend to other species, such as land-dwelling wildlife in a province, after an order is made by cabinet and following a significant consultation process.

It is an offence to:

- * kill, **harm**, possess, buy, or sell an EET species [s. 32 (1), 32(2)]
- * damage or destroy the **residence** of an EET species [s. 33] – a residence is a dwelling-place, such as a den, nest, that is habitually occupied by an individual during part of its life cycle, including breeding, rearing, staging, wintering, feeding or hibernating
 - These two offences apply only:
 - to aquatic species, *Migratory Birds Convention Act* (“MBCA”) protected birds, and other EET species on federal lands [s. 34(1)] and
 - elsewhere (i.e. in a province) IF Cabinet makes an order that they should apply (the Minister must recommend that an order be made if s/he is of the opinion that the laws of the province do not effectively protect the species or its residences) [s. 34(3), 34(4)]
- * destroy any part of the critical habitat of any EET species that is an aquatic species, MBCA protected bird, or on federal lands [s. 58(1)]
 - IF the critical habitat is specified in an order made by the competent minister – [s. 58(4)]
 - No orders have been made specifying critical habitat
 - (if a recovery strategy or action plan refers to the critical habitat of a species, the Minister must (a) make an order protecting the critical habitat OR (b) provide reasons for not making an order within 180 days after the critical habitat is specified)
- * destroy any part of the critical habitat of a species classified as endangered or threatened by a provincial minister IF Cabinet has made an order protecting that habitat [s. 60(1)]

Species Assessment and Protection Process

1. COSEWIC creates a candidate for assessment list, prioritizing species by apparent risk. (no time limit)
2. COSEWIC creates a “status report” for the top listed species (no time limit)
3. **Within 1 year** of receiving a status report COSEWIC writes an assessment and sends it to the Minister [s. 23]
4. **Within 9 months** of receiving the assessment the Cabinet/Minister must:
 - a) Add the species to the list by order [s. 27 (3)] OR
 - b) Decide not to add the species or refer the matter back to COSEWIC, providing reasons in the public registry
5. The Minister must create a Recovery Strategy identifying: the needs, threats, and critical habitat (to the extent possible) [s. 37-46]
6. The Minister must create an Action Plan stating: measures to implement the recovery strategy, costs and benefits, and critical habitat (to the extent possible) [s. 47-55]

Public Participation Opportunities

REQUESTING SPECIES ASSESSMENT

You may apply to COSEWIC for the **assessment** of a species. [s. 22]. COSEWIC will consider the species for addition to the candidate assessment list (see step 1 above).

- If your request includes a valid “status report” COSEWIC will assess the species, skipping candidate assessment step (see step 3 above)

You may apply to COSEWIC for the **emergency assessment** of a species, including information indicating an “imminent threat to the survival of the species.” [s. 28]

- The Minister must recommend that the Cabinet add the species to the List if the Minister believes there is an imminent threat – emergency assessment bypasses some of the usual consultation requirements, but the Minister is not held to any timelines

Soon after SARA was proclaimed, Okanagan Chinook and Sakinaw Lake Sockeye salmon were declared endangered through an application for emergency assessment under section 28.

Two requests for assessment have been rejected by COSEWIC because the animals did not meet the definition of Wildlife Species under SARA. (the White Moose and Marbled Murrelet)

COMMENTING ON PROPOSALS [s. 43, 47, 68]

1. A proposed **Action Plan OR Recovery Strategy OR Management Plan** must be posted to the public registry
 - Other proposals may be posted for comments, but need not be.
2. You may file written comments with the competent minister **within 60 days** of the posting
3. The Minister must consider your comments and make any changes s/he considers appropriate **within 30 days** after the public consultation period closes
 - the Minister is not required to provide a response to public comments, but both the “proposed” and “final” versions of the plans must be posted to the SARA registry

REQUESTING AN INVESTIGATION [s. 93 – 96]

1. You may apply to the competent minister for an investigation of whether an alleged offence has been committed or whether anything directed towards its commission has been done.
 - Amongst other things, the application must: state the nature of the offence, name the accused, summarize the evidence, describe all included documentation, detail contacts with the accused (see section 93(2) and contact the relevant Ministry for more details)
 - Request an investigation form from the Sara Registry (SARAreistry@ec.gc.ca)
2. The Minister must acknowledge receipt **within 20** days
3. The Minister must decide whether to investigate **within 60 days**, giving reasons if not investigating
4. The Minister must investigate all matters s/he considered necessary to determine the facts
5. The Minister may suspend investigating if (a) no further investigation is required OR (b) no offence is substantiated

6. The Minister must write a report when the investigation is suspended or concluded, including (a) information obtained, (b) reasons for conclusion/suspension, and (c) proposed actions (if any)

Links

Environment Canada (for non-aquatic species at risk): speciesatrisk.gc.ca

SARA Registry, which includes the List, regulations, agreements, COSEWIC's assessment criteria, status reports, guidelines, and reports: sararegistry.gc.ca

Department of Fisheries and Oceans (for aquatic species at risk):
dfo-mpo.gc.ca/species-especies/home_e.asp

COSEWIC, which includes candidate list, status reports, species assessment/results:
cosewic.gc.ca