BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL (SOUTHERN ZONE), CHENNAI

Appeal 46 of 2024

Praveena and Ors. **...Appellants**

v.

State Environment Impact

Assessment Authority and Anr. **...Respondents**

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Dated on this the 22nd day of August, 2024

(MS 1421/2011)

Counsel for Appellants

(2012) 4 Supreme Court Cases 629

(BEFORE K.S.P. RADHAKRISHNAN AND C.K. PRASAD, JJ.)

DEEPAK KUMAR AND OTHERS .. Petitioners;

Versus

STATE OF HARYANA AND OTHERS .. Respondents.

IAs Nos. 12-13 of 2011 in SLPs (C) Nos. 19628-29 of 2009† with SLPs (C) Nos. 729-31 of 2011, 21833 of 2009, 12498-99 of 2010, SLPs (C) Nos. CC … 16157 and 18235 of 2011, decided on February 27, 2012

A. **Environment Protection and Pollution Control — Mining — Minor minerals — Environmental impact assessment not required for mining areas of less than 5 ha — Invalidity — Mining/quarrying of minor minerals, boulders, gravel and sand in notified areas and riverbeds — Environmental consequences of — Necessary directions issued**

— Inspection report submitted by CEC silent on serious illegal sand mining activities in rivers and prevailing degree of degradation of environment especially on riverbeds — Auction notices concerned stating that for mining leases of area less than 5 ha no environmental impact assessment clearance was required by MoEF, GoI Noti. dt. 14-9-2006 — No light thrown on question whether there has been, in fact, an attempt to flout the Noti. dt. 14-9-2006 by breaking the homogeneous area into pieces of less than 5 ha — Deep concern expressed by Supreme Court on possible adverse environmental/ecological consequences of mining leases on rivers of fragile Shivalik Hills

— Held, there are no materials to come to conclusion that removal of minor minerals, boulders, gravel and sand quarries, etc. covered by auction notices would not cause environmental degradation or threat to biodiversity — Auction notices were issued without conducting any study on possible environmental impact on/in riverbeds and elsewhere

— When faced with a situation where extraction of alluvial material within or near a riverbed has an impact on river's physical habitat characteristics it is not an answer to say that extraction is in blocks of less than 5 ha, separated by 1 km — Collective impact may be significant, therefore, necessity of a proper environmental assessment plan is not done away with — Hence, States/UTs directed that all leases of minor minerals including their renewal for an area of less than five hectares could be granted only after getting EIA (environmental impact assessment) clearance from MoEF, GoI — Recommendation issued to States to prepare "comprehensive mines plan" for contiguous stretches of mineral deposits to be suitably incorporated in Mineral Concession Rules, 1960 by Ministry of Mines, GoI — Constitution of India — Arts. 21, 48-A and 51-A(g) — Minor Minerals Conservation and Development Rules, 2010 — Mines and Minerals (Development and Regulation) Act, 1957, Ss. 3(e), 70 and 15

(Paras 3, 4, 8 to 15 and 20 to 29)

† From the Judgment and Order dated 15-5-2009 of the High Court of Punjab and Haryana at Chandigarh in CWPs Nos. 20134 of 2004 and 4758 of 2008

B. **Environment Protection and Pollution Control — Mining — Effective mining plan framework — Necessity of — Recommendations issued by MoEF, Government of India and Model Rules, 2010 framed by Ministry of Mines, GoI — Non-implementation of, by States and UTs — Directions issued — Held, all States', UTs' MoEFs and Ministries of Mines directed to give effect to recommendations of MoEF, GoI and model guidelines within a period of six months from date of this order and to submit their compliance reports — Central Government also directed to take steps to bring into force Minor Minerals Conservation and Development Rules, 2010 at the earliest — Directions issued to State Governments and UTs to take immediate steps to frame necessary rules under S. 15 of Mines and Minerals (Development and Regulation) Act, 1957 — Further directions passed — Mines and Minerals (Development and Regulation) Act, 1957, S. 15 (Paras 22 to 29)**

B-D/49566/C

Advocates who appeared in this case :

Mohan Jain, Additional Solicitor General, Narender Hooda, Senior Additional Advocate General, Dr Manish Singhvi, Additional Advocate General, P.S. Narasimha, Gopal Subramanium, Ranjit Kumar, P.S. Patwalia and Ranbir Chandra, Senior Advocates [Gaurav Agarwal, K. Parmeswar, Haris Beeran, P.K. Manohar, V. Venayagam Balan, Shish Pal Laler, N.P. Midha, Balbir Singh Gupta, D.K. Thakur, B.K. Prasad, S.N. Terdal, Shivendra Dwivedi, Tarjit Singh, Manjit Singh (for Kamal Mohan Gupta), Aseem Mehrotra, Mohd. F. Khan, Ms Shefai Jain, R.P. Singh, Shree Pal Singh, Devashish Bharuka, Radhashyam Jena, Tapesh Kr. Singh, Samir Ali Khan, Jitender Mohan Sharma, Sandeep Singh, Vibhor Verdhan, Sameer Singh, Mohit Kr. Shah, Ashutosh Singh, Devanshu K. Devesh, Irshad Ahmad, Sarvesh Singh, A. Benayagamblan, Manish Pitale, Wasi Haider, C.S. Ashri, Ms Asha G. Nair, Sanand Ramakrishnan, Ms Meena C.R., M/s Karanjawala & Co., Prakash Kr. Singh, Vijay Panjwani, Ms Anitha Shenoy, Ms Vibha Datta Makhija, D.S. Mahra, Ms H. Wahi, D.K. Sinha, Milind Kumar, Krishananand Pandey, Kamlendra Mishra, Ms Rachana Srivastava, B.S. Banthia, Gopal Singh, Anil Srivastava, M/s Corporate Law Group, T.V. George, Naresh K. Sharma, Prashant Bhushan, Shibashish Misra, Ms Prerna Mehta, S.M. Jadhav, Shiv Kr. Suri, G. Prakash, E.M.S. Anam, Subhro Sanyal, Himinder Lal, Moinuddin Ansari, L.R. Singh, C.D. Singh, Ms Lalitha Kaushik, K.S. Bhati, Neeraj Shekhar, Ms Sumita Hazarika, M/s Suresh A. Shroff & Co., S. Prasad, M/s Khaitan & Co., Ms Pragati Neekhra, Naresh K. Sharma, R. Nedumaran, K.K. Mani, Ms Srikala Gurukrishna Kumar, S. Srinivasan, Prashant Kumar, L.K. Pandey, Shiv Prakash Pandey, Ms Sangeeta Kumar, Nikhil Nayyar, V. Ramasubramanian, Pratap Venugopal, Ms Namrata Sood (for M/s K.J. John & Co.), R. Ayyam Perumal, Ms Prabha Swami, M.A. Chinnasamy, C.N. Sreekumar, Naveen R. Nath, Ms Revathy Raghavan, L.C. Agrawala and Ashwani Bhardwaj, Advocates] for the appearing parties.

The Order of the Court was delivered by

K.S.P. RADHAKRISHNAN, J.— IAs Nos. 12-13 of 2011 are allowed. SLPs (C) Nos. 12498-99 of 2010 be detagged and be listed after two weeks.

2. The Department of Mines and Geology, Government of Haryana issued an auction notice dated 3-6-2011 proposing to auction the extraction of minor minerals, boulders, gravel and sand quarries of an area not exceeding 4.5 ha in each case in the district of Panchkula, auction notices

dated 8-8-2011 in the districts of Panchkula, Ambala and Yamuna Nagar exceeding 5 ha and above, quarrying minor mineral, road metal and masonry stone mines in the district of Bhiwani, stone and sand mines in the district of Mohindergarh, slate stone mines in the district of Rewari, and also in the districts of Kurukshetra, Karnal, Faridabad and Palwal, with certain restrictions for quarrying in the riverbeds of Yamuna, Tangri, Markanda, Ghaggar, Krishnavati River basin, Dohan River basin, etc. The validity of those auction notices is under challenge before us, apart from the complaint of illegal mining going on in the States of Rajasthan and Uttar Pradesh.

3. When the matter came up for hearing on 25-11-2011, we passed an order directing the CEC to make a local inspection with intimation to MoEF, the States of U.P., Rajasthan and Haryana with regard to the alleged illegal mining going on in the States of Uttar Pradesh, Rajasthan and also with regard to the areas identified for mining in the State of Haryana and submit a report. We also directed the CEC to examine whether there has been an attempt to flout EIA Notification dated 14-9-2006 by breaking the homogeneous area into pieces of less than 5 ha. CEC was also directed to examine whether the activities going on in that area have any adverse environmental impact.

4. CEC, in response to our order, submitted a detailed report on 4-1-2012. However, the report is silent with regard to the disturbing trend of serious illegal and unrestricted upstream, instream and flood plain sand mining activities and the prevailing degree of degradation of the sites and the environment, especially on the riverbeds mentioned earlier. The report of CEC however states that the auction notice also refers to mining leases of less than 5 ha and hence no environmental clearance need be obtained as per the MoEF Notification dated 14-9-2006. No light is also thrown on the question whether there has been, in fact, an attempt to flout the Notification dated 14-9-2006 by breaking the homogeneous area into pieces of less than 5 ha and the possible environmental or ecological impact on quarrying of minor minerals.

5. Mr Patwalia, learned Senior Counsel appearing for the petitioners, submitted that the CEC report is silent about those aspects and also whether 1 km distance has been maintained between the mining blocks of less than 5 ha. The learned counsel also submitted that mining areas earmarked are at the foothills of fragile Himalayan ranges known as Shivalik Hills, which are spread over the districts of Panchkula, Ambala and Yamuna Nagar and the illegal and excessive mining has caused serious environmental degradation and ecological impact, and no environmental impact assessment has ever taken place in areas earmarked for mining especially on the riverbeds.

6. Shri Gopal Subramanium, learned Senior Counsel appearing for the State of Haryana, submitted that the State has taken adequate and effective precautions to maintain 1 km separation between mining blocks of less than 5 ha each and that the auction notice dated 3-6-2011 itself has imposed strict restrictions on quarrying in the riverbeds so also the auction notice dated

8-8-2011. Further, it was pointed out that the Notification dated 14-9-2006 would not apply for quarrying minor minerals from areas of less than 5 ha and therefore, no environmental impact assessment needs to be undertaken either at the instance of the State Government or the project proponent.

7. Shri Mohan Jain, learned Additional Solicitor General, appearing for MoEF submitted that the grant or allotment of mining licence/lease of smaller plots of less than five hectares should not be encouraged from the environmental point of view and that the applicability of EIA Notification of 2006, has to be seen in its letter and spirit so as to ensure environmental safeguards in place and implemented for sustainable mining. The learned counsel also assured, if environmental clearance is sought for covering a mining area of less than five hectares, the same shall be immediately attended to and necessary clearance would be granted in accordance with law.

8. We have no materials before us to come to the conclusion that the removal of minor minerals, boulders, gravel, sand quarries, etc. covered by the auction notices dated 3-6-2011 and 8-8-2011, in the places notified therein and also in the riverbeds of Yamuna, Ghaggar, Tangri, Markanda, Krishnavati River basin, Dohan River basin, etc. would not cause environmental degradation or threat to the biodiversity, destroy riverine vegetation, cause erosion, pollute water sources, etc. Sand mining on either side of the rivers, upstream and instream, is one of the causes for environmental degradation and also a threat to the biodiversity. Over the years, India's rivers and riparian ecology have been badly affected by the alarming rate of unrestricted sand mining which damage the ecosystem of rivers and the safety of bridges, weakening of riverbeds, destruction of natural habitats of organisms living on the riverbeds, affects fish breeding and migration, spells disaster for the conservation of many bird species, increases saline water in the rivers, etc.

9. Extraction of alluvial material from within or near a streambed has a direct impact on the stream's physical habitat characteristics. These characteristics include bed elevation, substrate composition and stability, instream roughness elements, depth, velocity, turbidity, sediment transport, stream discharge and temperature. Altering these habitat characteristics can have deleterious impacts on both instream biota and the associated riparian habitat. The demand for sand continues to increase day by day as building and construction of new infrastructures and expansion of existing ones is continuous thereby placing immense pressure on the supply of the sand resource and hence mining activities are going on legally and illegally without any restrictions. Lack of proper planning and sand management cause disturbance of marine ecosystem and also upset the ability of natural marine processes to replenish the sand.

10. We are expressing our deep concern since we are faced with a situation where the auction notices dated 3-6-2011 and 8-8-2011 have permitted quarrying, mining and removal of sand from instream and upstream of several rivers, which may have serious environmental impact on

ephemeral, seasonal and perennial rivers and riverbeds and sand extraction may have an adverse effect on biodiversity as well. Further, it may also lead to bed degradation and sedimentation having a negative effect on the aquatic life. The rivers mentioned in the auction notices are on the foothills of the fragile Shivalik Hills. Shivalik Hills are the source of rivers like Ghaggar, Tangri, Markanda, etc. River Ghaggar is a seasonal river which rises up in the outer Himalayas between Yamuna and Satluj and enters Haryana near Pinjore, District Panchkula, which passes through Ambala and Hissar and reaches Bikaner in Rajasthan. River Markanda is also a seasonal river like Ghaggar, which also originates from the lower Shivalik Hills and enters Haryana near Ambala. During monsoon, this stream swells up into a raging torrent, notorious for its devastating power, as also, River Yamuna.

11. We find that it is without conducting any study on the possible environmental impact on/in the riverbeds and elsewhere the auction notices have been issued. We are of the considered view that when we are faced with a situation where extraction of alluvial material within or near a riverbed has an impact on the river's physical habitat characteristics, like river stability, flood risk, environmental degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in blocks of less than 5 ha, separated by 1 km, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan.

12. Possibly this may be the reason that in the affidavit filed by MoEF on 23-11-2011 along with Annexure 2, report, the following stand has been taken:

> "The Ministry is of the opinion that where the mining area is homogenous, physically proximate and on identifiable piece of land of 5 ha or more, it should not be broken into smaller sizes to circumvent the EIA Notification, 2006 as the EIA Notification, 2006 is not applicable to the mining projects having lease area of less than 5 ha. The report of the Committee on Minor Minerals, under the Chairmanship of the Secretary (Environment & Forests) with representatives of various State Governments as members including the States of Haryana and Rajasthan recommended a minimum lease size of 5 ha for minor minerals for undertaking scientific mining for the purpose of integrating and addressing environmental concerns. Only in cases of isolated discontinued mineral deposits in less than 5 ha, such mining leases may be considered keeping in view the mineral conservation."

13. Situations referred to earlier prevail not only in the State of Haryana but also in the neighbouring and other States of the country as well and those issues had come up for serious deliberations before the Government of India, on various occasions.

14. The Government of India was receiving various reports regarding the adverse impacts on riverbeds and groundwater due to quarrying/mining of minerals. The Mines and Minerals (Development and Regulation) Act, 1957 empowers the State Governments to make rules in respect of minor minerals.

It was noticed that proposals for mining of major minerals typically undergo environmental impact assessment and environmental clearance procedure, but due attention has not been given to environmental aspects of mining of minor minerals. Environmental Impact Assessment Notification of 1994 did not apply to the mining of minor minerals, noticing that minor minerals were brought under the ambit of the Environmental Impact Assessment Notification of 2006 and as per the said notification mining of minerals with a lease area of 5 ha and above require prior environmental clearance.

15. MoEF's attention was drawn to several instances across the country regarding damage to lakes, riverbeds and groundwater leading to drying up of waterbeds and causing water scarcity on account of quarry/mining leases and mineral concessions granted under the Mineral Concession Rules framed by the State Governments under Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957. MoEF noticed that less attention was given on environmental aspects of mining of minor minerals since the area was small, but it was noticed that the collective impact in a particular area over a period of time might be significant. Taking note of those aspects, MoEF constituted a Core Group under the Chairmanship of the Secretary (Environment & Forests) to look into the environmental aspects associated with mining of minor minerals, vide its Order dated 24-3-2009.

16. The terms of reference to the Core Group were as under:

(*i*) To consider the environmental aspects of mining of minor minerals (quarrying as well as riverbed mining) for their integration into the mining process.

(*ii*) Specific safeguard measures required to minimise the likely adverse impacts of mining on environment with specific reference to impact on water bodies as well as groundwater so as to ensure sustainable mining.

(*iii*) To evolve model guidelines so as to address mining as well as environmental concerns in a balanced manner for their adoption and implementation by all the mineral-producing States.

17. The Core Group held its first meeting on 7-7-2009 and discussed the impact that may be caused by quarrying/mining of minor minerals on riverbeds and groundwaters. It was noticed that individual mines of minor minerals being small in size may have insignificant impact, however, their collective impacts, taking into consideration various mines on a regional scale, is significantly adverse. It was, therefore, felt necessary to consider various aspects since appropriate guidelines have to be issued on the basis of the report of the Committee. The issues which were brought up for consideration were; (*i*) the need to relook the definition of minor mineral, (*ii*) minimum size of lease for adopting eco-friendly scientific mining practices, (*iii*) period of lease, (*iv*) cluster of mine approach for addressing and implementing EMP in case of small mines, (*v*) depth of mining to minimise adverse impact on hydrological regime, (*vi*) requirement of mine plan for minor minerals, similar to major minerals, and (*vii*) reclamation of mined out area, post mine land use, progressive mine closure plan, etc.

18. Comments and inputs from various States and experts were also invited so as to prepare a report for consideration of MoEF. Based on the discussion held and subsequent inputs received, a draft report was prepared and circulated to all members for their further inputs. The report was further discussed on 29-1-2010 for its finalisation. The observations/comments made during the meeting were incorporated in the report and it was again circulated to all members for their consideration. The report so circulated was ultimately finalised. The decision taken by MoEF affects generally the mining of minor minerals including the riverbed mining throughout the country.

19. For an easy reference, we may extract the issues and recommendations made by MoEF, which are as follows:

"**4.0.** ***Issues and recommendations***

4.1. *Definition of minor mineral*

The term 'minor mineral' is defined in clause (*e*) of Section 3 of the MMDR Act, 1957 as:

> '**3. (*e*) "minor minerals"** means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette declare to be a minor mineral;'

The term 'ordinary sand' used in clause (*e*) of Section 3 of the MMDR Act, 1957 has been further clarified in Rule 70 of the MCR, 1960 as:

> '**70.** ***Sand not be treated as minor mineral when used for certain purpose***.—Sand shall not be treated as a minor mineral when used for any of the following purposes, namely:
>
> (*i*) purpose of refractory and manufacture of ceramic;
> (*ii*) metallurgical purposes;
> (*iii*) optical purposes;
> (*iv*) purposes of stowing in coal mines;
> (*v*) for manufacture of silvicrete cement;
> (*vi*) manufacture of sodium silicate; and
> (*vii*) for manufacture of pottery and glass.'

Additionally, the Central Government has declared the following minerals as minor minerals: (*i*) boulder, (*ii*) shingle, (*iii*) chalcedony pebbles used for ball mill purposes only, (*iv*) limeshell, kankar and limestone used in kilns for manufacture of lime used as building material, (*v*) murrum, (*vi*) brick-earth, (*vii*) fuller's earth, (*viii*) bentonite, (*ix*) road metal, (*x*) reh-matti, (*xi*) slate and shale when used for building material, (*xii*) marble, (*xiii*) stone used for making household utensils, (*xiv*) quartzite and sandstone when used for purposes of building or for making road metal and household utensils, (*xv*) saltpetre and (*xvi*) ordinary earth (used for filling or levelling purposes in construction or embankments, roads, railways building).

It may thus be observed that minerals have been classified into major and minor minerals based on their end use rather than level of

production, level of mechanisation, export and import, etc. There do exist some minor mineral mines of silica sand and limestone where the scale of mechanisation and level of production is much higher than those of industrial mineral mines. Further, in terms of the economic cost and revenue, it has been estimated that the total value of minor minerals constitutes about 10% of the total value of mineral production whereas the value of non-metallic minerals comprises only 3%. It is, therefore, evident that the operation of mines of minor minerals need to be subject to some regulatory parameters as that of mines of major minerals.

Further, unlike India there does not exist any such system based on end usage in other countries for classifying minerals into major and minor categories. Thus, there is a need to relook at the definition of 'minor minerals' per se.

It is, therefore, recommended that the Ministry of Mines along with Indian Bureau of Mines, in consultation with the State Governments may re-examine the classification of minerals into major and minor categories so that the regulatory aspects and environment mitigation measures are appropriately integrated for ensuring sustainable and scientific mining with least impacts on environment.

4.2. *Size of the mine lease*

Area for grant of mine lease varies from State to State. Maximum area which can be held under one or more mine lease is 2590 ha or 25.90 sq miles in Jammu and Kashmir. Rajasthan prescribed a minimum limit of 1 ha for a lease. Maximum area prescribed for permit is 50 × 50 m. In most of the States area of permit is not specified in the Rules. It has recently been observed by the Punjab and Haryana High Court in its order dated 15-5-2009 that the State Government apparently granting short-term permits by dividing the mining area into small zones in effect avoids environmental norms.

There is, thus a need to bring uniformity in the extent of area to be granted for mine lease so as to ensure that eco-friendly scientific mining practices can be adopted. *It is recommended that the minimum size of mine lease should be 5 ha. Further, preparation of comprehensive mine plan for contiguous stretches of mineral deposits by the respective State Governments may also be encouraged. This may suitably be incorporated in the Mineral Concession Rules, 1960 by the Ministry of Mines.*

4.3. *Period of mine lease*

The period of lease varies from State to State depending on type of concessions, minerals and its end use. The minimum lease period is one year and maximum 30 years. Minerals like granite where huge investments are required, a period of 20 years is generally given with the provisions of renewal. Permits are generally granted for short periods which vary from one month to a maximum of one year. In States like Haryana, minor mineral leases are auctioned for a particular time period. Mining is considered to be capital intensive industry and considerable time is lost for developing the mine before it attains the status of fully developed mine. If the tenure of the mine lease is short, it would encourage the lessee to concentrate more on rapid exploitation of

mineral without really undertaking adequate measures for reclamation and rehabilitation of mined out area, posing thereby a serious threat to the environment and health of the workers and public at large.

There is thus, a need to bring uniformity in the period of lease. *It is recommended that a minimum period of mine lease should be 5 years, so that eco-friendly, scientific and sustainable mining practices are adopted. However, under exceptional circumstances arising due to judicial interventions, short-term mining leases/contracts could be granted to the State Agencies to meet the situation arising therefrom.*

4.4. *Cluster of mine approach for small-sized mines*

Considering the nature of occurrence of minor mineral, economic condition of the lessee and the likely difficulties to be faced by Regulatory Authorities in monitoring the environmental impacts and implementation of necessary mitigation measures, *it may be desirable to adopt cluster approach in case of smaller mine leases being operated presently. Further, these clusters need be provided with processing/ crusher zones for forward integration and minimising excessive pressure on road infrastructure. The respective State Governments/mine owners' associations may facilitate implementation of Environment Management Plans in such cluster of mines.*

4.5. *Requirement of mine plan for minor minerals*

At present, most of the State Governments have not made it mandatory for preparation of mining plan in respect of minor minerals. In some States like Rajasthan, eco-friendly mining plans are prepared, which are approved by the State Mining Department. The eco-friendly mining plans so prepared, though conceptually welcome, are observed to be deficient and need to be made comprehensive in a manner as is being done for major minerals. Besides, the aspects of reclamation and rehabilitation of mined out areas, progressive mine closure plan, as in vogue for major minerals could be introduced for minor minerals as well.

It is recommended that provision for preparation and approval of mine plan, as in the case of major minerals may appropriately be provided in the rules governing the mining of minor minerals by the respective State Governments. These should specifically include the provision for reclamation and rehabilitation of mined out area, progressive mine closure plan and post mine land use.

4.6. *Creation of separate corpus for reclamation/rehabilitation of mines of minor minerals*

Mining of minor minerals, in our country, is by and large an unorganised sector and is practised in haphazard and unscientific manner. At times, the size of the leasehold is also too small to address the issue of reclamation and rehabilitation of mined out areas. It may, therefore, be desirable that before the concept of mine closure plan for minor minerals is adopted, the existing abandoned mines may be reclaimed and rehabilitated with the involvement of the State Government. *There is thus, a need to create a separate corpus, which may be utilised for reclamation and rehabilitation of mined out areas. The respective State Governments may work out a suitable mechanism*

for creation of such corpus on the 'polluter pays' principle. An organisational structure may also need to be created for undertaking and monitoring these activities.

4.7. *Depth of mining*

Mining of minerals, whether major or minor have a direct bearing on the hydrological regime of the area. Besides affecting the availability of water as a resource, it also affects the quality of water through direct run of going into the surface water bodies and infiltration/leaching into groundwater. Further, groundwater withdrawal, dewatering of water from mine-pit and diversion of surface water may cause surface and subsurface hydrologic systems to dry up. An ideal situation would require that quarrying should be restricted to unsaturated zone only above the phreatic water table and should not intersect the groundwater table at any point of time. However, from the point of view of mineral conservation, it may not be desirable to impose blanket ban on mining operation below groundwater table.

It is, therefore, recommended that detailed hydrogeological report should be prepared in respect of any mining operation for minor minerals to be undertaken below groundwater table. Based on the findings of the study so undertaken and the comments/recommendations of the Central Groundwater Authority/State Groundwater Board, a decision regarding restriction on depth of mining for any area should be taken on case-to-case basis.

4.8. *Uniform minor mineral concession rules*

The economic value of the minor minerals excavated in the country is estimated to contribute to about 9% of the total value of the minerals whereas the non-metallic minerals contribute to about 2.8%. Keeping in view the large extent of mining of minor minerals and its significant potential to adversely affect the environment, it is *recommended that model mineral concession rules may be framed for minor minerals as well and the minor minerals may be subjected to a simpler regulatory regime, which is, however, similar to major minerals regime.*

4.9. *Riverbed mining*

4.9.1. Environment damage being caused by unregulated riverbed mining of sand, bazari and boulders is attracting considerable attention including in the courts. The following recommendations are therefore made for the riverbed mining:

(*a*) *In the case of mining leases for riverbed sand mining, specific river stretches should be identified and mining permits/lease should be granted stretchwise, so that the requisite safeguard measures are duly implemented and are effectively monitored by the respective Regulatory Authorities.*

(*b*) *The depth of mining may be restricted to 3m/water level, whichever is less.*

(*c*) *For carrying out mining in proximity to any bridge and/or embankment, appropriate safety zone should be worked out on case-to-case basis, taking into account the structural parameters, locational aspects, flow rate, etc. and no mining should be carried out in the safety zone so worked out.*

5.0. *Conclusion*

Mining of minor minerals, though individually, because of smaller size of mine leases is perceived to have lesser impact as compared to mining of major minerals. However, the activity as a whole is seen to have significant adverse impacts on environment. It is, therefore, necessary that the mining of minor minerals is subjected to simpler but strict regulatory regime and *carried out only under an approved framework of mining plan, which should provide for reclamation and rehabilitation of the mined out areas. Further, while granting mining leases by the respective State Governments location of any eco-fragile zone(s) within the impact zone of the proposed mining area, the linked rules/notifications governing such zones and the judicial pronouncements, if any, need be duly noted.* The Union Ministry of Mines along with the Indian Bureau of Mines and respective State Governments should therefore make necessary provisions in this regard under the Mines and Minerals (Development and Regulation) Act, 1957, Mineral Concession Rules, 1960 and adopt model guidelines to be followed by all States." (emphasis supplied)

20. The Report clearly indicates that operation of mines of minor minerals needs to be subjected to strict regulatory parameters as that of mines of major minerals. It was also felt necessary to have a relook to the definition of "minor minerals" per se. The necessity of the preparation of "comprehensive mines plan" for contiguous stretches of mineral deposits by the respective State Governments may also be encouraged and the same be suitably incorporated in the Mineral Concession Rules, 1960 by the Ministry of Mines.

21. Further, it was also recommended that the States, Union Territories would see that mining of minor minerals is subjected to simpler but strict regulatory regime and carried out only under an *approved framework of mining plan*, which should provide for *reclamation and rehabilitation* of mined out areas. Mining plan should take note of the level of production, level of mechanisation, type of machinery used in the mining of minor minerals, quantity of diesel consumption, the number of trees uprooted, export and import of mining minerals, environmental impact, restoration of flora and host of other matters referred to in the 2010 Rules. A proper framework has also to be evolved on cluster of mining of minor minerals for which there must be a *Regional Environmental Management Plan*. Another important decision taken was that while granting of mining leases by the respective State Governments, *location of any eco-fragile zone(s)* within the *impact zone* of the proposed mining area, the linked rules/notifications governing such zones and the judicial pronouncements, if any, need to be duly noted.

22. The Minister for (Environment and Forests) wrote DO Letter dated 1-6-2010 to all the Chief Ministers of the States to examine the Report and to issue necessary instructions for incorporating the recommendations made in the Report in the Mineral Concession Rules for mining of minor minerals

under Section 15 of the Mines and Mineral (Development and Regulation) Act, 1957. Following are the key recommendations reiterated in the letter:

"(*1*) Minimum size of mine lease should be 5 ha.

(*2*) Minimum period of mine lease should be 5 years.

(*3*) A cluster approach to mines should be taken in case of smaller mine leases operating currently.

(*4*) Mine plans should be made mandatory for minor minerals as well.

(*5*) A separate corpus should be created for reclamation and rehabilitation of mined out areas.

(*6*) Hydrogeological reports should be prepared for mining proposed below groundwater table.

(*7*) For riverbed mining, leases should be granted stretchwise, depth may be restricted to 3m/water level, whichever is less, and safety zones should be worked out.

(*8*) The present classification of minerals into major and minor categories should be re-examined by the Ministry of Mines in consultation with the States."

23. The Ministry of Mines, Government of India sent Communication No. 296/7/2000/MRC dated 16-5-2011 called "Environmental Aspects of Quarrying and of Minor Minerals—Evolving of Model Guidelines" along with a draft model guidelines calling for inputs before 30-6-2011. Draft rules called Minor Minerals Conservation and Development Rules, 2010 were also put on the website. Further, it may be noted that Section 15(1-A)(*i*) of the Act specifies:

"**15. (1-A)(*i*)** the manner in which rehabilitation of flora and other vegetation such as trees, shrubs and the like destroyed by reason of any quarrying or mining operations shall be made in the same area or in any other area [once] selected by the State Government (whether by way of reimbursement of the cost of rehabilitation or otherwise) by the person holding the quarrying or mining lease;"

24. We are of the view that all State Governments/Union Territories have to give due weight to the abovementioned recommendations of MoEF which are made in consultation with all the State Governments and Union Territories. The Model Rules of 2010 issued by the Ministry of Mines are very vital from the environmental, ecological and biodiversity point of view and therefore the State Governments have to frame proper rules in accordance with the recommendations, under Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957.

25. Quarrying of river sand, it is true, is an important economic activity in the country with river sand forming a crucial raw material for the infrastructural development and for the construction industry but excessive instream sand and gravel mining causes the degradation of rivers. Instream mining lowers the stream bottom of rivers which may lead to bank erosion. Depletion of sand in the streambed and along coastal areas causes the

deepening of rivers which may result in destruction of aquatic and riparian habitats as well. Extraction of alluvial material as already mentioned from within or near a streambed has a direct impact on the stream's physical habitat characteristics.

26. We are of the considered view that it is highly necessary to have an effective framework of mining plan which will take care of all environmental issues and also evolve a long-term rational and sustainable use of natural resource base and also the bio-assessment protocol. Sand mining, it may be noted, may have an adverse effect on biodiversity as loss of habitat caused by sand mining will affect various species, flora and fauna and it may also destabilise the soil structure of river banks and often leaves isolated islands. We find that, taking note of those technical, scientific and environmental matters, MoEF, Government of India, issued various recommendations in March 2010 followed by the Model Rules, 2010 framed by the Ministry of Mines which have to be given effect to, inculcating the spirit of Article 48-A and Article 51-A(*g*) read with Article 21 of the Constitution.

27. The State of Haryana and various other States have not so far implemented the above recommendations of MoEF or the guidelines issued by the Ministry of Mines before issuing auction notices granting short-term permits by way of auction of minor minerals boulders, gravel, sand, etc., in the riverbeds and elsewhere of less than 5 ha. We, therefore, direct all the States, Union Territories, MoEF and the Ministry of Mines to give effect to the recommendations made by MoEF in its Report of March 2010 and the model guidelines framed by the Ministry of Mines, within a period of six months from today and submit their compliance reports.

28. The Central Government also should take steps to bring into force the Minor Minerals Conservation and Development Rules, 2010 at the earliest. The State Governments and UTs also should take immediate steps to frame necessary rules under Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 taking into consideration the recommendations of MoEF in its Report of March 2010 and model guidelines framed by the Ministry of Mines, Government of India. Communicate the copy of this order to MoEF, Secretary, Ministry of Mines, New Delhi; Ministry of Water Resources, Central Government Water Authority; the Chief Secretaries of the respective States and Union Territories, who would circulate this order to the Departments concerned.

29. We, in the meanwhile, order that leases of minor minerals including their renewal for an area of less than five hectares be granted by the States/ Union Territories only after getting environmental clearance from MoEF. Ordered accordingly.

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2020 SCC OnLine Mad 809 : (2020) 4 CTC 160 : (2020) 1 LW 385

Substantially Reversed in *NHAI* v. *Pandarinathhan Govindarajulu*, (2021) 6 SCC 693

In the High Court of Madras

(BEFORE M. SATHYANARAYANAN AND N. SESHASAYEE, JJ.)

WP. 21883/2019

Pandarinathan Govindarajulu ... Petitioner;

Versus

Union of India Represented by the Secretary and Another ... Respondent.

With

WP. 15217/2019

Traffic Dr. K.R. Ramaswamy ... Petitioner;

Versus

Chief Secretary Government of Tamil Nadu and Others ... Respondent.

And

WP.14997/2019

Rajangam and Others ... Petitioners;

Versus

National Highways Authority of India (NHAII) Rep. By its Chairman and Others ... Respondents.

W.P. Nos. 21883, 15217 & 14997 of 2019 and WMP. Nos. 21095, 1519, 14941 & 14942 of 2019

Decided on January 8, 2020, [Reserved On : 04.10.2019]

Advocates who appeared in this case:

In WP. No. 21883 of 2019:

For Petitioner : Mr. Yogeshwaran A. for Ms. Poongkhulali B.

For Respondents : Mr. G. Karthikeyan Assistant Solicitor General [R1 & R2]

In WP. No. 15217 of 2019:

For Petitioner : Mr. K. Arvind

For Respondents : Mr. R. Udhayakumar, Special Government Pleader [R1 to R4, R6]

Mr. G. Karthikeyan Assistant Solicitor General [R5]

In WP. No. 14997 of 2019:

For Petitioner : Mr. M.R. Jothimanian for Mr. Balu K.

For Respondents : Mr. G. Karthikeyan Additional Solicitor General [R1 & R2]

Mr. R. Udhayakumar Special Government Pleader [R3 & R4]

Prayer in WP.21883 of 2019 : - Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the second respondent to obtain environmental clearance under the EIA, Environment Impact Assessment Notification, 2006 for the construction/laying of Villupuram - Nagaipatnam Section of NH-45A, cease all activity related to the construction/laying of Villupuram - Nagaipatnam Section of NH-45A.

Prayer in WP.15217 of 2019 : - Writ Petition filed under Article 226 of the

Constitution of India, praying to issue a Writ of Mandamus, directing the respondents to consider the representation/complaint dated 15.05.2019, Misc.78/2019 and direct the respondents to stop the land acquisition and scrap the project of National/State Highway the NHAII 45-A, New No. 332, Villupuram - Nagapattinam Phase 4 Sattanathapuram-Nagapattinam Project in this corridor and restore such land thus acquired from the innocent villagers.

Prayer in WP.14997 of 2019 : - Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to impugned notification published on 24.04.2018 in "Daily Thanthi" Tamil Newspaper under Section 3D and 3G(3) of the National Highways Act, 1956 issued by the third respondent and quash the same and consequently, forbear the respondents and their subordinates from forming four lanes road in National Highways No. 45A (Villupuram-Puducherry-Cuddalore-Nagapattinam) in between from KM 108.860 to KM 153.100 - from KM 166.950 to KM 183.600 through the petitioners' lands and also to consider alternative route i.e., S. No. 358/1 to S. No. 291/2 I, Thalachangadu as suggested by the petitioners.

The Order of the Court was delivered by

N. SESHASAYEE, J.:— Another standoff between cause of environment and call of development. The challenge herein relates to the project of the National Highways Authority of India (NHAI) involving expansion of NH-45A that runs between Villupuram and Nagapattinam, for a distance of 179.555 kms, as part of its Bharatmala Pariyojana Project. No Environmental Impact Assessment (henceforth, EIA) study was undertaken to evaluate the environmental viability of the project, whereas, the Notification in S.O.1533 issued by Ministry of Environment and Forest, dated 14.09.2006, under Rule 5 (3) of the Environment Protection Rules, 1986, and, as amended Vide notification in S.O.2559 (E) issued by the Ministry of Environment and Forest, dated 22.08.2013, mandates EIA compliance for projects of laying new or expanding existing National Highways. The relevant item in the Notifications is reproduced here.

Project or Activity		Category with threshold limit		Conditions if any
7		*Physical Infrastructure including Environmental Services*		
7(f)	Highways	i) New National Highways and ii) Expansion of National Highways greater than 30 KM, involving additional right of way greater than 20m involving land acquisition and passing through more than one State	1) New State Highways; and ii) Expansion of National/State Highways greater than 30 km involving additional right of way greater than 20m involving land acquisition.	General conditions shall apply.
7(f)(ii)	Highways	i) New National Highways and ii) Expansion of National Highways greater than 100 KM, involving additional right of way or land	1) New State Highways; and ii) Expansion of National/State Highways greater than 30 km involving additional right	General conditions shall apply.

		acquisition greater than 40m on existing alignments and 60m on realignments or bypasses.	of way greater than 20m involving land acquisition.	

2. The non-compliance of EIA is the eye of the litigious storm here. This is sought to be backed by few ancillary issues.

3. The NHAI adopted a strategy to segment the entire distance of 179.555 kms into four segments, and brought out four separate notifications. The details are as below:

Package No.	Name of the Project	Length of Package
I	Four laning of Villupuram (km.0/000) - Puducherry (km.29/000) Section of NH45A	29.000
II	Four laning of Puducherry (km.29/000) - Poondiankupam (km.67/000) Section of NH45A	38.000
III	Four laning of Poondiankuppam (km.67/000) - Satanathapuram (km.123/800) Section of NH45A	56.800
IV	Four laning of Satanathapuram (km.123/800) - Nagapattinam (km.179/555) Section of 45A	55.755
Total		179.555

4. The estimated total cost of the project was Rs. 6431.71 crores.

5. NHAI had invited tenders for the execution of the work, and entered into four Concession Agreements dated 23.04.2018 with M/s. Villupuram Highway Construction Pvt. Ltd., covering a stretch of 29.0 k.m., followed by two Concession Agreements both dated 5-05-2018, one with M/s. IRB PP Project Pvt. Ltd., and the other with M/s. TRB PS Highway Pvt. Ltd., and the last agreement, dated 03-12-2018 with M/s. Welspun Sattanathapuram Nagapattinam Road Pvt., Ltd.,

6. The project involves both widening of the existing road and also laying of new roads for formation of bye-passes. It may be broadly stated that the formation of bye-passes along the stretch of 179.555 km. are conceived for avoiding the cities/towns/villages on route. This necessarily involved acquisition of agricultural lands under the provisions of the National Highways Act, 1956. Three petitions have been filed in Public Interest, challenging either the project in toto, or the land acquisition specifically. They are tabulated as below:

WP. No.	Nature of challenge	Section to which the subject matter relates *
WP.14997/2019	Notification concerning	(III & IV)

(By owner's of land)	acquisition of land between KM-108.86 to 153, 166.95 to 183.6	
WP. 15219/2019 (PIL espousing the cause of Satyanathapuram - Nagapattinam)	To consider the representation of the petitioner to stop acquisition of land	IV Section
WP. 21883/2019 (PIL)	To drop the entire project and the land acquisition	I to IV
* Refer table in paragraph 2.1 above		

7. Even though WP.15217/2019 is styled as a Public Interest Litigation, the nature of prayer is only for issuance of writ of mandamus to direct the respondents to consider the representation of the petitioner. WP.14997/2019 concerns only with an objection to the intended acquisition of the petitioners' land for the project. WP.21883/2019, however attacks the very project itself. Hence, if this Court were to hold in favour of the petitioner in WP.21883/2019, then the other two petitions would necessarily become otiose. Therefore, WP.21883/2019 is taken as the principal case.

8. The crux of the contentions in WP.21883/2019 are:

- In terms of the EIA Notifications (extracted in paragraph 1 above), for the development of any National Highways for a length over 100 kms., environmental clearance based on an EIA study is mandatory. Since, the total distance covered in the proposed expansion of NH-45A between Villupuram-Nagapatinam is 179.555 k.ms, obtaining environmental clearance is indispensable. It is to avoid obtaining environmental clearance, the entire distance of 179.555 km has been artificially and arbitrarily split up into four segments, ensuring in the process that each of the segment fell within 100 kms. as to avoid the mandatory EIA. This is contrary to the spirit behind the aforesaid notifications.
- Without the EIA clearance, it is impermissible for the authorities to acquire the lands for the project. Reliance was placed on *M. Velu* v. *State of Tamil Nadu* [2010 SCC OnLine Mad 2736]

9. The petitioner in WP.15217/2019, also contends about the need for obtaining the Environmental Clearance, in terms of the EIA norms, but limits it to the last of the four segments indicated. He also pleads that the proposed Bharatmala project is not required, and instead, the ongoing, slow-paced four-laning of the ECR project could be expedited. He also reiterates the other averments made in WP. No. 21883/2019.

10. The petitioners in WP.14997/2019, however, do not focus much on Environmental Clearance, but challenge the intended land acquisition for the project on the grounds of, (a) inconvenient alignment; (b) that the proposed new road is contemplated along thickly populated areas, with a middle school, two temples, three ponds (each measuring more than 3 acres), churches, residential and commercial buildings etc., on the proposed route. The allegations stated can be broadly classified as one falling under the category of personal difficulties that the land owners might have to undergo if the project were to become a reality. There have been protests, and a peace meeting was held on 16-04-2018.

11. The National Highways Authority of India has filed separate counters in all the three writ petitions. Its contentions can be broadly divided into three : One defending the allegation of EIA non-compliance; and the other relating to legality of the acquisition proceedings. And the third one appears to be a subdued challenge to *locus standi* of the petitioners.

(a) Defending EIA non-compliance:

• Expansion of NH-45A for a stretch of 179.555 k.m has passed the scrutiny of the domain experts of the NHAI. It involves expansion of existing roads, and also the laying of by-pass roads to avoid towns on the route. Including 11 proposed railway over-bridges, several bridges are proposed to be built. The estimated total cost of the entire project is Rs. 6431.71 crores. If the total length of 179.555 km. is treated as one project, then it may have to be handed over to a single Concessionaire as one package, and it might take more than 6 years to complete the project. However, the intention of NHAII was to complete the entire project in 30 months. It is hence, the entire length of the project was divided into four convenient parts, and because each of the part falls outside the EIA criterion, the EIA study based environmental clearance is not required. Emphasis was made in particular to the amendment brought to the EIA criterion Vide S.O.2559 (E) dated 22.8.2013, referred to above, as per which, no EIA clearance was required for any distance up to 100 km.

(b) Legality of land acquisition:

• Notification under Sec. 3A of the National Highway Act, 1956, has been made after adhering to the procedure prescribed.

• Necessary notices in terms of the statute were given to the landowners, that they had participated in the enquiry. During enquiry their primary concern was on the compensation to be paid, and not on the land acquisition.

(c) Locus standi

So far as the petitioner in W.P.No : 21883/2019 is concerned, contrary to the title he asserts over certain lands which are part of the lands acquired for the project, the said land belongs to the Arulmigu Ramalingaswamy temple, Sirkali. Hence, he lacked the *locus standi.*

(d) Other aspects:

Due to salinity of the soil/water, for a length of 0.67 k.m., CRZ clearance is required in two locations. A survey was made by the IIT, Madras, and its report is submitted to CRZMA, and the same is pending approval, but the process is underway. (See counter in W.P.15217/2019)

The Arguments

12. Mr. Yogeshwaran, the counsel for the petitioner in WP. No. 21883/2019 led the arguments, with other counsel complementing the same. The arguments in essence are three-fold:

• The notification in S.O.1533 issued by the Ministry of Environment and Forest, dated 14.09.2006, provides for mandatory environmental clearance for different categories of economic or socio-economic activity, and the need to make an Environment Impact Assessment (EIA) is *sine quo non* for the same. The schedule provided in this notification, lists different heads of activity. In this, the head in Sl. No. 7(f) deals with the Highways. This notification *inter alia* requires that in cases of "*Expansion of National Highways, greater than 30 k.m. involving additional right of way greater than 20m involving land acquisition and passing through more that one State"*, environmental clearance is required. Consequentially, EIA has to be undertaken. This notification was subsequently amended, Vide S.O. No. 2559 (E) by the Ministry of Environment and Forest, dated 22.08.2013, as per which, environmental clearance is required only for the *"Expansion of National Highways greater than 100 km involving additional right of way, or land acquisition greater than 40m on existing alignment and 60m on re-alignments or by-passes."* So far as the present project of four laning of NH-

45A is concerned, the total stretch from Villupuram to Nagapattinam runs for 179.555 kms, out of which, road widening on the existing road is to take place only for a distance of 37% and for the remainder 63% of the road-length, new roads have to be laid, for which, vast tracts of agricultural lands are being acquired. In other words, new roads are going to be laid for a distance of 116.71 km. This would now require environmental clearance even in terms of S.O.2559 (E), referred to above. Notwithstanding the fact, this stretch runs as one continuous length, just to kill the need to obtain environmental clearance, and to avoid the mandatory EIA study, the project is artificially segmented into four parts with a view to circumvent the requirements of the amended 7(f). Nowhere in the world this artificial segmentation is judicially recognised, approved or tolerated.

- Be that as it may, the Ministry of Environment and Forests of the Union Government, has brought out the EIA Guidance Manual for the National Highways. This document though may not have a statutory sanctity, yet binds the NHAI, while undertaking its projects. Paragraph No. 2.3 in Chapter II of the said Manual is titled "*Summary of the Project Detail*", which requires noting down the length and width of the new alignment of the road proposed to be formed in the agricultural lands and also in the forest area. Chapter III of the Manual is specifically allotted for the Authorities to '*Analyse the Alternatives*' open to them while undertaking the project. It is not currently in dispute that for laying the new roads, for about 63% of the entire length, fertile agricultural lands are going to be acquired, bridges will be built, which pose serious threat, not only to the livelihood of the agriculturists, but will also create an ecological imbalance by affecting the natural flora and fauna which may have found a natural habitat for themselves, and all life that this entire stretch of 179.555 k.m. supports. Through maneuvering the project by an arbitrary and artificial segmentation of the entire road length of the project, the NHAI, in effect has ignored the very instructions in the Manual provided by the Government of India for any Highway project.
- As per the Indian Roads Congress (IRC) specifications, a four-lane National Highway shall have a width of 60 mtrs. However, NHAI has admitted in paragraph 6(c)(7) of its counter in WP. No. 15217/2019 that the average width of the present road between Villupuram and Nagapattinam is about 7 mtrs, which implies that, it hardly fits in with the character of a National Highway. Hence, to declare it as a National Highway, in terms of the National Highways Act, 1956, itself, is bad in law, and hence, the present road as it exists now does not even pass the test to be termed as a National Highway.

13. In this regard, it may be pertinent to point out that the same NHAI, in its project to upgrade a state highway and NH-348 B and NH-348 BB, as part of the same Bharatmala scheme in Maharashtra, has gone for EIA clearance. NHAI, has again complied with EIA requirements for its eight lane Greenfield Highway project on NH-148N covering a distance of 204.606 k.m. in Rajasthan as part of the Bharatmala Pariyojana. This makes it evident that NHAI knew about the need to go for EIA, that it was not averse to the idea of EIA, still it has chosen to comply with it selectively.

14. *Per contra*, the learned Assistant Solicitor General submitted in defense:

(a) The petitioner in WP.21883/2019 lack locus standi as the land over which they claim a right does not belong to them and it belongs to the Ramalingaswamy temple. The petitioners in W.P. No. 14997/2019 have all appeared during the enquiry before the Land Acquisition Authority, and have only insisted on the payment of compensation for the lands acquired. In other words, they were keen on the monetary compensation for their lands, and have no objection to the land

acquisition.

(b) So far as the segmentation alleged over the four-parts project, the entire project cost runs to over Rs. 6431.71 crores, and if the entire project is taken as a whole, then it may have to be handed over to one Concessionaire who might consume more than six years for implementing the project. It is to avoid this, and to expedite the completion of the project within a time frame of 30 months, the entire distance was divided into four convenient parts. And, it is being implemented as four separate parts, under four separate notifications for acquisition of lands covered in their respective stretch.

Discussion:

15. Should the NHAI have gone for an EIA study, and should it have waited for the environmental clearance, before embarking on the expansion of NH-45A, covering a total stretch of 179.555 k.m., and, whether, by segmenting the entire stretch into four blocks, each falling within 100 k.m., (which is the minimum distance that invites mandatory EIA norm) is a permissible strategy that EIA regime accommodates, are the core points in controversy.

16. An opening statement, based essentially on the pleadings may be made. While the petitioners focused primarily on the EIA non-compliance, NHAI was seen addressing them in a different frequency, when its pleadings are seen concentrated chiefly on the legality-issue of land acquisition besides the issue of *locus standi*. This frequency-variance resonated more during the arguments.

17. Both sides cited several authorities/literature, that matched their line of contentions. Accordingly, while the petitioners placed reliance on those authorities on environment and EIA, the learned Assistant Solicitor General opted for those on land acquisition, its legality, and the permissibility or otherwise, of the scope of judicial review in matters of administrative decisions guided by expert opinions. They will be referred to, and to the extent required, at the appropriate places in this Order.

A. Preludial Statement on Environmental law:

18. Environment may be best described as a microcosm in the incomprehensible vastness of cosmic space. An attempt to explain space therefore, may aid in appreciating what environment signifies. A less complicated definition of space is, that which separates things, and includes that which things occupy. With its molecular existence in space, our environment may now be explained as, all that separates those that exist in earth, and include them - the life and the lifeless - the naturally born, and the artificially created. Environment offers critical space, vital for supporting nature's creations, man included. Till Man stretched his ambitions beyond securing to himself the bare necessities for his existence, and began expanding his frontiers beyond that which nature could afford, Nature itself balanced the space for all its creations. Lives were created and became extinct, leaving the space for another life to occupy. The mountains are born, of tectonic shifts, perched their peaks in the emptiness of the space above, only to be swallowed by the waves, and to stay hidden in the darkness of the ocean-depths. Still, every life obeyed the Rules of Nature, and submitted to its command, and have showed supreme exemplification of their, rather unconscious, realization, that they are but mere licensees in Planet Earth, and that they have no right greater than that which are required for securing their short stay here.

19. But, not Man. The essential man established civilizations, built empires and castles, killed lives to declare his belief in his invincibility, only to stand as a helpless loser to witness their destruction every time Nature asserted its wisdom. He prided his intelligence, and pierced into unfathomable frontiers in science, which ordinary animal instinct for survival could hardly match. Still, he refused to believe that he too, is but a mere licensee in planet earth, and that, as a licensee, he has no greater right than a licensee that law understands : Use the facility that nature offers, but don't try

appropriating it.

20. The essential man, however, trapped in an unifocal vision of his own uplift, tried appropriating it. And, he took it to a bleeding point that Nature could no longer hide its cry. There then has dawned on the jurisprudential panorama, the environmental jurisprudence, as an intervenient, or more appropriately, an intercedent legal necessity, to bring in a balance between nature's arrangement of its space, and use for all its creation, and man's temptations to own it for himself. It is a legislative contrivance, an artificial effort, to balance man's brazenness to intervene with Nature, and Nature's right to stay for another generation, and for yet another generation. It is not a check on his felt and compelling need for development, but only a limitation on the extent to which his intent to intervene with his environment may go.

21. The emergence of environmental jurisprudence is traced to the public trust doctrine, conceptualization of which is attributed to Justinian II of the early Romans. It declared that the mountains and the rivers, the seas and the sky, the water and the air, are public wealth that belongs to all, that the Governments of the time are but trustees for the public with control over them, and have their power inbuilt in them, to preserve that which nature has provided for the benefit of all. It thus follows that it is the duty of the Governments as trustees of the public to regulate, or control the exploitation of the public wealth that they constitute. The contemporary environmental jurisprudence is shaped only on the platform that the public trust doctrine has provided. See : *M.C. Mehta* v. *Kamalnath*, [(1997) 1 SCC 388], *Association for Environment Protection* v. *State of Kerala* [(2013) 7 SCC 226 : AIR 2013 SC 2500].

22. In the Indian context, Article 21, with its stretchable quality to define the right to life, accommodates a person's right to near ideal environment, but it is more pronounced where the Constitution prescribed its directive to the State in Article 39(b) (where the emphasis is on public ownership of resources), and Article 48-A (where insistence is on preservation of environment and promotion of compassion) through which it imposed duties on the State, and then proceeds to cast a Fundamental Duty on the citizens in Article 51-A(g) *to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures* in Article 51-A(g). It is a Constitutional imperative that, in a democracy, which We, the People, have structured for ourselves, with its wafer thin - line differentiating the State and the citizens, the primary responsibility rests with every citizen to preserve the environment.

23. On this plane was enacted the Environment (Protection) Act, 1986. The preamble to the Act *inter alia* says, that the enactment was based on, "*the decisions (that) were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment".* But, it may have to be added that when the Environment (Protection) Act was legislated, the compulsions were not just traceable to the convention held on the other side of the Baltic sea, as our Constitution carried its own aspiration that our environment is, and should be, preserved as provided in the Directive in Articles 48-A, read alongside Article 51-A(g).

24. Sec. 2(a) of the Environment (Protection) Act defines environment as:"*Environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, microorganism and property".* The definition of environment, is therefore, not just limited to those that occupy the environmental space, but also includes the inter-relationship between them. It cannot be wider than this. To regulate indiscriminate exploitation of environment during developmental activity, Rule 5 of the Environment (Protection) Rules, 1986, vested the Central Government with the power to impose, "*Prohibition & Restrictions on the location of industries and carrying on processes and*

operation in different area." Thus began the EIA regime.

25. In *Hanuman Laxman Aroskar* v. *Union of India* [(2019) 15 SCC 401 : 2019 (5) Scale 484], the Hon'ble Supreme Court explained the Environmental Rule of Law as below:

> *"Environmental Rule of Law*
>
> *126. Fundamental to the outcome of this case is a quest for environmental governance within a rule of law paradigm. Environmental governance is founded on the need to promote environmental sustainability as a crucial enabling factor which ensures the health of our eco system.*
>
> *127. Since the Stockholm Conference, there has been a dramatic expansion in environmental laws and institutions across the globe. In many instances, these laws and institutions have helped to slow down or reverse environmental degradation. However, this progress is also accompanied, by a growing understanding that there is a considerable implementation gap between the requirements of environmental laws and their implementation and enforcement - both in developed and developing countries alike. The environmental rule of law seeks to address this gap.*
>
> *128. The environmental rule of law provides an essential platform underpinning the four pillars of sustainable development - economic, social, environmental, and peace. It imbues environmental objectives with the essentials of rule of law and underpins the reform of environmental law and governance. The environmental rule of law becomes a priority particularly when we acknowledge that the benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effects are on protection of the environment, it also strengthens rule of law more broadly, supports sustainable economic and social development, protects public health, contributes to peace and security by avoiding and defusing conflict, and protects human and constitutional rights. Similarly, the rule of law in environmental matters is indispensable "for equity in terms of the advancement of the Sustainable Development Goals, the provision of fair access by assuring a rights -based approach, and the promotion and protection of environmental and other socio-economic rights."*
>
> *129. Amartya Sen argues for a broadening of the notion of sustainable development which is the most dominant theme of environmental literature, from a need-based standard to a standard based on freedoms. Thus recharacterized, it encompasses the preservation, and when possible even the expansion of the substantive freedoms and capabilities of people today without compromising the capability of future generations to have similar - or more - freedoms. The intertwined concepts of environmental rule of law thus further intragenerational as well as intergenerational equity."*

B. Consideration of Arguments:

26. Four arguments, two each by the petitioners and the respondent, can be addressed immediately. The argument concerning the petitioners are (a) Their challenge to proposed alignment, and suitability of the proposed expansion of the road; and (b) as to whether NH-45A with its width around 7m can be termed a National Highway. The one that relates to respondents are : (i) On the *locus standi* of petitioners in W.P.21883/2019; and (ii) legality of acquisition.

27. First, to the contention of the petitioners in W.P.14997/2019. This pertains to their objection to the very need for the project Bharatmala, and the undesirability of the alignment of the proposed road. Several reams of printed papers are already made available by the Courts of this country that the power of judicial review does not stretch into the Executive's legitimate domain of policy-making. Still, this Court often witnesses tireless attempts to drag it into areas where the Courts show utmost reluctance. In plain terms this Court holds that it will not enter into spheres

earmarked for the Executive, where not even malafide is pleaded.

28. The other argument of the petitioners is that as per Roads Congress (IRC) specifications, a National Highway must have a minimum width of 60 meters, and since the existing NH-45A has only a width of 5.5 k.m to 7 m (refer the counter in WP. No. 15217/2019) the said road does not even qualify for being notified as a National Highway in order that it could be expanded. First, this argument does not find support in the pleadings of the petitioners. Second, Sec.2(2) of the National Highways Act, 1956, does not stipulate anything as to the minimum width of the road for declaring an existing road as a National Highway. Third, merely because a notified National Highway did not have road-width as prescribed by IRC, it does not automatically cease to be a National Highway.

29. Turning to the two points referable to the respondents, the issue of petitioners' *locus standi* (which is seen subdued or camouflaged in the pleading, but heard louder during arguments), according to NHAI, the petitioners in W.P. 15217/2019 attempt to canvass their private cause behind the mask of EIA, in that they challenge the project after they had participated in the land acquisition proceedings. And, so far as the land acquisition proceedings are concerned, the contention of NHAI is that, not a single provision of law on land acquisition was ignored. These contentions, in the view of this Court, literally beg the question.

30. The need to submit to the EIA regime is statutory in character, and it is contemplated at the point where the Executive is still in the process of evaluating the environmental viability of a project. The EIA study, in the context, is what ought to be undertaken, before a project goes out of its designer's desk. See paragraph 94 of the judgement of a Division Bench of this Court in *P.V. Krishnamoorthy* v. *The Government of India* [2019 (3) CTC 113]. And, land acquisition proceedings take place not when a developmental policy is designed, but at the point when it is implemented. It may be that the land acquisition may conform to the relevant provisions of National Highways Act, but that has no reflective effect to validate a developmental activity without an environmental clearance, which in law requires one.

31. The compulsions on the Executive to undertake an EIA study for an intended developmental activity is imposed by the statute, and not by few men of the locality where the project is to be implemented. EIA is non-negotiable, and hence, neither express approval, nor tacit concessions by the landowners who might lose their lands to the project, can replace the statutory requirement to go for a EIA study. Hence, a few landowners participating in the land acquisition proceedings cannot be a *fait accompli*, to estop them from challenging the legality of the very project for EIA non-compliance.

32. Even if these landowners choose not to challenge the project for bypassing EIA requirements, still any project that requires EIA study for its launch is assailable by any environmentally sensitive citizen. And, the fact that the challenge is from those who are to lose their land for the project, makes no difference. EIA is imposed by the statute on the planners, and hence the planners should listen to the statute, and may not look to the landowners.

Is the segmenting-strategy justifiable?

33. What is segmentation? A passage, from the judgement of the United State District Court in *Old Town Neighborhood Association V Kauffman* [S.D. Ind, 2002] explains it lucidly. (This Court, with humility, respects every source of information and knowledge, no matter who has said it.) The American experience has been that, its planners attempted at inventing methods to avoid the requirements of The National Environment Policy Act, 1969. One instant-solution they developed was to segmentize the project which required environmental clearance. Set in this context, the ‘Law of Segmentation is sxplained as below:

"'Segmentation' or 'piecemealing' is an attempt by an agency to divide artificially a 'major federal action' into smaller components to escape the application of NEPA to some of its segments." Save Barton Creek Ass'n *v.* Federal Highway Admin., *950 F.2d 1129, 1140 (5th Cir. 1992)*; Dickman *v.* City of Santa Fe, *724 F. Supp. 1341, 1345 (D.N.M. 1989) ("The rule against segmentation was developed to insure that interrelated projects, the overall effect of which may be environmentally significant; not be artificially divided into smaller, less significant actions"). Segmentation may be proper or improper. See* Village of Los Ranchos de Albuquerque *v.* Barnhart, *906 F.2d 1477, 1483 (10th Cir. 1990). Generally, improper segmentation is found only where a federal project has been segmented with the purpose of avoiding compliance with NEPA. Save Barton Creek, 950 F.2d at 1139; cf. 40 C.F.R. 1506, i (c) (while agency is preparing environmental impact statement, no other federal action may be taken unless it can be independently justified, has its own environmental impact statement, and will not limit alternatives in subsequent projects).*

Judge Cummings wrote for the Seventh Circuit about segmentation in Swain *v.* Brinegar, *542 F.2d 364 (7th Cir. 1976) (en banc). He described the balance that must be struck:*

Segmentation of highway projects, although necessary to make their design and construction more manageable, can limit the usefulness of environmental impact studies in two significant ways. First, the project can be divided into small segments; although the individual environmental impact might be slight, the cumulative consequences could be devastating. Second, the location of the first segment may determine where the continuation of that roadway is to be built. In such a case, preparation of the EIS for the extension is no more than a formal task because the decision-maker's ability to choose a different route no longer exists. On the other hand, an EIS need not consider the long-term visions of highway designers and urban engineers when they suggest comprehensive plans which may take years to construct, if they are to be built at all. The information contained in an EIS for such a comprehensive plan is likely to be speculative, irrelevant to the specific question before the decision-maker, and outdated by the time the choice must be made. To require the preparation of such an EIS would surely impose an undue burden on the state and federal agencies".

34. The segmentation-strategy appears to have evolved itself into a ready-referencer-strategy for administrators/planners elsewhere in the world too, for negotiating environmental issues and, the planners have attempted to experiment this strategy to circumnavigate the directives on environmental preservation in their scheme for development. The facts in *Commission of the European Communities* v. *Kingdom of Spain* [Case C-227/01, dated 16-09-2004], provides a case-study material on this aspect. The issue there is about the failure to comply with the Directives on the environmental assessment connected with laying a supplementary railway track for 13.2 k.m., of which a 7.64 k.m. section covers a new route, which forms part of a project that goes by the name the Mediterranean corridor, which covers a distance of 251 k.m. The European Court of Justice held:"*If the argument of the Spanish Government were upheld, the effectiveness of Directive....could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter section in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.*"

35. There are Indian experiences too, where the planners have risked ignoring the EIA, only to be reminded by the Court to follow it. A classic instance is seen in *Deepak Kumar* v. *State of Haryana* [(2012) 4 SCC 629]. The facts that led to the intervention of the court involved grant of mining leases for mining minor minerals by the state of

Haryana, with each lease covering an extent of less of 5 hectares, whereas EIA study is made mandatory for any mining activity in excess of 5.0 hectares. The Hon'ble Supreme Court held:

> *"9. We find that it is without conducting any study on the possible environmental impact on/in river beds and elsewhere the auction notices have been issued. We are of the considered view that when we are faced with a situation where extraction of alluvial material within or near a river bed has an impact on the rivers physical habitat characteristics, like river stability, flood risk, environment degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in block of less than 5 hectares, separated by one kiolemeter, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan...."*
>
> *(emphasis supplied)*

36. Another instance was seen in a matter which the National Green Tribunal had an occasion to decide in *Citizens for Green Doon* v. *Union of India* [2018 SCC OnLine NGT 1777], the issue was environment Vs road expansion in the Himalayan ranges situated in the State of Uttrakhand. The planners, (the NHAI) adopted similar a logic that it has adopted in the present case, by ensuring that a road expansion project involving 16 bypasses/realignments over a stretch of 889 k.m. was broken into smaller sections, each falling with 100 k.m. The NGT then found an occasion to state:

> *"41. We, thus propose to first consider the question whether there is violation of law in undertaking the project without mandatory in terms of the said provisions, Environmental Impact Assessment (EIA) in terms of the Environment (Protection) Act, 1986 read with statutory notifications, particularly Notification dated 14.09.2006. Further question is whether even if such assessment is not mandatory in terms of said provisions, is such assessment necessary under the environment jurisprudence principles? On such assessment, what are the safeguards which may render the project sustainable and make it consistent with the principle of inter-generational equity.*
>
> *42. As regards the question whether EIA is mandatorily required, it may be noted that EIA has been recognised as the most valuable, inter-disciplinary and objective decision-making tool with respect to alternate routes for development, process technologies and project sites. It is considered an ideal anticipatory mechanism allowing measures that ensure environmental compatibility in our quest for socio-economic development. In fact, the whole concept is based on jurisprudential principle of 'Sustainable Development' and 'Precautionary Principle' though statutory basis has been provided to the same for effective enforcement."*

37. It then proceeded to consider if EIA was necessary de hors the statutory scheme. Ultimately it held that though, EIA was not statutorily required, yet directed EIA compliance. In arriving at his conclusion the NGT has considered all the leading authorities of the Hon'ble Supreme Court on the subject, but not *Deepak Kumar* v. *State of Haryana* [(2012) 4 SCC 629]. The reasoning of the NGT later came to be approved by the Judgement of the Hon'ble Supreme Court, dated 08-08-2019, in C.A. 8518-8520 of 2018 (The Hon'ble Supreme Court, though has modified the direction issued by the NGT, yet has not disturbed the reasoning of the NGT for issuing the directions).

38. NHAI now appears to have been sucked into testing the segmentation-strategy by dividing the stretch of 179.555 k.m. into four parts, ensuring in the process that each segmented portion falls below 100 k.m. Its defense for segmentation is the administrative expediency aimed to achieve the accomplishment of the project expeditiously, and if this statement were to be trusted, then avoiding EIA, in its view, is only incidental to its strategy, and not a motive behind it.

39. This Court sees through the pall of pretended innocence behind the NHAI's segmentation-strategy, and finds its argument fallacious and distractive. It focuses on the implementation part of the project, when the issue is the legality of the very conception of the project for its non-compliance of the statutory imperatives on environmental clearance. It mixes up and overlaps two aspects, which in the ordinary course will follow a certain sequence : Exploring *inter alia* the environmental viability of the project at stage-I, followed by its implementation at stage-II. Both are independent issues.

40. A policy decision in designing a project is entirely different from a policy involved in deciding how the project as designed is implemented. Therefore, it is not impossible to treat the entire stretch of 179.555 k.m. as a single project, and to subject it to the rigour of EIA to explore its environmental viability at the first stage, and then to segment it into as many convenient parts as may be considered necessary for expeditious execution through as many Concessionaires as may be required. A felt need for dividing the entire project into different segments for simultaneous execution of a developmental project, though may be appreciable, yet it cannot be a justification for avoiding EIA requirements. Therefore, any argument such as the one advanced in favour of segmentation of a project will only engineer statutory abuse, and sound the death-knell for EIA. The Court cannot countenance it.

41. There is yet another reasoning that supports this conclusion. Even on a plain understanding of Item 7(f)(ii) in S.O.2559(E) of the Ministry of Environment and Forests provided dated 22.08.2013 (see paragraph 1), EIA is neither implementation centric, nor concessionaire centric, but is project centric.

42. These aspects apart, Chapter 3 of EIA Guidance Manual for National Highways, requires the NHAI to explore the alternatives for every project it undertakes. It is part of its EIA requirement. So avoidance of EIA in the instant case has also resulted in a failure to explore the alternatives available to the NHAI. It needs to be emphasised that several hectares of fertile agricultural lands are proposed to be consumed by the project-road expansion. Several trees are likely to be felled. Is it not necessary at least to know the number of trees that may be lost? Or, how many water bodies are likely to affected, or, if any water bodies or trees serve as a natural habitat for any species? This explains the significance of the EIA, and the need for exploring alternatives. It is hence, every time the planner is tempted to avoid EIA with his ingenuity, Courts insist in a sterner voice of its indispensability.

43. There is yet another allied, but equally significant issue. The NHAI has admitted in its counter in WP. No. 15217/2019 that it requires CRZ clearance at two locations, for which it had obtained a report from IIT, Madras, and submitted it for the consideration of CRZMA. That approval has not yet been obtained. It needs to be stated that the EIA study and its consequential enabling of an environmental clearance is entirely different from the CRZ clearance. In *Secretary, Kerala State Coastal Management Authority* v. *DLF Universal Ltd.*, [(2018) 2 SCC 203], environmental clearance was obtained by a realtor for its construction activity, but it failed to obtain the approval of CRZMA. Relying on a few earlier authorities, the Hon'ble Supreme Court held (at page 219-221):

> *"45. In* Anil Hoble *v.* Kashinath Jairam Shetye *[(2016) 10 SCC 701], it was held that any illegal structure falling within the "No Development Zone" (200 m from the HTL) in a CRZ-III area was directed to be demolished and even the permission granted by the Coastal Zone Management Authority was of no avail. Similarly, the practice of regularising unauthorised constructions effected by erring buildings in violation of law has not found approval from this Court and humanitarian and equitable grounds found no place in the same.*
>
> *46. In* UT of Lakshadweep *v.* Seashells Beach Resort *[(2012) 6 SCC 136], it has*

been observed as under:

> *"30. The High Court's order in* Seashells Beach Resort *v.* Union of India, *[(2012) SCC OnLine Ker 949], proceeds entirely on humanitarian and equitable considerations, in the process neglecting equally, if not more, important questions that have an impact on the future development and management of the Lakshadweep Islands. We are not, therefore, satisfied with the manner in which the High Court has proceeded in the matter.*
>
> *31. The High Court obviously failed to appreciate that equitable considerations were wholly misplaced in a situation where the very erection of the building to be used as a resort violated the CRZ requirements or the conditions of land use diversion. No one could in the teeth of those requirements claim equity or present the administration with a fait accompli. The resort could not be commissioned under a judicial order in disregard of serious objections that were raised by the administration, which objections had to be answered before any direction could issue from a writ court."*
>
> *51. We also make it clear that in the future, wherever permissions are required to come and are to be obtained before commencement of construction, it would be no answer that activity can be carried on without obtaining the permissions...."*

44. In *M.C. Mehta* v. *Union of India* [(2004) 12 SCC 118 : AIR 2004 SC 4016], the Hon'ble supreme Court has underscored the supremacy accorded to environmental concerns, when it declared:"*in case of doubt.... protection of environment would have precedence over the economic interest*." This leaves the Executive/planners with no choice or option to avoid an EIA study on grounds of efficient implementation of the project.

45. In the instant case, inasmuch as, a non-criterion in administrative exigency (intending speedy implementation of the project), is made a criterion for segmentation, this Court holds that segmenting the entire stretch of 179.555 k.m. is arbitrary and artificial and also violative of the environmental laws of this country, but this decision is limited to EIA and CRZ approval alone, and not as concerning its implementation.

46. A survey of judicial pronouncements on environment protection brings to surface a disappointing state of affairs. Notwithstanding the primacy granted to the environment by the Constitution and in the legislative initiatives, anti-environmental tendencies and temptations that try to outmaneuver it, continue their sporadic display. This is worrisome. The planners ought not to approach EIA as an allergen, but as an opportunity (beckoning their scientific temper) to formulate environmentally viable developmental projects. Courts may be the sentinel guard, but unless the legislations on environment are engraved in the conscience of men, the planners included, our Constitutional hopes and dreams of preserving our environment will be in peril of being defeated, not by any aliens, but by, We, the People.

What is the road ahead for the project?

47. The EIA is a holistic narrative which encompasses within its fold the theme of both sustainable development and precautionary doctrine. It brings in efficiency and effectiveness in resolving a conflict between the environment and development. And, the Courts cannot ignore the legislative spirit in balancing the need for development alongside the preservation of environment.

48. Therefore, the project-expansion of NH-45A need not be shelved, nor the concessionaire agreements already into, need be cancelled, nor the land acquisition proceedings should be dropped. They may be put on hold, and the NHAI is now required to undertake an EIA study, and to go for environmental clearance as well as the CRZ approval from such statutory authorities as have been constituted, and then to proceed with the work, if the project is cleared for its environmental viability. It is

not an *ex post facto* environmental clearance, but an aspect of balancing development with environmental concerns. There have been instances where the court has directed EIA study during the implementation of a project that requires environmental clearance. Reference may be made to the decision of the First bench of this Court in *Puducherry Environment Protection Association* v. *Union of India* [(2017) 8 MLJ 513].

49. Before parting with this case, this Court intends to record that the earlier experience in this State viz a viz the Authorities complying with the environmental restoration through planting of trees, has been deplorable. About two decades back the four-laning of the major National Highways was undertaken. Several thousands of trees were felled across the State, but hardly any tree was planted for restoring the environment that was lost. Promises are made, and undertakings are given that every tree lost will be replaced with ten saplings and grown, but they are flouted with impunity and forgotten with convenience. If this project takes off again in terms of the directions herein below given, then it is indispensable for the NHAI to ensure that environmental restoration is accorded priority.

The Decision

50. This court now issues the following directions:

a) The present project of expansion of NH-45A covering a stretch of 179.555 k.m. shall be put on hold, and the present status quo is directed to be maintained.

b) That the project proponent (NHAI) shall undertake a EIA study and obtain environmental clearance.

c) The NHAI is also directed to obtain approval from CRZMA for CRZ clearance for two locations that it has indicated in its counter in W.P.15217/2019.

d) Once the necessary clearances are obtained as mentioned in (b) and (c) above, the project can proceed. If the EIA study to be undertaken provides any contra-indicators to the NHAI's plan of development of NH-45A, it will be at liberty to make necessary alterations and modifications to make the project environmentally viable.

e) If after ensuring the environmental viability of the project, its implementation resumes, the project proponent, and subject to the terms of the contract, the concessionaire, should first identify the places for planting the saplings of the same variety, preferably native-trees, for every tree felled, and it must be grown first. Possibility of forming a “Miyawaki forest” has to be explored as well.

f) This Court proposes to form a Committee to monitor the compliance of the direction given in (e) above, and hence, before resumption of the project, NHAI is required to approach this Court.

51. Accordingly, W.P.21883/2019 is partly allowed in terms of the directions in paragraph 24 above. In view of this, W.P.15217/2019 and W.P.14997/2019 are closed as no orders are necessary. No costs. Consequently, connected miscellaneous petitions are closed.

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3J

(BEFORE L. NAGESWARA RAO, HEMANT GUPTA AND AJAY RASTOGI, JJ.)

NATIONAL HIGHWAYS AUTHORITY OF INDIA . . Appellant;

Versus

PANDARINATHAN GOVINDARAJULU AND ANOTHER . . Respondents.

Civil Appeals Nos. 4035-37 of 2020†, decided on January 19, 2021

A. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — Expansion of National Highway — Environmental clearance — When necessary — Interpretation of Notis. dt. 14-9-2006 and 22-8-2013 — Segmentation of project as a strategy to avoid environmental clearance — Held, not permissible — Project proponent, held, is obligated to obtain prior environmental clearance only if the additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments or bypasses for a National Highway project which is greater than 100 km — Though, segmentation as a strategy is not permissible for evading environmental clearance as per Notis. dt. 14-9-2006 and 22-8-2013, question of permissibility of the segmentation of a National Highway beyond a distance of 100 km, held, is a matter to be considered by experts**

— Environmental clearance for expansion of National Highway 45-A between Villuppuram to Nagapattinam — Considering entire materials, held, in present case, for said expansion of National Highway 45-A, there is no requirement for obtaining environmental clearances, because of land acquisition being not more than 40 m on existing alignments and 60 m on realignments or bypasses — Resultantly, appeal allowed with certain directions by setting aside impugned order of the High Court — Environment (Protection) Act, 1986 — S. 3(2)(v)(i) — Environment (Protection) Rules, 1986, R. 5(3)(b)

B. **Administrative Law — Subordinate/Delegated Legislation — Principles of interpretation of subordinate legislation — Held, applicable to interpretation of statutory notifications — Thus, if the words of the statute or notification are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense — Words themselves do alone in such cases best declare the intent of the law giver — Hence, in absence of any ambiguity in the words, literal meaning has to be applied and words of the statute or notification must prima facie be given their ordinary meaning**

— As per relevant Item 7(f) of the Noti. dt. 22-8-2013, if the project involves expansion of a National Highway greater than 100 km, prior environmental clearance would be required only if it involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses — On a plain reading of said relevant item, held, there is no ambiguity or scope for two interpretations — Thus, by applying golden rule of interpretation, held, there is no requirement of prior environmental clearance for expansion of a National Highway project merely because the distance is greater than 100 km

† Arising from the Judgment and Order in *Pandarinathan Govindarajulu* v. *Union of India*, 2020 SCC OnLine Mad 809 (Madras High Court, WP No. 21883 of 2019, dt. 8-1-2020)

C. **Administrative Law — Subordinate/Delegated Legislation — Interpretation of — In case of a doubt, the interpretation of the author of the notification has to be accepted**

D. **Environment Law — Environment (Protection) Act, 1986 — S. 3(2)(v)(i) r/w R. 5(3)(b) of Rules 1986 — Issuance of statutory rules and notifications under provisions of Act/Rules — Binding effect — Held, a statutory rule or notification is to be treated as a part of the statute and Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act, are to be of the same effect as if they are contained in the Act, and are to be judicially noticed for all purposes of construction or obligation — Administrative Law — Subordinate/Delegated Legislation — Generally — Concept, Nature and Scope**

E. **Environment Law — Development vis-à-vis Ecology: National, Urban and Rural Development — Held, while economic development should not be allowed at the cost of ecology or by causing widespread environmental destruction, the necessity to preserve ecology and environment should not hamper economic and other development — There should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment — The traditional concept that development and ecology are opposed to each other is no longer acceptable**

F. **Roads and Highways — Planning Commission Manual of Specifications and Standards for Two-Laning of Highways through Public Private Partnership — S. 10 r/w Para 2.3 — Term "right of way" — Scope of — Toll plazas, held, are included in the "right of way" — There is no merit in the contention that amenities such as toll plazas and rest houses cannot be part of the "right of way" — Words and Phrases — "Right of way"**

The issues that arose before the Supreme Court were:

(*i*) Whether in the project pertaining to the expansion of NH 45-A between Villuppuram to Nagapattinam for a distance of 179.555 km as a part of the Bharatmala Pariyojana project, environmental clearance was not required as the additional right of way or land acquisition was not greater than the limits specified in the Notifications even if the expansion of the National Highways was beyond 100 km?

(*ii*) Whether segmentation of a project as a strategy to avoid environmental clearance is impermissible and in view of the bifurcation of NH 45-A into four packages and each package being less than 100 km, the Notifications were not applicable?

While allowing the appeals, the Supreme Court

Held :

Issue (i)

The pivot of the controversy relates to the applicability of Notifications dated 14-9-2006 and 22-8-2013 to the project in question. Therefore, it is necessary to adjudicate on the interpretation of the said Notifications though the High Court did not consider the said point. (Para 6)

A plain reading of Item 7(*f*) to the Notification dated 22-8-2013 would make it clear that expansion of a National Highway project needs prior environmental clearance in case (*a*) expansion of the National Highway project is greater than 100 km, and (*b*) it involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses. There is no ambiguity in the above provision as it gives no scope for any doubt. The distance of 100 km is important as expansion of National Highways below 100 km needs no prior environmental clearance. If the project involves expansion of a National Highway greater than 100 km, prior environmental clearance would be required only if it involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses. (Para 7)

A statutory rule or notification is to be treated as a part of the statute. Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act, are to be of the same effect as if they are contained in the Act, and are to be judicially noticed for all purposes of construction or obligation. The principles of interpretation of subordinate legislation are applicable to the interpretation of statutory notifications. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the law giver. (Para 8)

State of U.P. v. *Babu Ram Upadhya*, (1961) 2 SCR 679 : AIR 1961 SC 751 : (1961) 1 Cri LJ 773, *followed*

Sussex Peerage case, (1844) 11 Cl & Fin 85 : 8 ER 1034 : (1843-60) All ER Rep 55 (HL), *relied on*

State of T.N. v. *Hind Stone*, (1981) 2 SCC 205; *Bansal Wire Industries Ltd.* v. *State of U.P.*, (2011) 6 SCC 545, *affirmed*

It has been repeatedly held that where there is no ambiguity in the words, literal meaning has to be applied, which is the golden rule of interpretation. The words of a statute must prima facie be given their ordinary meaning. (Para 9)

Dental Council of India v. *Hari Prakash*, (2001) 8 SCC 61; *Harbhajan Singh* v. *Press Council of India*, (2002) 3 SCC 722, *affirmed*

In the current case, there is no ambiguity or scope for two interpretations. On a plain reading of Item 7(*f*) of the Notification dated 22-8-2013, the golden rule of interpretation is adopted to hold that there is no requirement of prior environmental clearance for expansion of a National Highway project merely because the distance is greater than 100 km. The project proponent is obligated to obtain prior environmental clearance only if the additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments or bypasses for a National Highway project which is greater than 100 km. (Para 10)

It is a cardinal principle of interpretation that full effect has to be given to every word of the notification. Interpreting the Notification dated 22-8-2013 to mean that every expansion of National Highway which is greater than 100 km requires prior environmental clearance would be making the other words in Item 7(*f*) redundant and otiose. (Para 11)

South Central Railway Employees Coop. Credit Society Employees' Union v. *Registrar of Coop. Societies*, (1998) 2 SCC 580 : 1998 SCC (L&S) 703; *Bansal Wire Industries Ltd.* v. *State of U.P.*, (2011) 6 SCC 545, *affirmed*

There is force in the submissions of the Union of India that the word "involving" is of significance because in the absence of the requirement of an additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses, the expansion of National Highways

which are greater than 100 km per se does not require prior environmental clearance. (Para 13)

CIT v. *Surat Art Silk Cloth Manufacturers' Assn.*, (1980) 2 SCC 31 : 1980 SCC (Tax) 170, *relied on*

It is submitted on behalf of the Ministry of Environment, Forest and Climate Change, Government of India that environmental clearance is necessary only if the expansion project pertains to a National Highway which is greater than 100 km and involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses. In case of a doubt, the interpretation of the author of the notification has to be accepted. Ergo, the opinion of the author of the notification i.e. the Ministry of Environment, Forest and Climate Change deserves to be accepted. (Para 14)

Silppi Constructions Contractors v. *Union of India*, (2020) 16 SCC 489, *affirmed*

A conspectus of the above discussion leads to the unerring conclusion that there is no ambiguity in Item 7(*f*) of the Schedule to the Notification that prior environmental clearance is required for expansion of a National Highway project only if:

(*a*) The National Highway is greater than 100 km.

(*b*) The additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments and bypasses. (Para 15)

Para 2.3 of the Manual makes it clear that right of way is the total land width required for the project Highway to accommodate right of way, side drains, service roads, tree plantations, utilities, etc. toll plazas and rest houses should be included in the "right of way". For the sake of clarity, it is held that the "right of way" includes the existing National Highway and the additional right of way. To illustrate further, if the existing National Highway is 20 m then the right of way will be that 20 m and the land acquired for the additional right of way. (Paras 24 and 25)

Issue (ii)

While economic development should not be allowed at the cost of ecology or by causing widespread environmental destruction, the necessity to preserve ecology and environment should not hamper economic and other development. Both development and environment must go hand in hand. In other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment. The traditional concept that development and ecology are opposed to each other is no longer acceptable. (Para 18)

Indian Council For Enviro-Legal Action v. *Union of India*, (1996) 5 SCC 281; *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, *relied on*

Apart from providing smooth flow of public goods and services which contribute to the economic growth, highways also benefit regional development in the country. In the normal course, impediments should not be created in the matter of National Highways which provide the much needed transportation infrastructure. At the same time, protection of environment is important. The Notification dated 22-8-2013 exempts a National Highway, the distance of which is less than 100 km from obtaining environmental clearance. If the project proponent is permitted to divide projects having a distance beyond 100 km into packages which are less than 100 km, the Notifications dated 14-9-2006 and 22-8-2013 will be rendered redundant. In that event, administrative exigencies and speedy

completion will be a ground taken for justifying the segmentation of every project. Therefore, this Court is in agreement with the High Court that segmentation as a strategy is not permissible for evading environmental clearance as per Notifications dated 14-9-2006 and 22-8-2013. (Para 19)

Pandarinathan Govindarajulu v. *Union of India*, 2020 SCC OnLine Mad 809, *affirmed on this point*

Having held that adoption of segmentation of a project cannot be adopted as a strategy to avoid environmental clearance impact assessment, the question that arises is whether segmentation of a National Highway beyond 100 km is impermissible under any circumstance. As the Court lacks the expertise of deciding upon this issue, an expert committee should examine the permissibility of segregation. (Para 20)

As the question of permissibility of the segmentation of a National Highway beyond a distance of 100 km is a matter to be considered by experts, it would be necessary for a committee to be constituted by the Government of India to decide whether segmentation of a National Highway project beyond a distance of 100 km is permissible. If it is permissible, the circumstances under which segmentation can be done also requires to be examined by the expert committee. (Para 21)

Pandarinathan Govindarajulu v. *Union of India*, 2020 SCC OnLine Mad 809, *substantially reversed*

Old Town Neighborhood Assn. v. *Kauffman*, Case No. 1: 02-cv-1505-DFH, decided on 15-11-2002 (SD Ind); *Commission of the European Communities* v. *Kingdom of Spain*, Case C-227 of 2001, order dated 16-9-2004 : ECLI:EU:C:2004:528; *Deepak Kumar* v. *State of Haryana*, (2012) 4 SCC 629; *Citizens for Green Doon* v. *Union of India*, 2018 SCC OnLine NGT 1777, *referred to*

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Chronological list of cases cited ***on page(s)***

1. (2020) 16 SCC 489, *Silppi Constructions Contractors* v. *Union of India* 702*c*
2. 2020 SCC OnLine Mad 809, *Pandarinathan Govindarajulu* v. *Union of India* **(substantially reversed)** 698*a*, 698*d-e*, 706*e*
3. 2018 SCC OnLine NGT 1777, *Citizens for Green Doon* v. *Union of India* 702*f-g*
4. (2012) 4 SCC 629, *Deepak Kumar* v. *State of Haryana* 702*f-g*
5. (2011) 6 SCC 545, *Bansal Wire Industries Ltd.* v. *State of U.P.* 700*f-g*, 701*c*
6. Case C-227 of 2001, order dated 16-9-2004 : ECLI:EU:C:2004:528, *Commission of the European Communities* v. *Kingdom of Spain* 702*f*
7. (2002) 3 SCC 722, *Harbhajan Singh* v. *Press Council of India* 701*a*
8. Case No. 1: 02-cv-1505-DFH, decided on 15-11-2002 (SD Ind), *Old Town Neighborhood Assn.* v. *Kauffman* 702*e-f*
9. (2001) 8 SCC 61, *Dental Council of India* v. *Hari Prakash* 701*a*
10. (1998) 2 SCC 580 : 1998 SCC (L&S) 703, *South Central Railway Employees Coop. Credit Society Employees' Union* v. *Registrar of Coop. Societies* 701*c*
11. (1996) 5 SCC 647, *Vellore Citizens' Welfare Forum* v. *Union of India* 703*d*
12. (1996) 5 SCC 281, *Indian Council For Enviro-Legal Action* v. *Union of India* 703*d*
13. (1981) 2 SCC 205, *State of T.N.* v. *Hind Stone* 700*e-f*
14. (1980) 2 SCC 31 : 1980 SCC (Tax) 170, *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.* 701*d*
15. (1961) 2 SCR 679 : AIR 1961 SC 751 : (1961) 1 Cri LJ 773, *State of U.P.* v. *Babu Ram Upadhya* 700*f-g*
16. (1844) 11 Cl & Fin 85 : 8 ER 1034 : (1843-60) All ER Rep 55 (HL), *Sussex Peerage case* 700*g*

The Judgment of the Court was delivered by

L. NAGESWARA RAO, J.— The dispute in these appeals pertains to the environmental clearance for expansion of National Highway 45-A between Villuppuram to Nagapattinam. The High Court held[1] that it is necessary. The appellant disagrees. Hence, these appeals.

2. The project of widening and improvement of the existing 4-laning carriageway in the State of Tamil Nadu and the Union Territory of Puducherry, from Villuppuram to Nagapattinam was bifurcated into four packages, which are as follows:

(*i*) Villuppuram to Puducherry (29.000 km)—Package I.

(*ii*) Puducherry to Poondiankuppam (38.00 km)—Package II.

(*iii*) Poondiankuppam to Sattanathapuram (56.800 km)—Package III.

(*iv*) Sattanathapuram to Nagapattinam (55.755 km)—Package IV.

3. Approval was granted by the competent authority i.e. Special District Revenue Officer (Land Acquisition), National Highways No. 45-A in March 2018 and agreements were entered into between the appellant and the concessionaires. Process was initiated for acquisition of lands required for the project. Writ petitions were filed in the High Court of Madras by certain aggrieved farmers and public interest litigants questioning the commencement of the project without obtaining environmental clearance. The High Court allowed[1] the writ petitions and issued the following directions:

> "(*a*) The present project of expansion of NH 45-A covering a stretch of 179.555 km shall be put on hold, and the present status quo is directed to be maintained.
>
> (*b*) That the project proponent (NHAI) shall undertake an EIA study and obtain environmental clearance.
>
> (*c*) The NHAI is also directed to obtain approval from CRZMA for CRZ clearance for two locations that it has indicated in its counter in WP No. 15217 of 2019.
>
> (*d*) Once the necessary clearances are obtained as mentioned in (*b*) and (*c*) above, the project can proceed. If the EIA study to be undertaken provides any contra-indicators to the NHAI's plan of development of NH 45-A, it will be at liberty to make necessary alterations and modifications to make the project environmentally viable.
>
> (*e*) If after ensuring the environmental viability of the project, its implementation resumes, the project proponent, and subject to the terms of the contract, the concessionaire, should first identify the places for planting the saplings of the same variety, preferably native trees, for every tree felled, and it must be grown first. Possibility of forming a Miyawaki forest has to be explored as well.

1 *Pandarinathan Govindarajulu* v. *Union of India*, 2020 SCC OnLine Mad 809

(*f*) This Court proposes to form a committee to monitor the compliance of the direction given in (*e*) above, and hence, before resumption of the project, NHAI is required to approach this Court."

4. Section 3 of the Environment (Protection) Act, 1986 empowers the Central Government to take all such measures for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. One of the measures provided in Section 3(2)(*v*) is restriction of areas in which any industries, operations or processes or class of industries shall not be carried out or shall be carried out subject to certain safeguards. The Environment (Protection) Rules, 1986 were made in exercise of power conferred by Sections 6 and 25 of the Environment (Protection) Act, 1986. According to Rule 5, the Central Government may prohibit or restrict the location of industries and the carrying on of processes and operations in different areas.

5. In exercise of the power conferred on the Central Government by clause (*i*) and clause (*v*) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 read with clause (*b*) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986, the Ministry of Environment and Forests, Government of India issued a Notification on 14-9-2006 directing that construction of new projects or activities or the expansion or modernisation of existing projects or activities listed under the Schedule to the Notification shall be undertaken only after prior environmental clearance from the Central Government or the State Level Environment Impact Assessment Authority. Clause 2 of the said Notification provides that new projects or expansion and modernisation of existing projects listed under the Schedule to the Notification require prior environmental clearance from the regulatory authority concerned. The Schedule to the Notification includes Highways at Item 7(*f*). New National Highways and expansion of National Highways greater than 30 km involving additional right of way greater than 20 m or land acquisition and passing through more than one State, require prior environmental clearance. A High-Level Committee headed by Member (Environment and Forests, Science and Technology), Planning Commission was constituted by the Ministry of Environment and Forests to review the provisions of the Environmental Impact Assessment Notification dated 14-9-2006 pertaining to environmental clearance for roads, buildings and Special Economic Zone projects. One of the terms of the reference for the Committee was to review the requirement of environmental clearance for Highways expansion projects with a right of way up to 60 m and length of 200 km. The Committee submitted its report recommending that expansion of National Highways projects up to 100 km involving additional right of way or land acquisition up to 40 m on existing alignments and 60 m on realignments or bypasses may be exempted from the purview of the Notification. The report of the Committee was accepted and Item 7(*f*) in column (3) to the Notification dated 14-9-2006 was substituted as follows: "expansion of National Highways greater than 100 km involving

additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses".

6. The project under consideration in this case pertains to the expansion of NH 45-A between Villuppuram to Nagapattinam for a distance of 179.555 km as a part of the Bharatmala Pariyojana project. Admittedly, no environmental impact assessment was undertaken. The appellant stated in the counter-affidavit filed before the High Court that environmental clearance is not required as the additional right of way or land acquisition was not greater than the limits specified in the Notification even if the expansion of the National Highways is beyond 100 km. Environmental clearance under the Notifications dated 14-9-2006 and 22-8-2013 is required only if the additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments or bypasses. The pivot of the controversy relates to the applicability of Notifications dated 14-9-2006 and 22-8-2013 to the project in question. Therefore, we deem it necessary to adjudicate on the interpretation of the said Notifications though the High Court did not consider the said point.

7. A plain reading of Item 7(*f*) to the Notification dated 22-8-2013 would make it clear that expansion of a National Highway project needs prior environmental clearance in case (*a*) expansion of the National Highway project is greater than 100 km, and (*b*) it involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses. There is no ambiguity in the above provision as it gives no scope for any doubt. The distance of 100 km is important as expansion of National Highways below 100 km needs no prior environmental clearance. If the project involves expansion of a National Highway greater than 100 km, prior environmental clearance would be required only if it involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses.

8. A statutory rule or notification is to be treated as a part of the statute[2]. Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act, are to be of the same effect as if they are contained in the Act, and are to be judicially noticed for all purposes of construction or obligation[3]. The principles of interpretation of subordinate legislation are applicable to the interpretation of statutory notifications[4]. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the law giver[5].

2 *State of T.N.* v. *Hind Stone*, (1981) 2 SCC 205
3 *State of U.P.* v. *Babu Ram Upadhya*, (1961) 2 SCR 679 : AIR 1961 SC 751 : (1961) 1 Cri LJ 773
4 *Bansal Wire Industries Ltd.* v. *State of U.P.*, (2011) 6 SCC 545
5 *Sussex Peerage case*, (1844) 11 Cl & Fin 85 : 8 ER 1034 : (1843-60) All ER Rep 55 (HL)

9. It has been repeatedly held by this Court that where there is no ambiguity in the words, literal meaning has to be applied, which is the golden rule of interpretation. The words of a statute must prima facie be given their ordinary meaning[6].

10. In the current case, there is no ambiguity or scope for two interpretations. On a plain reading of Item 7(*f*) of the Notification dated 22-8-2013, we adopt the golden rule of interpretation to hold that there is no requirement of prior environmental clearance for expansion of a National Highway project merely because the distance is greater than 100 km. The project proponent is obligated to obtain prior environmental clearance only if the additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments or bypasses for a National Highway project which is greater than 100 km.

11. It is a cardinal principle of interpretation that full effect has to be given to every word of the notification[7]. Interpreting the Notification dated 22-8-2013 to mean that every expansion of National Highway which is greater than 100 km requires prior environmental clearance would be making the other words in Item 7(*f*) redundant and otiose.

12. The learned Attorney General for India relied upon a judgment of this Court in *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.*[8] to highlight the importance of the word "involving" in Item 7(*f*) of the Notification in which it was held as follows: (SCC pp. 51 & 60, paras 15 & 33)

> "*15*. We must then proceed to consider what is the meaning of the requirement that where the purpose of a trust or institution is advancement of an object of general public utility, such purpose must not involve the carrying on of any activity for profit. The question that is necessary to be asked for this purpose is as to when can the purpose of a trust or institution be said to involve the carrying on of any activity for profit. The word "involve" according to *Shorter Oxford Dictionary* means 'to enwrap in anything, to enfold or envelop; to contain or imply'. The activity for profit must, therefore, be intertwined or wrapped up with or implied in the purpose of the trust or institution or in other words it must be an integral part of such purpose. …
>
> * * *
>
> *33*. … The word "involving" in the restrictive clause is not without significance. An activity is involved in the advancement of an object when it is enwrapped or enveloped in the activity of advancement. In another

6 *Dental Council of India* v. *Hari Prakash*, (2001) 8 SCC 61 and *Harbhajan Singh* v. *Press Council of India*, (2002) 3 SCC 722

7 *South Central Railway Employees Coop. Credit Society Employees' Union* v. *Registrar of Coop. Societies*, (1998) 2 SCC 580 : 1998 SCC (L&S) 703 and *Bansal Wire Industries Ltd.* v. *State of U.P.*, (2011) 6 SCC 545

8 (1980) 2 SCC 31 : 1980 SCC (Tax) 170

case, it may be interwoven into the activity of advancement, so that the resulting activity has a dual nature or is twin faceted."

13. We find force in the submissions made by the learned Attorney General that the word "involving" is of significance because in the absence of the requirement of an additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses, the expansion of National Highways which are greater than 100 km per se does not require prior environmental clearance.

14. It is submitted on behalf of the Ministry of Environment, Forest and Climate Change, Government of India that environmental clearance is necessary only if the expansion project pertains to a National Highway which is greater than 100 km and involves additional right of way or land acquisition greater than 40 m on existing alignments and 60 m on realignments or bypasses. In case of a doubt, the interpretation of the author of the notification has to be accepted[9]. Ergo, the opinion of the author of the notification i.e. the Ministry of Environment, Forest and Climate Change deserves to be accepted.

15. A conspectus of the above discussion leads to the unerring conclusion that there is no ambiguity in Item 7(*f*) of the Schedule to the Notification that prior environmental clearance is required for expansion of a National Highway project only if:

(*a*) The National Highway is greater than 100 km.

(*b*) The additional right of way or land acquisition is greater than 40 m on existing alignments and 60 m on realignments and bypasses.

16. In view of the bifurcation of NH 45-A into four packages and each package being less than 100 km, the appellant contended before the High Court that the Notifications dated 14-9-2006 and 22-8-2013 are not applicable. Seeking support from a judgment of the United States District Court for the Southern District of Indiana in *Old Town Neighborhood Assn.* v. *Kauffman*[10] and a judgment of the European Court of Justice in *Commission of the European Communities* v. *Kingdom of Spain*[11], the High Court held that segmentation of a project as a strategy to avoid environmental clearance is impermissible. The High Court also relied upon a judgment of this Court in *Deepak Kumar* v. *State of Haryana*[12] and a judgment of the National Green Tribunal in *Citizens for Green Doon* v. *Union of India*[13] to reject the contention of the appellants that the division of the project into four packages is for administrative expediencies. According to the High Court, if segmentation of National Highway projects is permitted, the Notifications dated 14-9-2006 and 22-8-2013 would become

9 *Silppi Constructions Contractors* v. *Union of India*, (2020) 16 SCC 489
10 Case No. 1: 02-cv-1505-DFH, decided on 15-11-2002 (SD Ind)
11 Case C-227 of 2001, order dated 16-9-2004 : ECLI:EU:C:2004:528
12 (2012) 4 SCC 629
13 2018 SCC OnLine NGT 1777

a dead letter as every National Highway beyond 100 km can be divided into packages to avoid environmental clearance.

17. It was submitted by the learned Attorney General that the division of the project was done by the Government of India and the National Highways Authority is only an executing agency. He stated that the proposed project is of great importance to the movement of public goods and services for which reason, speedy execution was required. It would be difficult to get one concessionaire with necessary finances to mobilise required machineries, construction material and human resources for the entire length of 179.555 km. He laid stress on the point that the project was divided into four packages in public interest.

18. While economic development should not be allowed at the cost of ecology or by causing widespread environmental destruction, the necessity to preserve ecology and environment should not hamper economic and other development. Both development and environment must go hand in hand. In other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment[14]. The traditional concept that development and ecology are opposed to each other is no longer acceptable[15].

19. Apart from providing smooth flow of public goods and services which contribute to the economic growth, highways also benefit regional development in the country. In the normal course, impediments should not be created in the matter of National Highways which provide the much needed transportation infrastructure. At the same time, protection of environment is important. The Notification dated 22-8-2013 exempts a National Highway, the distance of which is less than 100 km from obtaining environmental clearance. If the project proponent is permitted to divide projects having a distance beyond 100 km into packages which are less than 100 km, the Notifications dated 14-9-2006 and 22-8-2013 will be rendered redundant. In that event, administrative exigencies and speedy completion will be a ground taken for justifying the segmentation of every project. Therefore, we are in agreement with the High Court that segmentation as a strategy is not permissible for evading environmental clearance as per Notifications dated 14-9-2006 and 22-8-2013.

20. Having held that adoption of segmentation of a project cannot be adopted as a strategy to avoid environmental clearance impact assessment, the question that arises is whether segmentation of a National Highway beyond 100 km is impermissible under any circumstance. As we lack the expertise of deciding upon this issue, we are of the considered view that an expert committee should examine the permissibility of segregation. After the issuance of a Notification dated 14-9-2006 requiring environmental

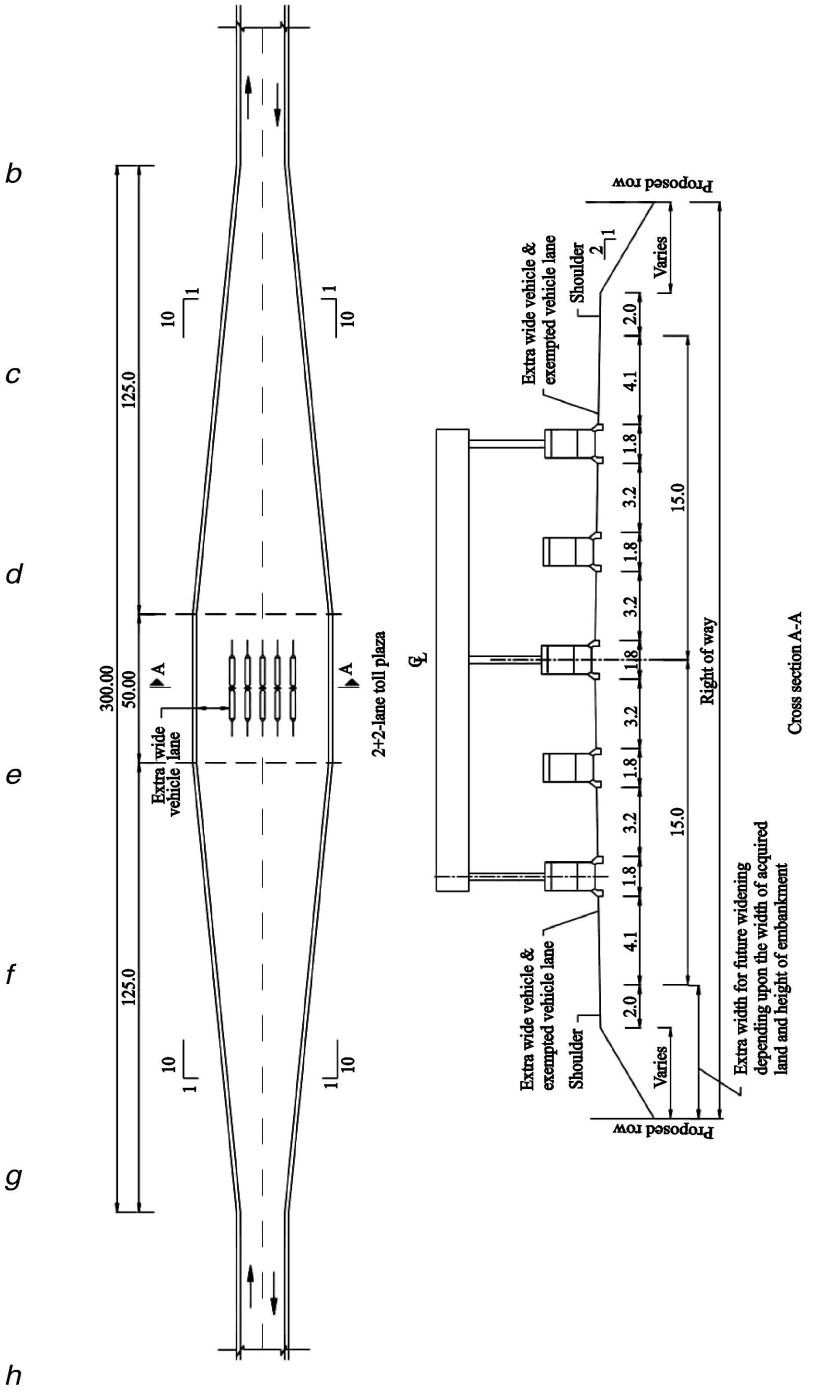
14 *Indian Council For Enviro-Legal Action* v. *Union of India*, (1996) 5 SCC 281
15 *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647

clearance for new projects and expansion of the existing projects, a High-Level Committee was constituted by the Government of India to review the environmental clearances for Highway expansion projects. As per the Notification dated 14-9-2006, environmental clearance was required for new National Highway and expansion of National Highways greater than 30 km involving additional right of way greater than 20 m and passing through more than one State. One of the terms of the reference to the High-Level Committee was to review the requirement of environmental clearance for Highway expansion projects beyond a distance of 200 km up to the right of way of 60 m. The High-Level Committee recommended that environmental clearance would be required for expansion of National Highway projects beyond a distance of 100 km and if the additional right of way or land acquisition is more than 40 m on existing alignments and 60 m on realignments or bypasses. The said recommendation was accepted by the Government of India and the Notification dated 22-8-2013 was issued, amending the Notification dated 14-9-2006.

21. As the question of permissibility of the segmentation of a National Highway beyond a distance of 100 km is a matter to be considered by experts, it would be necessary for a committee to be constituted by the Government of India to decide whether segmentation of a National Highway project beyond a distance of 100 km is permissible. If it is permissible, the circumstances under which segmentation can be done also requires to be examined by the expert committee.

22. Mr A. Yogeshwaran, learned counsel appearing for the first respondent submitted that the toll plazas proposed to be erected on the National Highways should be within the permissible limits specified in the Notification dated 22-8-2013. In the note of submissions made by the learned Attorney General, reference has been made to the definition of "right of way" placing reliance on Para 2.3 of the Manual of Specifications and Standards for Two-Laning of Highways through Public Private Partnership issued by the Planning Commission of India. Right of way as per the said Manual is the total land width required for the project Highway to accommodate roadway (carriageway and shoulders) side drains, service roads, tree plantation, utilities, etc. In the written submissions filed on behalf of the appellant, it has been stated that the right of way not being greater than 40 m on existing alignments and 60 m on realignments or bypasses, applies only to construction of road and is not applicable for other road amenities or facilities such as toll plazas. However, the appellant has also stated in the written submissions that if this Court is not agreeable to the above proposition, it is willing to limit the construction of toll plazas and rest areas within the permissible limits.

23. Section 10 of the Manual of Specifications & Standards for Two-Laning of Highways through Public Private Partnership, issued by the Planning Commission of India deals with toll plazas. Figure 10.1 which shows the general layout of 2+2 lane toll plazas, is as follows:



Note:
All dimensions are in metres.

Fig. 10.1 : General layout 2+2-lane toll plaza

24. A bare perusal of the above figure shows that toll plazas are included in the "right of way". The aforementioned Manual issued by the Planning Commission of India has been relied upon by the appellant to highlight the definition of the expression "right of way". However, it was contended on behalf of the appellant that amenities such as toll plazas and rest houses cannot be part of the right of way. In other words, the appellant contended that toll plazas and rest houses can be set up beyond the limit specified in the Notification dated 22-8-2013. We do not agree. As Para 2.3 of the aforementioned Manual makes it clear that right of way is the total land width required for the project Highway to accommodate right of way, side drains, service roads, tree plantations, utilities, etc. toll plazas and rest houses should be included in the "right of way".

25. For the sake of clarity, we hold that the "right of way" includes the existing National Highway and the additional right of way. To illustrate further, if the existing National Highway is 20 m then the right of way will be that 20 m and the land acquired for the additional right of way.

26. The consternation of the High Court that the appellant had been remiss in not fulfilling the requirement of reafforestation in spite of giving undertakings for the projects taken up earlier is to be noted. There is an obligation on the part of the appellant to plant ten trees for each felled tree. The High Court commented upon Coastal Regulation Zones ("CRZ") clearances to be taken at certain points. The learned Attorney General submitted that the appellant has already obtained CRZ clearances, wherever it is required. We have not dealt with the issues relating to acquisition of land being in contravention of the National Highways Act, 1956 as no such submission was made either before the High Court or this Court.

27. On the basis of the above discussion, we set aside the judgment[1] of the High Court and issue the following directions:

27.1. There is no requirement for obtaining environmental clearances for NH 45-A Villuppuram-Nagapattinam Highway as land acquisition is not more than 40 m on existing alignments and 60 m on realignments or bypasses.

27.2. The appellant is directed to strictly conform to the Notification dated 14-9-2006 as amended by the Notification dated 22-8-2013 in the matter of acquisition of land being restricted to 40 m on the existing alignments and 60 m on realignments.

27.3. The Ministry of Environment, Forest and Climate Change, Government of India shall constitute an Expert Committee to examine whether segmentation is permissible for National Highway projects beyond a distance of 100 km and, if permissible, under what circumstances.

27.4. The appellant is directed to fulfil the requirement of reafforestation in accordance with the existing legal regime.

28. The appeals are allowed accordingly.

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1 *Pandarinathan Govindarajulu* v. *Union of India*, 2020 SCC OnLine Mad 809

415 F. Supp. 1276

Ronald PATTERSON, Plaintiff,
v.
J. James EXON and William T. Coleman (formerly Claude Brinegar), Defendants.

Civ. No. 73-0-434.

United States District Court, D. Nebraska.

June 14, 1976.

[415 F. Supp. 1277]

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[415 F. Supp. 1278]

James T. Gleason, Omaha, Neb., for plaintiff.

Clarence A. H. Meyer, Atty. Gen. of Neb., Lincoln, Neb., for Governor Exon.

Stephen L. Muehlberg, Asst. U. S. Atty., Omaha, Neb., for William T. Coleman, Secretary of Transportation.

MEMORANDUM OPINION

SCHATZ, District Judge.

This is an action to enjoin the defendants from spending any money or beginning any construction on a section of Nebraska State Highway 31 until a proper environmental impact statement has been prepared and approved. Plaintiff owns and leases property abutting the right-of-way of Highway 31 in the area of the proposed construction. The defendants are the governor of the State of Nebraska and the Secretary of the United States Department of Transportation. This matter was tried to the Court without a jury and the Court conducted a view of the section of the highway in question and the surrounding environment on December 30, 1975, pursuant to a request from all parties. Jurisdiction is present under 28 U.S.C. § 1331.

FINDINGS OF FACT

Nebraska State Highway 31 is a state highway approximately thirty-one miles long and generally running north and south. The portion in issue here is an unpaved stretch of that highway between Interstate 80 on the north and Nebraska State Highway 50 on the south, consisting of eleven miles, more, or less. (See Appendix I.) It is the only unpaved section of the highway. For the first three miles south of I-80, Highway 31 passes through rolling farmland with cultivated fields and pastures on either side of the right-of-way. There are few trees adjacent to the right-of-way immediately south of I-80, but the trees and underbrush become thicker as the highway progresses south. About three miles south of I-80 the terrain through which Highway 31 passes becomes thickly wooded. The highway continues for about four miles through this wooded area and along the banks of the Platte River. The terrain becomes rolling farmland for approximately the last four miles until the highway intersects with Highway 50.

The above-mentioned wooded area includes some land owned by the Nebraska Game and Parks Commission, part of which is known as the Gretna Fish Hatchery and part of which is land known as the Schram Tract. The Fish Hatchery is no longer actively operated as such, but it serves as a picnic area and place for outdoor recreation. The Schram Tract was willed to the State for use as an outdoor recreation and nature study area. It is adjacent to the Fish Hatchery and tentative plans call for using the Fish Hatchery and Schram Tract as a single recreation area for 4-H camping activities such as picnicking, camping, hiking, etc. The wooded area contains a wide variety of trees and plants and it provides shelter for different types of birds and small game, such as deer, fox, rabbits and the like. There is a small lake near the right-of-way and several

streams run through the area. It is an area rich in natural scenic beauty.

The portion of Highway 31 in issue is a gravel road which passes over several narrow bridges and which contains a number of sharp turns. A driver's visibility is restricted because of the sharp turns and because the trees and vegetation grow up to or near the road in some places. The road is dusty during dry weather and muddy during wet weather. During the winter snow tends to drift across the road and snow removal is hampered because of the lack of cleared places or shoulders adjacent to the roadway on which to push the snow. The area served by the highway is primarily agricultural and residential. A small housing development containing a few houses has been started adjacent to the right-of-way. The highway carries mostly local traffic with an average daily volume of two hundred sixty-five (265) vehicles. Traffic is light on weekdays but becomes heavier on weekends as people travel to the Fish Hatchery and surrounding areas for recreational purposes.

[415 F. Supp. 1279]

The defendants have prepared plans for the improvement of a 4.1 mile stretch of the road. It is this project that the plaintiff wishes to enjoin. The proposed project, identified as Project S-31-2(101)177, calls for a reconstruction of a section of the highway from the I-80 interchange to a point 4.1 miles south, which is about one-half mile north of the north boundary of the Fish Hatchery/Schram Tract. (See Appendix II). The reconstruction will generally follow the existing alignment of the highway, except that the new highway will deviate in such a manner as to eliminate an "S" curve. The plans also call for an existing bridge over a stream to be replaced with a concrete bridge forty (40) feet by one hundred (100) feet, along with a realignment of the channel of the stream. It should be emphasized that this project calls for a total reconstruction of the road section, not merely a widening of the existing highway. The new road will be built to a design speed of sixty-five (65) miles per hour, which is determined according to the functional classification of the road and the projected traffic volume. In order to meet these design standards it will be necessary to level and widen the roadbed, straighten curves and improve approaches to bridges. It will be necessary to acquire about forty-five (45) acres of additional right-of-way. The present right-of-way is sixty-six (66) feet and the proposed right-of-way will vary between one hundred twenty (120) feet and two hundred seventy-five (275) feet. The plans call for grading to remove all vegetation within the proposed construction limits, which area will then be seeded with grass after the construction is completed. The state intends to mow the grass within fifteen (15) feet of either side of the highway. The state estimated that about four hundred (400) trees, some of which were infected with Dutch elm disease, would have to be removed, but the evidence at trial showed the number to be about eight hundred (800). The project will require the moving of about four hundred thousand (400,000) cubic yards of dirt and the pouring of over six thousand (6,00) cubic yards of concrete. The estimated cost of the project in 1973 was about $900,000, of which the federal government would pay seventy per cent (70%). As yet, the defendants have not begun proceedings to acquire additional right-of-way nor have they begun construction on the project.

At the time this project was being planned, the Nebraska Department of Roads was planning to improve the balance of the highway south of the project in question all the way to Highway 50. It did not intend to seek federal funds for that project, or at least for that part which crossed the Fish Hatchery and Schram Tract.

The Department of Roads conducted a study of the environmental impact of the 4.1 mile project and concluded that the project would not have a significant effect on the quality of the human environment and,

consequently, an environmental impact statement was not needed. A negative declaration, which discussed the factors in this decision, was prepared and submitted to the Federal Highway Administration FHWA for approval. Officials of the FHWA initially recommended disapproval for the negative declaration for the reasons that, among others, the state was dividing the project into sections in order to avoid a thorough assessment of the environmental consequences of building a road through the Fish Hatchery/Schram Tract area. They noted that area might be land covered by Section 4(f) of the National Transportation Act of 1966, 49 U.S.C. § 1653(f)[1] and that

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the project foreclosed alternatives which could avoid Section 4(f) lands. Subsequently, the Nebraska Department of Roads voluntarily agreed to prepare an environmental impact statement for the remainder of the road before any improvement on the balance of the highway was undertaken. The FHWA then approved the negative declaration for the project in question.

CONCLUSIONS OF LAW

There are two issues in this litigation: whether an environmental impact statement was required for the project in question and, if so, whether the negative declaration prepared by the defendants meets the statutory requirements of an impact statement.

The National Environmental Policy Act of 1969 NEPA, 42 U.S.C. § 4321 *et seq.,* recognizes the need to preserve and protect the environment in a manner which will allow the most beneficial uses of our natural resources. It requires all federal agencies to fully assess and strike a balance between the benefits to be obtained from a proposed action, on the one hand, and the environmental costs on the other hand.[2] To that end it has established certain procedures which must be followed by all federal agencies. Among those procedures the federal agency must

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on — (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> 42 U.S.C. § 4332(2).

NEPA is an "environmental full disclosure law." The environmental impact statement serves as a basis by which the agency can fully and completely evaluate the environmental consequences of the project. *Iowa Citizens for Environmental Quality, Inc. v. Volpe,* 487 F.2d 849, 850 (8th Cir. 1973). It also provides an accessible means by which those outside the agency can critically evaluate the agency's decision. *Environmental Defense Fund, Inc. v. Froehlke,* 473 F.2d 346, 351 (8th Cir. 1972). The purpose of such a written declaration is

> to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the

> project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.
>
> *Calvert Cliff's Coordinating Committee v. United States Atomic Energy Commission,* 146 U.S.App.D.C. 33, 449 F.2d 1109, 1114 (1971).

[415 F. Supp. 1281]

The FHWA ultimately decided that the project was not a major federal action significantly affecting the quality of the human environment and, consequently, that an impact statement need not be prepared. Before proceeding further, this Court must determine whether and to what extent it is bound by that agency's decision. The Eighth Circuit has held that an agency's initial decision not to file an environmental impact statement should be measured in terms of its reasonableness under the circumstances. *Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1319-20 (8th Cir. 1974) (*en banc*). Although the agency must be afforded some latitude in deciding whether to prepare an impact statement, the scope of this judgment is limited in that the agency's decision must be reasonable in light of the requirements and standards set by NEPA. *Wyoming Outdoor Coordinating Counsel v. Butz,* 484 F.2d 1244, 1249 (10th Cir. 1973). Under this standard of review the Court must determine "whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality." *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 467 (5th Cir. 1973). If the evidence shows that no environmental factor would be significantly degraded by the project, the agency's decision must be upheld; if the project may cause a significant degradation of some human environmental factor, the agency's decision must be overturned. *Id. See also City of Davis v. Coleman,* 521 F.2d 661, 673 (9th Cir. 1975). For the reasons which follow the Court finds that the FHWA's decision not to prepare an impact statement was unreasonable under the circumstances.

An environmental impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The parties do not dispute that federal participation and funding makes this a "federal" project for purposes of NEPA. *Indian Lookout Alliance v. Volpe,* 484 F.2d 11, 16 (8th Cir. 1973); *River v. Richmond Metropolitan Authority,* 359 F.Supp. 611, 628 (E.D.Va.), *aff'd,* 481 F.2d 1280 (4th Cir. 1973). The defendants argue that an environmental impact statement was not required because, first, the project is not a "major" action and, second, it will not "significantly affect the quality of the human environment." Those two concepts, however, are not separate and independent. The magnitude of a project cannot be considered apart from its effect on the environment. A project which has a significant effect on the environment must be given the detailed consideration required by NEPA. *Minnesota Public Interest Research Group v. Butz, supra,* 498 F.2d at 1321-22.

The defendants rely on *Julis v. City of Cedar Rapids,* 349 F.Supp. 88 (D.Ia.1972), and *Kisner v. Butz,* 350 F.Supp. 310 (N.D. W.Va.1972), to support their position that the project is not a major action significantly affecting the quality of the human

environment. But those cases differ in degree from the instant case. In *Julis* the proposed project called for street widening in a fourteen-block area of a city. In *Kisner* the project involved construction of a 4.3 mile segment of a single-lane gravel road which connected other segments of a road that had already been built. Roads similar to the segment in question had previously been constructed in the area and had not significantly affected the environment.

The project in question is not merely a resurfacing of Highway 31 — it is a total reconstruction which will deviate in some places from the alignment of the existing road. Although the reconstruction will have only a minimal effect on the farmland through which the highway passes, the plans call for a modification of the channel of a stream, construction of a relatively large bridge, and considerable grading and tree removal in a wooded area through which the last mile of the project passes. That area is rich in scenic beauty and the extent of the construction, grading and clearing would seriously impair the natural

[415 F. Supp. 1282]

beauty of that area.[3] There was also some evidence that the project would have an adverse effect on the wildlife in the area which, in turn, would adversely affect the quality of the human environment. Under these circumstances, the Court concludes that the project would have a significant effect on the quality of the human environment and the agency's decision to the contrary was unreasonable. An environmental impact statement should have been prepared pursuant to 42 U.S.C. § 4332(2)(C).

The defendants next argue that the negative declaration in question satisfied the statutory requirements for an environmental impact statement. A sufficiency of an impact statement must be judged in terms of its reasonableness under the circumstances.

> The environmental statement "to some extent must be examined in light of the particular facts and circumstances surrounding the project * * * in order to determine its sufficiency. The extent of detail required must necessarily be related to the complexity of the environmental problems created by the project." The discussion of environmental effects need not be "exhaustive" but rather need only provide sufficient information for a "reasoned choice of alternatives." (Citations omitted.)
>
> *Iowa Citizens for Environmental Quality, Inc. v. Volpe,* 487 F.2d 849, 852 (8th Cir. 1973).

The plaintiffs have alleged numerous deficiencies in the negative declaration prepared and submitted by the defendants. It is unnecessary to consider most of these allegations because the issue which lies at the heart of the negative declaration is whether the defendants analyzed the environmental effects of construction with respect to an adequate length of highway.

National environmental policy requires a detailed analysis of the long-range environmental costs of proposed action and a thorough study of the available alternatives before any action is taken. Planning and building highways in a piecemeal fashion threatens to frustrate this policy by allowing a gradual, day-to-day growth without providing an adequate opportunity to assess the overall, long-term environmental effects of that growth. *Indian Lookout Alliance v. Volpe, supra; Appalachian Mountain Club v. Brinegar,* 394 F.Supp. 105, 114 (D.N.H.1975); *Daly v. Volpe,* 376 F.Supp. 987 (W.D.Wash.1974), *aff'd,* 514 F.2d 1106 (9th

Cir. 1975); *Conservation Society of Southern Vermont v. Secretary of Transportation,* 362 F.Supp. 627 (D.Vt. 1973), *aff'd,* 508 F.2d 927 (2d Cir. 1974); *vacated,* 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975); *Sierra Club v. Volpe,* 351 F.Supp. 1002 (N.D.Cal.1972); *Thompson v. Fugate,* 347 F.Supp. 120 (E.D.Va.1972); *Committee to Stop Route 7 v. Volpe,* 346 F.Supp. 731 (D.Conn.1972). In many instances, construction of one segment will affect more than just the immediate area through which that segment is built. It may cause an increase in traffic through another area. *Appalachian Mountain Club v. Brinegar, supra,* 394 F.Supp. at 115. Placement of one highway segment tends to limit the range of alternatives for placement of succeeding segments. *Committee to Stop Route 7, supra,* 346 F.Supp. at 740. As a practical matter, commitment of resources in one section tends to make further construction more likely. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department,* 446 F.2d 1013, 1023 (5th Cir. 1971). This is not to say, however, that NEPA forbids highway planners from dividing construction programs into sections for purposes of planning and financing. In order to effectively provide for an orderly program of highway improvement, planners must be allowed to divide highway systems into workable units.

[415 F. Supp. 1283]

The FHWA and the courts have recognized, on one hand, the planners' need to divide highway programs into workable segments and, on the other hand, the dangers to environmental planning that this creates. In order to reconcile these competing considerations, they have developed guidelines for determining whether the impact statement considers a proper segment of road for purposes of environmental planning. The administrative guidelines[4] of the FHWA provide:

> The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. *Piecemealing proposed highway improvements in separate environmental statements should be avoided.* If possible, the highway section should be of a substantial length that would normally be included in a multi-year highway improvement program. (Emphasis added.)
>
> Paragraph 6, PPM 90-1.

"Highway section" is defined as

> a substantial length of highway between logical termini (major crossroads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study.
>
> Paragraph 3a, PPM 90-1.

The Courts have considered three criteria in deciding whether the environmental impact statement considers a proper length of highway: (1) whether the segment connects logical termini; (2) whether the segment has an independent utility; (3) whether the length of the section assures an adequate opportunity for consideration of the alternatives to the proposed action (both whether and where to build). *Daly v. Volpe, supra; River v. Richmond Metropolitan Authority,* 359 F.Supp. 611, 635 (E.D. Va.), *aff'd,* 481 F.2d 1280 (4th Cir. 1973). *See also Sierra Club v. Froehlke, supra,* which focused on the independence of the project in question. The Eighth Circuit has stated:

> The minimum length of state highway projects that are

> supported in part by federal funds must be extended to embrace projects of a nature and length that are supportable by logical termini at each end. * * * Segments that fit into an overall highway plan should be as large as is feasible under present construction and financing practices and at least be independently supportable by meaningful terminal points. However, an impact statement can be more extensive than the proposed project.
>
> *Indian Lookout Alliance v. Volpe,* 484 F.2d at 19.

The proposed project does not connect logical termini nor does it have an independent utility. The northern terminus, which is the intersection with Interstate 80, is a logical terminus. *Indian Lookout Alliance v. Volpe, supra,* 484 F.2d at 19. The southern terminus is literally in the middle of the woods — there are no access roads, population areas or other traffic generators at that point. It is not a logical place for beginning or ending a road. Upon reaching the southern terminus for the project, southbound traffic will have no place to go except to continue along the unimproved portion of the road. The project in question is completely dependent upon the balance of Highway 31. The fact that the state plans to improve the balance of that road further convinces this Court that the project does not have a utility independent of the remainder of Highway 31. *Indian Lookout Alliance, supra,* 484 F.2d at 19-20. Nor was this division at the southern terminus required by geographical differences in the terrain or varying traffic needs of the two areas. *Compare River v. Richmond Metropolitan Authority, supra,* 359 F.Supp. at 635; *Citizens for Mass Transit against Freeways v. Brinegar,* 357 F.Supp. 1269, 1283-84 (D.Ariz.1973).

[415 F. Supp. 1284]

This 4.1 mile segment does not provide officials with a proper opportunity to adequately consider alternatives to the project. In order to identify alternatives and bring them into proper prospective it is necessary to look at the overall objectives to be achieved by the project. If a project is intended to connect two roads, the length of the highway considered in that statement should be large enough to give the planners an opportunity to consider all the alternative routes that would connect those two roads, or the alternative of not building at all. At the same time, the segment does not have to be so long that it overlooks one of the major objectives of the proposal. *Committee to Stop Route 7 v. Volpe, supra,* 346 F.Supp. at 740. The evidence persuades this Court that the state's objective was to improve all of Highway 31 between I-80 and Highway 50, and that this project, having a southern terminus which is not meaningful, was only the first step toward that goal. This 4.1 mile section is obviously too small to permit the defendants to meaningfully consider alternatives which would achieve the same objective. For example, there might be alternative routes between I-80 and Highway 50 which would avoid the Fish Hatchery/Schram Tract area altogether, or at least minimize the intrusion in that area. The defendants, however, could not consider that possibility by looking at only a 4.1 mile section of the road.

The Court, therefore, concludes that this 4.1 mile section was not an appropriate segment to be the subject of an environmental impact statement. The division of Highway 31 at the proposed southern terminus for purposes of environmental planning was artificial and arbitrary. A number of courts have held that an environmental impact statement should be broader than the construction limits of the project in question. *Indian Lookout Alliance, supra; Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, supra;*

Appalachian Mountain Club v. Brinegar, supra; Committee to Stop Route 7 v. Volpe, supra. With further construction planned for the balance of the road, including land which might be covered by Section 4(f), the defendants should have considered the environmental consequences of that construction before beginning any work on the 4.1 mile segment. This holding, of course, does not purport to tell the state and federal highway authorities how large the actual construction project must be. It merely requires them to follow the applicable federal statutes by making a long-range environmental assessment before beginning any construction.

The fact that the Department of Roads has voluntarily agreed to prepare a complete statement on the environmental effect of improvement of the remainder of the road before that improvement is begun does not redeem the defendants. That statement may well come too late. Placement of one segment narrows the range of choices for placement of the remaining highway sections. *Committee to Stop Route 7 v. Volpe, supra,* 346 F.Supp. at 740. With a paved highway leading up to the boundaries of the Fish Hatchery/Schram Tract, further construction through that area would be almost inevitable or, at least, any meaningful consideration of alternatives would be drastically limited. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, supra,* 446 F.2d at 1023. Construction through that area could be too easily justified on the basis of previous commitment of resources in the completion of the 4.1 mile section leading to that area. *Appalachian Mountain Club v. Brinegar, supra,* 394 F.Supp. at 117-119. NEPA was intended to provide a meaningful assessment of environmental factors *before* the bureaucratic juggernaut of highway construction began moving.

> The concept of NEPA was that responsible officials would think about environment *before* a significant project was launched; that what would be assessed was a *proposed* action, not a fait accompli; that alternatives to such action would be seriously canvassed and assayed; and that any irreversible effects of the proposed action would be identified. (Emphasis in original.)

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> *City of Boston v. Volpe,* 464 F.2d 254, 257 (1st Cir. 1972).

To allow the defendants to postpone meaningful consideration of the environmental factors until after the project in question has been completed would totally frustrate that policy. *See also Arlington Coalition of Transportation v. Volpe,* 458 F.2d 1323, 1332-34 (4th Cir. 1972); *Chelsea Neighborhood Association v. U. S. Postal Service,* 389 F.Supp. 1171, 1181-83 (S.D.N.Y.), *aff'd,* 516 F.2d 378 (2d Cir. 1975). *Cf. Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 156 U.S.App. D.C. 395, 481 F.2d 1079 (1973).

The defendants' failure to consider an adequate section of road is a fundamental defect which violates the language and spirit of NEPA. The foundation for a proper environmental study is an adequate section of highway. Consideration of an improper segment distorts the agency's ability to correctly analyze the situation. Unless the defendants have viewed the proposed construction in the proper prospective, they are not in a position to make an informed evaluation of the environmental consequences of the action and the available alternatives. Without such an evaluation, it is impossible to tell whether the decision to go ahead with the project is reasonable or arbitrary.

In conclusion, the Court finds that construction of the 4.1 mile project in question, without a proper environmental impact statement, is likely to cause irreparable injury and that the defendants should be enjoined from taking such action pending the completion of a proper environmental impact statement. None of the parties have requested this Court to retain jurisdiction of this matter until such an impact statement has been completed and, indeed, such a course would be unwise and unnecessary under these circumstances.

A separate order will be entered granting plaintiff the relief requested.

Appendix I to follow

[415 F. Supp. 1286]

APPENDIX I

[415 F. Supp. 1287]

APPENDIX II

Notes:

1 This section is identical to the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, which reads in pertinent part:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. * * * The Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereto, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

2 It is important to note that NEPA leaves the final decision up to the legislative and executive branches. The court's function is not to substitute its judgment as to what that delicate balance is or whether a project should be undertaken at all, but to see that the responsible agencies have fulfilled the procedural requirements established by the statutes. *Environmental Defense Fund, Inc. v. Corps of Engineers,* 470 F.2d 289, 300 (8th Cir. 1972); *Rankin v. Coleman,* 394 F.Supp. 647, 653-54 (E.D. N.C.1975).

3 This situation appears to fall within the FHWA's own administrative guidelines calling for an impact statement. Policy and Procedure Manual, 90-1 (1972) hereafter cited as PPM 90-1, Appendix F, reads in part:

3. Any of the following highway sections should ordinarily be considered as significantly affecting the quality of the human environment.

a) A highway section that is likely to have a significantly adverse impact on natural ecological, cultural or scenic resources of national, State or local significance.

4 These guidelines are entitled to substantial weight in determining whether there has been compliance with NEPA. *Sierra Club v. Froehlke,* 534 F.2d 1289 at 1294 n. 17 (8th Cir., 1976); *Indian Lookout Alliance v. Volpe, supra,* 484 F.2d at 18.

Case No. 1:02-cv-1505-DFH
United States District Court, S.D. Indiana, Indianapolis Division

Old Town Neighborhood Association v. Kauffman, (S.D.Ind. 2002)

Decided Nov 15, 2002

ENTRY ON MOTION FOR PRELIMINARY INJUNCTION

DAVID F. HAMILTON, District Judge

Plaintiffs are groups interested in historic preservation. They seek a preliminary injunction against local, state, and federal officials to block the widening of Third Street in Goshen, Indiana, which runs through a large historic district in the downtown area, until defendants evaluate thoroughly the project's effects on the historic district and alternative solutions to Goshen's traffic problems. The court heard evidence and argument on October 28 and November 4, 2002, and now states its ruling pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure. All factual findings in this entry are preliminary, of course, based on the limited record established thus far.

The Seventh Circuit has often stated the standard for deciding motions for preliminary injunctions. One definitive statement of the standard reads:

> As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.
>
> The court, sitting as would a chancellor in equity, then "weighs" all four factors in deciding whether to grant the injunction, seeking at all times to "minimize the costs of being mistaken." We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side.

Abbott Laboratories v. Mead Johnson Co., 971 F.2d 6, 11-12 (7th Cir. 1992) (citations omitted).

As explained in detail below, the court grants plaintiffs' motion for a preliminary injunction to maintain the status quo and to stop further work

on the Third Street project. Plaintiffs have shown a substantial likelihood of prevailing on the merits of their claims that the Third Street project has been improperly "segmented" from a major federal undertaking — improvement of U.S. Highway 33 through downtown Goshen — that is subject to environmental and historic impact review. The evidence indicates that the City of Goshen, the Indiana Department of Transportation, and the Federal Highway Administration have reached an understanding that the City of Goshen should carry out its Third Street project without environmental and historic impact review, and then carry out a "swap" of Third Street and Main Street so that U.S. 33 and State Road 15 will be shifted to use the widened and improved Third Street. The defendants discussed such a scheme, never definitively rejected it, and have acted in a way that is consistent with the scheme. In addition, the scheme makes a great deal of sense, at least from the standpoint of managing traffic through the city. It also offers the apparent advantage of sparing defendants from having to go through formal review of environmental and historic impacts of their desired course of action.

Such segmentation to evade the required environmental and historic review threatens plaintiffs with irreparable harm to their interests in the historic district in downtown Goshen. The balance of harms weighs in favor of plaintiffs, and the public interest weighs in favor of an injunction as well.

The Parties Plaintiff Old Town Neighborhood Association Inc. ("Old Town") is a private not-for-profit corporation whose primary purpose is to enhance the Goshen Historic District, an area of downtown Goshen that is listed on the National Register of Historic Places established under 16 U.S.C. § 470a. Old Town's members include persons who live and own property in the historic district.

Plaintiff Historic Landmarks Foundation of Indiana, Inc. ("Historic Landmarks") is also a private not-for-profit corporation. Historic Landmarks seeks to protect buildings and places of architectural and historical significance throughout Indiana. In addition, Historic Landmarks itself has a legally protected interest in the "Champion House," one of the most important historic buildings in the Goshen Historic District.

Defendant Allan Kauffman is the Mayor of the City of Goshen. Defendant Mary E. Peters is the Administrator of the Federal Highway Administration ("FHWA"), and defendant John Baxter is the Division Administrator of the Indiana Division of the FHWA. Defendant Bryan Nicol is the Commissioner of the Indiana Department of Transportation ("INDOT"). All defendants have been sued in only their official capacities.

The Nature of the Case and the Applicable Law Plaintiffs seek declaratory and injunctive relief based on Sections 106 and 110 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f and 470h-2, Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.

Section 106 of the NHPA provides in relevant part that the head of any federal agency overseeing a proposed federally assisted project or having the authority to license such a project shall, prior to approving the use of federal funds, "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Section 110 of the NHPA provides that the federal agency will ensure no federal money is loaned or license issued to an applicant who has "intentionally significantly adversely affected a historic property" unless the agency first determines that, despite that significant adverse impact, "circumstances justify granting such assistance." 16 U.S.C. § 470h-2(k).

Section 4(f) of the Department of Transportation Act provides in relevant part that the FHWA may not approve a transportation project that would require the use "of land of an historic site of national, State, or local significance" unless "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the . . . historic site resulting from the use." 49 U.S.C. § 303.

NEPA requires that a federal agency prepare a detailed statement to be included in every proposal for major federal actions that "significantly affect the quality of the human environment." 42 U.S.C. § 4332(C). The agency conducts an initial review to determine what impact, if any, the proposed project will have on the environment. If the agency issues a finding of no significant impact (often called a "FONSI"), then the project may proceed as planned without further inquiry. See 40 C.F.R. § 1501.4(e). However, if there is a finding of significant impact, NEPA requires that a detailed environmental impact statement be included in the proposal. See 40 C.F.R. § 1502.2. That statement is to include a discussion of "(i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(C).

The Parties' Positions Since 1992, INDOT and FHWA have been planning improvements to U.S. 33, which runs through downtown Goshen. Since 1997, INDOT and FHWA have been planning and coordinating their U.S. 33 project together with the City of Goshen's plan to widen Third Street in downtown Goshen. From 1997 through early 2002, the FHWA, INDOT, and the City of Goshen were moving forward on both projects together, with plans for one joint document examining the environmental and historic impacts of the two projects, which were otherwise kept formally separate. In December 2001, federal highway funds were formally obligated for the Third Street project.

There is no doubt that the larger U.S. 33 project is a major federal undertaking that is subject to Section 106 of the NHPA, NEPA, and Section 4(f) of the Transportation Act. In early 2002, however, after encountering delays in the environmental and historic review process, the City of Goshen announced that it would carry out the Third Street project using only local funds. Based on that decision not to use federal funds for the Third Street project, the city has started and plans to complete the project without undertaking the environmental and historic impact review process that applies to major federal undertakings.

Plaintiffs contend in this action that the city's new strategy for separating the controversial Third Street project is an attempt to violate these three federal laws by improperly "segmenting" the Third Street project from the larger U.S. 33 project, which all concede is subject to the laws. In essence, plaintiffs contend that the Third Street project makes sense only as a part of a larger federal project in which U.S. 33 along Madison Street is widened and U.S. 33 and State Road 15 are shifted from Main Street to the newly-widened Third Street. If that is correct, plaintiffs argue, then the defendants should not be able (a) to carve out the Third Street project from the larger federal project, (b) to avoid the environmental and historic impact review, and then (c) to finish the project by having the City of Goshen and INDOT swap Main Street and Third Street after the work has been completed, so that Third Street would become an improved and critical link for both U.S. 33 and State Road 15 without ever being subjected to the federal review of its environmental and historic impacts.

Defendants argue that the Third Street project has not been improperly segmented. They contend that the Third Street project has never been paid for by federal funds or planned by the FHWA, that the Third Street project has "substantial independent utility," that the City of Goshen is committed to the Third Street project regardless of INDOT's and FHWA's eventual decision on the U.S. 33 project, that the Third Street project will have no effect on INDOT's and FHWA's decision on the U.S. 33 project, and that INDOT has conclusively rejected Goshen's earlier proposal to swap Main Street and Third Street and redesignate Third Street as U.S. 33 and State Road 15.

The Law of "Segmentation"

"`Segmentation' or `piecemealing' is an attempt by an agency to divide artificially a `major federal action' into smaller components to escape the application of NEPA to some of its segments." Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129, 1140 (5th Cir. 1992); Dickman v. City of Santa Fe, 724 F. Supp. 1341, 1345 (D.N.M. 1989) ("The rule against segmentation was developed to insure that interrelated projects, the overall effect of which may be environmentally significant, not be artificially divided into smaller, less significant actions."). Segmentation may be proper or improper. See Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1483 (10th Cir. 1990). Generally, improper segmentation is found only where a federal project has been segmented with the purpose of avoiding compliance with NEPA. Save Barton Creek, 950 F.2d at 1139; cf. 40 C.F.R. § 1506.1(c) (while agency is preparing environmental impact statement, no other federal action may be taken unless it can be independently justified, has its own environmental impact statement, and will not limit alternatives in subsequent projects).

Judge Cummings wrote for the Seventh Circuit about segmentation in Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976) (en banc). He described the balance that must be struck:

> Segmentation of highway projects, although necessary to make their design and construction more manageable, can limit the usefulness of environmental impact studies in two significant ways. First, the project can be divided into small segments; although the individual environmental impact might be slight, the cumulative consequences could be devastating. Second, the location of the first segment may determine where the continuation of that roadway is to be built. In such a case, preparation of the EIS for the extension is no more than a formal task because the decision-maker's ability to choose a different route no longer exists. On the other hand, an EIS need not consider the long-term visions of highway designers and urban engineers when they suggest comprehensive plans which may take years to construct, if they are to be built at all. The information contained in an EIS for such a comprehensive plan is likely to be speculative, irrelevant to the specific question before the decision-maker, and outdated by the time the choice must be made. To require the preparation of such an EIS would surely impose an undue burden on the state and federal agencies.

> The purpose of NEPA is to require that federal decision-makers consider the environmental consequences of their actions before deciding to proceed. Their source of information, the EIS, must therefore take a pragmatic and realistic view of the scope of the action being contemplated. The view must be one neither confined by the literal limits of the specific proposal nor one unbounded except by the limits of the designer's imagination. The task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice.

542 F.2d at 368-69.

Courts have generally used four factors to determine whether segmentation has been improper: (1) whether the segmented project has logical termini; (2) whether the supposed "segment" has substantial independent utility; (3) whether construction of the supposed independent "segment" will foreclose other alternatives for other projects; and (4) whether construction of the supposed "segment" will irretrievably commit federal money to closely related projects. See Swain v. Brinegar, 542 F.2d at 369-70; accord, e.g., Utahns for Better Transportation v. United States Dep't of Transportation, 305 F.3d 1152, 1182-84 (10th Cir. 2002); Save Barton Creek, 950 F.2d at 1139-40; Village of Los Ranchos, 906 F.2d at 1483; Stewart Park and Reserve Coalition, Inc. v. Slater, — F. Supp.2d ___, ___, 2002 WL 31163861, *9-10 (N.D.N.Y. Sept. 30, 2002); Brewery District Society v. Federal Highway Admin., 211 F. Supp.2d 902, 912-13 (S.D.Ohio 2002); Burkholder v. Wykle, 2002 U.S. Dist. LEXIS 4850, *31-32 (N.D.Ohio. February 22, 2002); see also 23 C.F.R. § 771.111(f) (the evaluated proposal shall "(1) Connect logical termini . . .; (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements"); 40 C.F.R. § 1502.2(f) ("Agencies shall not commit resources prejudicing selection of alternatives before making a final decision"); 40 C.F.R. § 1506.1(c) (while agency is preparing environmental impact statement, no other federal action may be taken unless it can be independently justified, has its own environmental impact statement, and will not limit alternatives in subsequent projects).

In light of these factors, the court must consider the history of the Third Street project and its intended purpose and design in considerable detail. In light of some evidence presented, however, the court also notes what is not at issue in this case. First, this court does not have the power, the duty, or the expertise to choose the best solution for Goshen's traffic problems. Second, this court also does not have the power, the duty, or the expertise to decide how best to balance historic preservation interests against the various alternatives for addressing Goshen's traffic problems.

The City of Goshen offered substantial evidence to the effect that, notwithstanding opposition to the Third Street project and the widening of Madison Street east of Main, other alternatives pose more serious problems in terms of effects on the historic district and on the economic viability of downtown commerce in Goshen. Mayor Kauffman summarized those views. Tr. 142-44.

The court's task is to decide plaintiffs' motion for a preliminary injunction, which requires the court to decide whether plaintiffs have shown that the defendants have probably violated NEPA, the NHPA and/or the Transportation Act by trying to transform a "segment" of a genuinely federal project into a small local project for the purpose of avoiding compliance with those federal laws.

Chronology and Geography "Segmentation" cases are especially fact-sensitive. Accordingly, the court traces in detail the relevant events. Also, the

geography and geometry of downtown Goshen and its principal roads are critical to this case, and the court must describe them in some detail. For clarity, a map of downtown Goshen (taken from Exhibit 51) is attached as Appendix A to this Entry.

The Goshen Historic District was listed on the National Register of Historic Places in 1983. The historic district includes about 45 city blocks and is the largest intact historic district in Indiana. The historic district includes both commercial and residential areas both east and west of Main Street. The historic district includes the entire segment of Third Street and Madison Street that is in dispute in this case, as well as the relevant portions of Main Street.[1] U.S. Highway 33 and Indiana State Road 15 intersect in downtown Goshen.

[1] Mayor Kauffman lives in the Goshen Historic District himself, and he was born and raised there. He has a strong record in support of historic preservation, as plaintiffs themselves have acknowledged. For example, the Carnegie Library has been adapted for use by the mayor, the clerk, and the treasurer as office space, and there is an effort underway to reuse the old Goshen High School.

As shown on Appendix A, the streets in downtown Goshen are laid out in a grid.

Main Street runs north-south with two lanes of traffic in each direction. Third Street is one block west of Main Street. It also runs north-south, but traffic currently runs only one way south in two lanes. Fifth Street is one block east of Main Street and also runs north-south, but traffic currently runs only one way north. Pike Street runs east-west at the northern edge of downtown Goshen and intersects with Third, Main, and Fifth. U.S. 33 enters downtown Goshen from the west on Pike Street.

State Road 15 enters downtown Goshen from the north on a railroad overpass that empties into Third Street just north of Pike. At the intersection of Pike and Third, U.S. 33 and State Road 15 join together and run east for one block on Pike, then turn south on Main Street for five blocks. At the intersection of Main and Madison, which runs east-west, the two highways separate again.

State Road 15 continues south on Main Street. U.S. 33 turns east on Madison for six or seven blocks before turning southeast near Goshen High School. East of Main Street, U.S. 33 has only one lane in each direction on Madison.

The two highways carry a considerable volume of truck traffic through downtown Goshen. Congestion is a problem in downtown Goshen for both local and through-traffic. Also, trucks and other through-traffic along the two highways must make several tight 90-degree turns to travel through the city. Mayor Kauffman is one of many city leaders who believe that Goshen would be better off as a whole if that traffic could be routed off of Main Street.

Among other traffic issues, the segment of U.S. 33 that runs along Madison Street is two lanes, and that segment also gets congested and slow. For years, INDOT and FHWA have looked at improvements and alternatives to U.S. 33. In 1992, INDOT "programmed" improvements for U.S. 33. When a project has been "programmed," it has been listed in the Indiana transportation improvement program. Once listed or "programmed" in the state's transportation improvement program, the project is determined to be proposed for federal funding. Tr. 110.

In August 1996, the City of Goshen adopted a "Thoroughfare Plan," which is a comprehensive long-term plan for Goshen's streets and roads. Goshen's Thoroughfare Plan recognized that INDOT planned to reconstruct U.S. 33 east of Main Street. Ex. 74 at 58 (Table 3, listing "Madison St./Lincolnway Ave. Reconstruction" as a project programmed for completion within next four years).

The Thoroughfare Plan considered a number of alternatives, especially for downtown traffic. The best alternative identified in the plan, and the top priority for new improvements, was the plan in dispute here, to widen and improve Third Street:

> Of the alternative scenarios investigated, the re-configuration of Third Street to a two-way roadway between Pike and Madison Street resulted in the main traffic flow adjacent to Main Street but not within the residential areas to the east of Main Street. The Third Street reconfiguration has the advantage of reducing excessive turning movements of traffic in the downtown area. The existing configuration of U.S. 33 and S.R. 15 on Main Street requires through traffic to make two major turning maneuvers at intersections. This characteristic restricts capacity as traffic volumes increase. These turning maneuvers will occur at the intersections of Pike St./Third St., Pike St./Main St., and Main St./Madison St. The reconfiguration of Third Street would reduce the heavy turning movements at two intersections (Pike St./Third St. and Main St./Madison St.) and foster better traffic progression. A horizontal curve can be constructed on Third Street in the vicinity of Madison Street to promote free-flowing operation and eliminate the need of a traffic signal at the Third Street/Madison Street intersection.

Ex. 74 at 50; see also id. at 59 (listing Third Street improvements as city's first proposed future project).

On September 24, 1996, a month after adoption of the Thoroughfare Plan, Goshen's city engineer issued a Request for Proposals for consulting services to develop construction plans and related documents for widening Third Street from Pike to Madison from its present width of 38 feet to establish five traffic lanes and to build a sweeping curve from southbound Third Street to eastbound Madison Street (which would require removal of seven houses). Ex. 63. The Request for Proposal stated that the engineering services would be funded with only local funds, without using federal assistance. However, the Request for Proposal also indicated that the design should be done so that the project would be "eligible for use of Federal-Aid funding for construction as administered by INDOT." Id.

The City of Goshen contracted with the Wightman Petrie consulting firm for the design work on the proposed Third Street project. City officials instructed Wightman Petrie to design the improved roadway so that it would meet any applicable standards for federal and state highways. If the project met those standards, it would be possible, with approval of INDOT and the FHWA, to shift both U.S. 33 and State Road 15 away from Main Street onto the new and improved Third Street. In fact, Wightman Petrie president Ken Jones testified that city officials told him to design Third Street to meet those standards as if it were to be redesignated. Tr. 204.

Also in November 1996, INDOT was seeking consulting services to help analyze five alternatives for improving U.S. 33 through Goshen. See Ex. 93. As early as November 8, 1996, INDOT had already separated the U.S. 33 project into two projects, and it was considering breaking the project down into three projects: "the downtown piece is separate." Ex. 93 (agenda).

In April 1997, Mayor Kauffman took office as mayor. He made the Third Street project a priority. On August 5, 1997, Mayor Kauffman wrote to INDOT about the relationship between Third Street and INDOT's U.S. 33 project. Ex. 1. Mayor Kauffman explained that Goshen's Thoroughfare Plan recommended that Third Street be widened from Pike Street south to Madison Street, and Madison Street east to Main Street, where

Madison becomes U.S. 33. He described the city's planned improvement, including the sweeping turn:

> The curve has been incorporated into the design to accommodate easier movement for trucks. Truck traffic has a difficult time making turns throughout the city due to the small turning radii at intersections.
>
> From our discussions, we would like to suggest that this Third Street route become the designated U.S. 33 route. By changing this designation, the traffic, especially truck traffic, could move easier through the city.

Ex. 1. Mayor Kauffman also proposed that the Third Street project be extended east along Madison, with the city paying for design engineering if INDOT would fund right-of-way acquisition and construction costs. Id. Exhibit 1 is important as the first document explaining the logic of linking the Third Street project to INDOT's U.S. 33 project. Also, Mayor Kauffman authorized adding the Third Street project to MACOG's transportation improvement plan for federal funding. Tr. 64.

[2] MACOG is the acronym for the Michiana Area Council of Governments, a regional metropolitan planning organization that is in charge of developing and coordinating transportation plans in several counties. It receives funding from the federal government. Tr. 106-07.

The evidence indicates that Mayor Kauffman's proposal had an immediate effect on INDOT's planning. On July 17, 1997, INDOT had issued a "Request for Traffic Projections" for alternatives for the U.S. 33 project. Ex. 94. On September 11, 1997, just a few weeks after Mayor Kauffman's request, INDOT issued an "addendum" to that request to add traffic projections for U.S. 33 and State Road 15 from Madison Street to Pike Street. The addendum sought traffic projections for alternatives that included shifting both U.S. 33 and State Road 15 from Main Street over to Third Street, with Main Street to be relinquished to the City of Goshen. Id.

The consulting firm of Pflum Klausmeier Gehrum ("PKG") won the INDOT contract and developed the traffic projections, which were submitted on October 23, 1997. Ex. 100. The PKG report divided the work into the "South Project," described as "US 33 from Main Street east to County Rd. 40," and the "North Project," described as "US 33/SR 15 (Main St.) and 3rd St. from Madison St. to Pike St.," thus including the current Third Street project within INDOT's "North Project." PKG was paid with federal funds to carry out the traffic projections.

INDOT and Goshen continued discussions regarding Third Street and the U.S. 33 project. FHWA was also a party to the discussions. On January 21, 1998, a meeting was held with representatives from INDOT, the FHWA, Goshen, MACOG, and the Wightman Petrie consulting firm that was working for the city.

Ex. 22 (meeting minutes prepared by INDOT). In that meeting, the city's Third Street project was still considered separate, at least for the time being, though the connections were obvious to all. After describing the city's Third Street project, the minutes noted:

> . . . City of Goshen would like INDOT to relinquish Main Street to the city and take over Third Street as part of the State System. U.S. 33 and S.R. 15 will be relocated along Third Street. Goshen made an offer to design the Madison Street project and to purchase any necessary right-of-way for the project, if INDOT would pay for the construction of Third Street. INDOT suggested to Goshen to send a proposal with Mayor signature to Fort Wayne District and Division of Planning with their offer in order to begin the negotiating process. Any agreement shall require the approval of the INDOT Executive Office. At this time, INDOT and Goshen shall continue to develop their projects separately until the agreement has been negotiated.

Ex. 22.

In early February 1998, INDOT and city officials held a public meeting to discuss the projects. After the meeting, Mayor Kauffman wrote to INDOT's deputy commissioner, who also attended the meeting. Ex. 2. The letter indicates that opposition was vocal at that meeting. The mayor's letter downplayed the opposition and argued in favor of the plans. He acknowledged that, if INDOT were persuaded not to widen U.S. 33 along Madison Street, the city's Third Street project "makes less sense." Id.

Mayor Kauffman also discussed in his letter to INDOT's deputy commissioner his proposed swap of Main Street for Third Street:

> My administration is committed to implement as much of the Thoroughfare Plan as can be afforded. That is a large part of the reason [INDOT district director] John Passey will be bringing INDOT officials in Indianapolis a request from Goshen that the State assume our Third Street project as a natural extension of your Madison/US 33 project. We understand that the only way that could happen is that the streets that currently carry U.S. 33 and SR 15 would be relinquished in their present condition to local control. If INDOT is agreeable to this, it allows the federal/local resources currently reserved for Third Street to be applied to the peripheral roads. This benefits INDOT by decreasing traffic on through-town routes.

Ex. 2. Mayor Kauffman testified that when he wrote this letter to INDOT, he knew that INDOT's preferred alternative for the U.S. 33 project was to widen U.S. 33 along its present route of Madison Street east of Main. Tr. 74 ("the preferred alternate at the time coordinated with our Third Street project and enhanced our Third Street project").

The next business day, Mayor Kauffman elaborated on these points in a letter to INDOT's Passey urging INDOT to swap Main Street for Third Street. assuming that the city's proposed improvements to Third Street would be made:

> INDOT cannot justify a favorable response to this request unless there is benefit to both the Department and its customers. A primary consideration is, of course, how traffic flows through the urbanized corridor in Goshen. The requested re-designation of routes reduces turning movements of traffic, which greatly benefits commercial traffic especially. Thus INDOT's customers are moved quicker, easier, and with reduced negative impact on air quality.

* * *

> Taking over the Third/Madison project is that it is [sic] a natural extension of INDOT's Madison/US 33 project. If one looks at how these routes flow after re-designation, they appear much more logical than those now followed.
>
> It is important that the two projects be coordinated. Since the new Third/Madison Street intersection with Main Street is placed to the north of its present lineup with Madison/US 33, it makes no sense to construct one leg of the intersection significantly before the other.

Ex. 3.

[3] A few days later, INDOT's Passey wrote to INDOT's deputy commissioner Klika that he agreed with Mayor Kauffman. Ex. 18 (stipulated as to authenticity and admissibility, but not mentioned during hearing). Passey agreed that Goshen's Third Street project and INDOT's U.S. 33 project "should be developed and constructed concurrently." He added: "If the Third Street project is constructed as planned, both U.S. 33 and SR 15 should be re-routed over Third Street. This would have the benefit of eliminating the complex turns on Pike Street and aligning SR 15 with Third Street over the railroad bridge."

Later in 1998, the City of Goshen began consultations with the Indiana Department of Natural Resources ("DNR") regarding historic preservation issues under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f.

These consultations are reflected in Exhibit 32, a September 8, 1998 letter from Wightman Petrie to DNR Commissioner Larry D. Macklin. (By virtue of his office, Macklin was then the "State Historic Preservation Officer" or "SHPO" under federal law.) In early consultations, which had included a tour of the historic district, DNR had taken the view that Third Street should not be widened.

Wightman Petrie responded with a detailed explanation of the advantages of the Third Street plan as compared to other proposed alternatives for addressing traffic problems in downtown Goshen. Wightman Petrie argued, apparently with substantial reason, that other proposed solutions were likely to cause greater negative effects on the Goshen Historic District.

The Wightman Petrie explanation shows that the Third Street plan makes most sense on the assumption that U.S. 33 and State Road 15 would be shifted from Main Street to Third Street. For example, Wightman Petrie emphasized the awkward and slow turns that through-traffic, and especially large trucks, must make to follow the existing routes of U.S. 33 and State Road 15 through downtown Goshen. Ex. 32 at 2-3. Wightman Petrie also emphasized the importance of the location of the railroad overpass on State Road 15 just north of downtown: "This overpass is directly aligned with the 3rd Street corridor, and thus 3rd Street becomes the route which is needed for the relief of Main Street and the avoiding of all the turning by non-local traffic at the Main Street and Pike Street intersection. In order for INDOT to be able to redesignate both S.R. 15 and U.S. 33 onto 3rd Street, the routes must eventually connect to U.S. 33 to the east of the City, while also minimizing the impact to the grid pattern." Id. at 3. The Wightman Petrie letter also stated: "The City of Goshen and INDOT officials are preparing to share the traffic of S.R. 15 and U.S. 33 on Main Street and Third Streets." Id. at 1.

DNR's Macklin responded to Wightman Petrie in a letter dated October 29, 1998. Ex. 17.[4] Based on the consultations undertaken to comply with Section 106 of the National Historic Preservation Act, Macklin, acting in his capacity as State Historic Preservation Officer, concluded that Third Street should not be widened. He proposed instead

that two additional travel lanes could be established within the existing curb lines by eliminating on-street parking.

[4] Actually, the letter was signed for Macklin by John Costello, another DNR official, but there is no indication that Costello acted without proper authority.

Macklin did not object to demolishing seven buildings to accommodate the sweeping turn from Third Street to Madison Street, so long as those buildings were documented and photographed for appropriate repositories of historic information. DNR and Macklin did not receive any response to this letter until March 15, 2000, nearly eighteen months later. The response is Exhibit 35, discussed below.

Further consultations continued between the City of Goshen and INDOT on the U.S. 33 project and the Third Street project. On June 14, 1999, Mayor Kauffman wrote to INDOT's Christine Baynes. Ex. 8. Mayor Kauffman formally requested that INDOT "participate with the City of Goshen in the costs of reconstructing Third Street." The mayor explained: "We believe that the Third Street project is a natural extension of the US33 project through downtown Goshen. In fact, history will show that when the SR15 overpass was built, the intent was to move state road designation to Third Street. We request that INDOT incorporate this project into plans to improve US33." Id. He repeated his earlier proposal to share costs and to swap state and local jurisdiction over Main Street and Third Street.

INDOT's Daniel Buck wrote an internal e-mail on June 28, 1999 regarding the mayor's swap idea. He concluded:

> It makes sense for INDOT to swap Main Street for 3rd Street after it is built as a local road. At all the local public meetings, the Mayor and INDOT have made it clear this is a local project, not an INDOT project. If we were to take it over now and fund it as an INDOT project, we would be open to severe criticism that we had mislead [sic] the public in the previous meetings.
>
> If we swap the roads, we should not do it until after the project is constructed with local funds. Once built with local financing, we could take it into our system as a straight swap.

Ex. 105 (emphasis added). Buck was not a decision-maker on this issue, and his next communication was more formal and less candid about the possibility of a future swap. On July 15, 1999, Buck wrote to INDOT's deputy commissioner for planning and recommended against making the swap, but with one important qualifier: "If INDOT were to fund and build the project now, it would open us up to claims of misleading the public." Ex. 111 (emphasis added).

Buck's July 15, 1999 memorandum did not explicitly address the possibility he had suggested earlier — waiting until after Goshen built the Third Street project before making the swap.

The record before the court does not indicate that INDOT has ever formally or finally declined the mayor's proposal for a swap. INDOT's Christine Baynes testified that INDOT made a "final decision" in July or August of 1999 to deny the city's request to redesignate the highways. Tr. 349. The court does not find that testimony credible, especially in light of later discussions described below, which included Baynes.

On March 15, 2000, Wightman Petrie finally responded to the October 28, 1998 letter from DNR's Macklin proposing that the Third Street project be revised to protect the historic district by

not widening the street. Wightman Petrie argued that the narrower road proposed by Macklin would "conflict with the applicable State and Federal road design standards and requirements for the proposed route." Ex. 35 at 2.

The Wightman Petrie response shows plainly that the value and usefulness of the Third Street project depend on having Third Street become both U.S. 33 and State Road 15:

> Your 10/29/98 letter aptly states the project's purposes on page 1 as "essentially to increase the capacity of Third St. to accommodate more traffic and relieve congestion on Main St.," and "other interests include maintaining a healthy business center and safety issues.
>
> With these purposes in mind, and considering that the relieving of congestion at Main St. can only be achieved by the changing of the U.S. 33 and S.R. 15 designation away from the Main St. route, the road design for this multiple lane, urban arterial route must follow the guidelines of the "Indiana Department of Transportation Road Design Manual," (as approved and required by the Federal Highway Administration).

Ex. 35 at 2 (emphasis added). Wightman Petrie then explained the details of those requirements, which require wider traffic lanes than the present curb width would allow.

Wightman Petrie then emphasized the link between the Third Street project and the state highways: "Again, it is essential to keep in mind that the critical goal of improved traffic capacity for Goshen cannot be achieved without the designating of the realigned Third Street corridor as U.S. 33 and S.R. 15." Ex. 35 at 3 (emphasis added). Wightman Petrie concluded by rejecting Macklin's proposed conditions and proposing instead that DNR agree to the city's preferred plan with minor cosmetic changes. See id. at 8-9.

DNR responded on May 10, 2000 in a letter to Wightman Petrie (with copies to the FHWA, INDOT, the mayor, numerous agencies, and many other interested parties) proposing a "consultation meeting." Ex. 36. DNR treated the Third Street project and the U.S. 33 project as two segments of the same project:

> A copy of this letter is also being sent to the INDOT to assist with the Madison segment of the project. Since our letter of November 10, 1999, additional parties above have expressed interest in both segments of the project. As a result, INDOT can also refer to the above list of interested parties in order to supplement its original list of consulting parties for the Madison Street segment of the project.

Ex. 36 at 2. DNR recognized the close linkages:

> Due to the complexity of this segment of the project, the issues raised in your recent letter, and the number of agencies, organizations, and individuals having interest and jurisdiction in the project, we recommend that a consultation meeting be organized. In order for this to happen, the City of Goshen needs to obtain a finding of effect from FHWA, who may officially make a finding of effect. Afterwards, the City of Goshen with FHWA could arrange a consultation meeting for all interested parties. At that time, FHWA may also notify the Advisory Council on Historic Preservation of the effects. We urge FHWA and City of Goshen to arrange one meeting in which both the Third Street segment noted above and the U.S. 33 modification would be handled, even if they were to be discussed separately. Both segments involve similar issues, the same agencies, and the same interested parties. As a result, we can avoid a duplication of efforts and come to a quick resolution on both segments of the project.

Ex. 36 at 2.

After this correspondence, a meeting was arranged for June 28, 2000 including officials from FHWA, INDOT, the City of Goshen, MACOG, and Wightman Petrie. (DNR and historic preservation groups were not included, though, of course, they were not required to be.)

On June 6, 2000, before the meeting, Mayor Kauffman and Wightman Petrie provided information to the FHWA through Sandra Seanor of MACOG. Ex. 45.

They identified as advantages of the Third Street project: "Includes redesignation of U.S. 33 and S.R. 15 away from downtown Main Street historical area while providing traffic capacity for motorists and trucks on those routes." Also, the project "[m]akes a smooth and logical connection with the existing S.R. 15 overpass just north of Pike Street and thus relocates existing congested turning movements . . .," and is "a logical and efficient extension of the widened U.S. 33 roadway, which is the preferred option of INDOT for needed traffic capacity increase on U.S. 33 south of Goshen." The project also "[r]elocates the intersection of U.S. 33/S.R. 15 and S.R. 4 (currently at Main Street/Lincoln Avenue), away from Main Street, thus greatly reducing traffic turning movements (including significant truck traffic) onto Main Street."

Another listed advantage was that the Third Street project "[a]llows for needed proactive improvements as soon as possible with an established project on the INDOT program for Federal Aid funding eligibility as well as in compliance with traffic study needs. . . ." Ex. 45. Attached was a list of "local federal aid projects" in Elkhart County, including the Third Street project indicating a federal share of $2.5 million and a local amount of $625,000.

Also before the June 28th meeting, FHWA's Larry Heil sent an e-mail to two other FHWA officials to notify them of the meeting and to prepare them for it. Heil wrote:

> As you know, the local 3rd Street Project and the State U.S. 33 Project are currently being developed as separate EAs [Environmental Assessments under NEPA]. The intent is that upon completion, the existing U.S. 33 route designation may be shifted over to 3rd Street. Given the extensive controversy, and the associated [NHPA §] 106 issues, [MACOG's Sandy Seanor] wanted to bring FHWA, INDOT, and the City of Goshen and their Consultant together to discuss how best to proceed. The SHPO has requested that the Section 106 Consultation be accomplished for both projects at the same time. FHWA needs to look at the merits, and determine if the two projects should be advanced as one EA. Given the controversial history of this project, I have asked that Robert also participate in the meeting.

Ex. 53 (emphasis added).[5] Heil's statement in June 2000 that such a redesignation might occur after completion of the Third Street project is an important part of the evidence undermining the testimony by INDOT's Baynes that INDOT made a "final decision" in the summer of 1999 to reject the city's request for redesignation. (FHWA's Heil had been in frequent contact with INDOT's Baynes regarding the Goshen projects.)

[5] Heil sent copies of the e-mail to INDOT's Jim Juricic and MACOG's Sandy Seanor, as well as Chris Andrews, who appears to have been INDOT's person responsible for consultation under § 106 of the NHPA. See Ex. 9

The minutes of the June 28th meeting provide a detailed and credible summary of the discussion.[6] The meeting is critical to the segmentation issue here, for the participants were anticipating and planning for judicial review of their decisions regarding the Third Street project. Ex. 9.

6 The minutes were prepared by Ken Jones, the president of Wightman Petrie. Defendants made some half-hearted attempts at the hearing to undermine the accuracy and credibility of the minutes, but the attempts were not persuasive. The participants are experienced government officials who understood the importance of accurate minutes, especially when the meeting participants were already anticipating the possibility of litigation over their decisions.

FHWA's Val Straumins explained that the several road projects, including the Third Street project and the U.S. 33 project were "closely interdependent," and that "the buck stops on his desk" regarding environmental and historic impacts.

FHWA's Heil noted that the Third Street project and U.S. 33 projects had been considered independent, but Straumins "re-stated that all of the documents need to be tied together by a single report." Heil stated that the Third Street project "does have some independent utility," but also stated: "His concern is that, now, if one of the projects proceed independently that a case could be made that the authorities are making a segmented decision." Ex. 9 at 2. Heil then asked the key question: "should the environmental document be done as one project?" Mayor Kauffman responded that the city "has never hidden their desire to move the State Highway designation."

In an apparent effort to argue for independence, the city's Bob McCoige asserted that the Third Street project had begun in 1996 before INDOT had announced the U.S. 33 plan. (However, as noted above, the Thoroughfare Plan took into account the U.S. 33 plan and linked it to the Third Street project.)

Regarding the linkage between the two projects, FHWA's Straumins "stated that the truck traffic is what ties the projects together," and he asked whether re-routing State Road 15 and U.S. 33 was a priority.

After further discussion of the projects' needs and purposes, FHWA's Heil "stated that he believed that the interdependence of the projects will likely require that they be combined into a single environmental document." Ex. 9 at 3.

Straumins, INDOT's Baynes, and the city's McCoige then discussed the possibility of routing U.S. 33 away from the historic district, using the so-called "north connector" that would run along the northeast side of the downtown area close to the railroad tracks. See App. A. The north connector was an alternative to widening Madison Street to establish four lanes for U.S. 33.

In a critical comment on segmentation involving the Third Street project, FHWA's Heil stated: "we could not make a case for independent utility and that the request for 106 consultation had been made and now must be responded to.

Heil further stated [presciently, as it turned out] continuing to proceed under two environmental documents will bring much more nationwide attention to bear (i.e. the National trust and similar groups)."[7] Heil then stated INDOT would need to make a decision on the question and ask FHWA for concurrence, which might require INDOT "to make a formal statement as to how they view the jurisdiction transfer of Main Street," meaning the redesignation of Third Street as U.S. 33 and State Road 15. Ex. 9 at 4.

7 The court interprets the reference as being to the National Trust for Historic Preservation.

From that point in the meeting, the minutes state:

> Rick Pharis [Elkhart County Highway] reminded the group that the district director [of INDOT] supports that move.
>
> Val Straumins [FHWA] stated that this decision must be made prior to discussion with FHWA.

> Sandra Seanor [MACOG] re-stated that INDOT must make a decision regarding the State Highway transfer.
>
> Chris Baynes [INDOT] stated that if INDOT decides to combine the routes a single E.A. makes sense.
>
> Bob McCoige [Goshen] mentioned that the purpose of the Third Street project is to move traffic thru [sic] town, so you could make a case for independent utility for both Third Street and Madison Street. But agreed that a combined E.A. would be a cleaner method to reach the same result.
>
> Chris Baynes reminded that the national parks and the national trust could delay the projects but they really cannot stop them.

Larry Heil agreed with this statement.

Ex. 9 at 4-5.

At that point, the conversation turned toward an option critical to the segmentation issue: "Bob McCoige asked if we should proceed then change state routes later." In other words, the city's McCoige was suggesting that the government agencies go forward as if the projects were separate, with the explicit or implicit understanding that the state routes would be changed later so that Third Street would become U.S. 33 and State Road 15.

INDOT's Baynes responded to this suggestion by asking "if it would help if INDOT stated they are considering this but this will remain unanswered until completion of the E.A." Ex. 9 at 5. The meeting ended with INDOT's Baynes' commitment to discuss the redesignation issue with "the director" and to report back to FHWA and Goshen.

[8] This meeting, in which INDOT was represented by Baynes, occurred nearly a year after what Baynes testified was a "final decision" by INDOT to reject the city's request to redesignate U.S. 33 and State Road 15 to follow Third Street. See Tr. 349. As discussed below, the court believes on the present record that INDOT and the other agencies have tacitly agreed to take exactly this approach — allow Goshen to build the Third Street project with only local funds, then complete the swap of Main Street and Third Street and the redesignation of U.S. 33 and State Road 15 after the project has been completed.

The evidence convinces the court that INDOT still has not taken an explicit and definitive position on redesignation. A definite yes would demonstrate both the linkage between the Third Street project and the U.S. 33 project and the need to comply with federal environmental and historic preservation law. A definite no would not make sense and is likely to be contradicted after the Third Street project is completed and a final decision is made on the U.S. 33 route.

Baynes' testimony to the contrary, see Tr. 350, 368-69, 371-72, is not credible and is undermined by all of this planning done in 2000. And even Baynes had to admit that things could change in the future. Any witness would have to admit as much, but the point is relevant here because the pressures in that direction are likely to be very strong if the Third Street project is completed.

On this issue, the mayor was asked whether INDOT had ever said yes. He was not asked whether INDOT had definitively rejected the idea of redesignation. Tr. 148-49. The mayor also testified that it would of course be possible for INDOT to redesignate the highway routes in the future, such as after the Third Street project is completed, without having to go through the environmental and historic impact review. See Tr. 88. Such a future designation would also be helpful to the city, which, as part of its overall plan for downtown traffic, would like to implement traffic "calming" measures on Main Street. Tr.

166. Those measures would slow traffic down, but the city may not implement them as long as Main Street is also State Road 15 and/or U.S. 33.

Two weeks after the June 28, 2000 meeting, FHWA's Val Straumins wrote to James Malcolm, a resident of Third Street and prominent and outspoken opponent of the Third Street project. Straumins told Malcolm that the FHWA had authorized the City of Goshen and INDOT and their consultants to initiate the Section 106 consultation process. Straumins wrote: "At this time there has been no indication by the City or INDOT that these projects could be combined to address the Section 106 requirements nor has the INDOT indicated that they are considering routing SR 15 and U.S. 33 on the reconstructed portion of Third Street." Ex. 88 (letter of July 10, 2000). Of course, precisely these options had been discussed in the meeting of June 28, 2000. Straumins indicated that Malcolm would be considered a consulting party for both the U.S. 33 project and the Third Street project.

Through the rest of 2000, INDOT, FHWA, and city officials began working on the combined environmental/historic impact document for U.S. 33 and Third Street. The next major event was a public meeting on February 15, 2001 at a middle school in Goshen where officials from INDOT, the FHWA, and the City of Goshen appeared to provide information to interested residents. The invitation to the meeting identified four purposes: (1) to explain NEPA as it related to the Third Street and U.S. 33 projects; (2) to explain how a person could become a "consulting party" under NEPA; (3) to explain why the two projects were being combined in one environmental document but would "still remain independent"; and (4) to invite the public to express concerns about the projects. Ex. 51.

For the remainder of 2001, there is little evidence in the record as to what occurred, except that a number of interested Goshen residents were either advised of the review process or advised that they had been recognized as "consulting parties" for the NEPA and NHPA review of both the U.S. 33 project and the Third Street project. See Exs. 48, 50, 87.

At some point, probably in late 2001 or early 2002, MACOG's Sandy Seanor met with Mayor Kauffman and the city's Bob McCoige to talk about road construction priorities for available federal funds. Seanor was concerned that the Third Street project was not moving forward and about the possibility of losing available federal funds, which could be shifted to some other project that was ready for actual construction. Seanor's concern was based on the 2003 expiration of the six-year legislation authorizing federal expenditures. However, this explanation does not provide a convincing rationale for the city's rush to complete Third Street separately from construction of the U.S. 33 project. It is highly unlikely that federal funds would not be available for construction after the end of federal fiscal year 2003.

In January 2002, the City of Goshen advised INDOT that it was considering whether to go forward with the Third Street project using only city funds. Tr. 350.

On February 22, 2002, FHWA's Matt Fuller wrote to Phyllis Stutzman of the newly-formed Old Town Neighborhood Association. The FHWA asserted that the city was not then required to seek federal funds for the Third Street project or to comply with Section106 if it chose to complete the Third Street project without federal funds. The FHWA also asserted: "INDOT is on record as declining to accept ownership of 3rd Street and re-sign it as U.S. 33 . . . ." Compl. Ex. B at 4.

It is not clear at this point where INDOT was "on record" to that effect.

On February 25, 2002, Baynes sent an e-mail to FHWA's Larry Heil stating that Goshen's McCoige had said the city would know by March 5, 2002

whether it would proceed with only local funds. Ex. 47.

On March 5, 2002, the Goshen City Council voted to go forward with the Third Street project using only local funds. Two days later, Mayor Kauffman wrote to Commissioner Bryan Nicol of INDOT informing him of the city's decision:

> INDOT has been contemplating a US33 improvement project in Goshen since at least 1997. Goshen has planned for a Madison/Third Street improvement project since 1996. The two projects meet at a downtown intersection.
>
> Since both projects contemplated using federal funds, and since the projects were contiguous both physically and in time of development, Federal Highways preferred to have one environmental document developed covering both projects. The City of Goshen and INDOT agreed to proceed according to Federal Highways' preference, with INDOT being the party responsible to develop the document.
>
> Early coordination letters have not yet been mailed to Consulting Partners. No federal money has been spent to date on our local project. Though it is in our Metropolitan Planning Organization's (MACOG) Transportation Improvement Plan, we agreed to let MACOG divert the federal funds that had been committed to our local project to an Elkhart County project that was ready for construction. Because of the environmental document, our project was delayed long enough that the federal funds would have been forfeited had they not been reassigned.
>
> Tuesday, March 5, our City Council voted to approve the City of Goshen using Economic Development Income Taxes for our project in lieu of federal funds. On Wednesday, March 6, our City Engineer and I met with Clem Ligocki, Brad Steckler, and Larry [Heil] to discuss our intention to proceed with our project, separating it from the INDOT environmental review process. This letter serves as the official notification of that intent.
>
> We look forward to continuing a positive partnership with INDOT on the US33 project.

Thus, the Mayor's letter attributed the decision to the delays caused by the federal environmental review process. The separation of the projects was intended to separate the Third Street project "from the INDOT environmental review process," which was also the federal process for reviewing historic impacts.

In the wake of this decision, the new Indiana State Historic Preservation Officer (DNR Director John R. Goss had replaced Macklin) informed the Old Town Neighborhood Association that DNR would not provide any further assistance regarding the Third Street project because no federal or state funds had been used on the project. Ex. 67 (letter of April 15, 2002).

After the March 2002 decision, the City of Goshen instructed Wightman Petrie to prepare a final engineering design and drawings for construction of the Third Street project, and to do so on an unusually fast schedule. Tr. 216. There is no evidence that the city considered asking Wightman Petrie to use the narrower design proposed by DNR, which would have rendered the project ineligible for redesignation as U.S. 33 and State Road 15. In July 2002 the City of Goshen solicited bids for construction of the Third Street project. The winning bidder was Selge Construction Company, which planned to begin

construction in September 2002, continuing over the winter as weather permitted, with the project complete by June 30, 2003. Ex. 43.

On August 19, 2002, counsel for plaintiffs wrote to Mayor Kauffman, INDOT Commissioner Nicol, and FHWA's Baxter and threatened legal action if the city proceeded with the Third Street project without complying with Section 106 of the NHPA. Compl. Ex. B. Counsel's letter reviewed the history of the project and asserted that a local government cannot avoid the requirements of federal law by taking over and constructing part of a federal project. Id. at 2, citing Brewery District Society v. Federal Highway Admin., 211 F. Supp.2d 902 (S.D.Ohio 2002), and the minutes of the June 28, 2000 meeting. The letter advised the defendants of the possibility of a lawsuit if construction proceeded without first complying with Section 106.

The City of Goshen did not respond to plaintiffs' letter but began construction about three weeks later. Construction started initially with the removal of existing pavement on the northern two blocks of Third Street, from Pike Street south to Lincoln Street. Plaintiffs filed this action on October 1, 2002 and sought injunctive relief.

On the issue of substantial independent utility of the Third Street project, INDOT's Christine Baynes testified that the project had such independent utility because its purpose "was to carry local traffic." Tr. 353. That testimony is not credible; it was flatly contradicted by Goshen's Bob McCoige, who testified quite clearly, and consistently with the extensive documentary evidence, that the purpose was to divert traffic from Main Street, which is now U.S. 33 and State Road 15, including the heavy truck traffic, and that the sweeping curve was for that truck traffic. Tr. 309, 322, 294. (McCoige was also rather evasive on this topic at pages 325 and 326 of the transcript, but the documents belie his and Baynes' efforts to explain away the fact that the Third Street project was designed to become U.S. 33 and State Road 15.)

The city's Third Street project causes some problems for INDOT's U.S. 33 project. The wide curve straightens out at Madison Street just west of the intersection of Main and Madison. In acquiring additional right of way for the sweeping turn, the city chose not to acquire a bank building on the south side of Madison because of the cost of acquisition. As a result, the city plans to have the widened Madison enter the Main and Madison intersection at an offset, so that if no change is made to Madison east of Main (in the U.S. 33 project) traffic going either direction on Madison will have to jog to the right. This offset, shown in Exhibit 70, is addressed in more detail below.

In early 2002, at about the same time Goshen was deciding to build the Third Street project with its own local money, Goshen added a combined sewer overflow project to the Third Street project. Tr. 214 (Jones). That larger project is in its early stages of construction.

Discussion I. Likelihood of Success on the Merits

The court finds that plaintiffs have established a substantial likelihood of prevailing on their claim that the Third Street project has been improperly segmented from a larger federal project, with both the effect and purpose of the segmentation being to evade application of Section 106 of the NHPA, Section 4(f) of the Transportation Act, and NEPA.

The evidence shows that the U.S. 33 project has been a major federal undertaking since 1992, when it was "programmed" by INDOT. The City of Goshen decided to widen Third Street in 1996, when the city expected the U.S. 33 project to be built in the near future and expected the Third Street project to link with the U.S. 33 project at Madison and Main Streets, given that the widening of Madison Street was then INDOT's preferred alternative for improving U.S. 33.

From the outset, the city designed the Third Street project so that it would become the most natural and obvious route for U.S. 33 and State Road 15 through downtown, hoping and expecting that INDOT would see the obvious benefits of shifting the two highways away from Main Street and over to the improved Third Street. In the summer of 1997, shortly after Mayor Kauffman took office, he proposed exactly that shift of the highways, and at that time INDOT began studying and considering Third Street project as part of its alternatives for the U.S. 33 project. See Exs. 96-103. INDOT used federal funds to conduct those studies, though the amounts were not large by highway standards approximately $30,000 for the traffic studies of which the Third Street projections were a part. See Exs. 104-A to 104-G; Tr. 427-30 (Klausmeier testimony addressing a portion of the charges for the studies).

Further, FHWA, INDOT, and the city saw the two projects as so closely related that they tried the unprecedented effort of preparing one environmental and historic impact document for the two projects while still attempting to keep the projects formally separate. As the projects progressed, federal funds to construct the Third Street project were authorized and obligated in December 2001, though such funds have not been used and are not currently planned to be used for construction.

The Third Street project and the U.S. 33 project are physically linked, of course, and it was perfectly natural for the local, state, and federal governments to coordinate their planning for these efforts. The mere facts of the physical connection and the coordinated planning fall well short of what is needed to show improper segmentation. As the Tenth Circuit has observed in this context, "all local projects must start and end somewhere." Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1483-84 (10th Cir. 1990) (rejecting segmentation claim). Similarly, the fact that a modest amount of federal funds was used in early studies related to the U.S. 33 project did not transform the Third Street project into a major federal undertaking. Compare Village of Los Ranchos, 906 F.2d at 1481 (preliminary involvement and funding of preliminary EIS work by FHWA did not transform project irrevocably into major federal undertaking), with Ross v. Federal Highway Admin., 162 F.3d 1046, 1052-53 (10th Cir. 1998) (project was too advanced to allow state to transform last segment into a purely local project by withdrawing federal funding), and Scottsdale Mall v. Indiana, 549 F.2d 484, 489-90 (7th Cir. 1977) (much more extensive funding through later stages of project rendered the project federal).

[9] [9] Nevertheless, those early traffic studies and their consideration of Third Street as one of the alternatives for the U.S. 33 project emphasize the close connections between the projects and the reasons to treat redesignation as a likely outcome here.

In this case, however, plaintiffs have shown much more that tends to show improper segmentation. First, and most important, the Third Street project has little independent utility — independent, that is, from the expected improvement of U.S. 33 by widening Madison Street east of Main Street. From the beginning, the Third Street project was built for the primary purpose of carrying most through-traffic through downtown Goshen without having that traffic use Main Street. The planning documents show that the city insisted that Third Street be designed so that it would qualify for designation as a state and federal highway.

The sweeping curve was specifically designed to make it easier for a large volume of trucks to go through Goshen. The planning documents also show that the city expected that such a shift of traffic would occur only if the two highway designations were shifted from Main Street to Third Street, and that the city's expectations on that point were both reasonable and obvious to INDOT and FHWA.

The city's adherence to this plan to shift the highway designations is apparent from its responses to DNR's concerns about historic impacts. DNR proposed that the Third Street project be modified to avoid widening the roadway.

The city responded, through its consultant, by saying that such a narrow roadway would not serve the purpose of the project because it would not qualify for designation as a state or federal highway. Ex. 35 at 2. At that time in March 2000, of course, the city was still coordinating its planning and was still seeking federal funding for the project. But after the city made its decision to use only local funds for this supposedly local project, at a time when INDOT purportedly had made a "final decision," according to Baynes, never to shift the highway designations, the city stuck to its original design for a route wide enough to qualify as a state and federal highway. There is no evidence that the city reconsidered the need for that wider design in 2002 after the project supposedly became a purely local project.

Moreover, the evidence shows that the city, state, and federal officials discussed precisely this scenario, in which the city might use local funds to build Third Street, and where INDOT and the city would then agree to swap Main Street and Third Street and to shift the highway designations to Third Street. Ex. 9 (minutes of June 28, 2000 meeting); Ex. 105 (INDOT internal e-mail proposing that Third Street be improved as local project, to be followed by swap).

The evidence also shows that such a shift of the highway designations makes a great deal of practical sense, at least in terms of addressing traffic problems in downtown Goshen. (The only caveat for that statement is that it would not make sense if INDOT later decides to shift U.S. 33 away from Madison altogether.) The existing routes for U.S. 33 and State Road 15 require one and two extra 90-degree turns, respectively, for through-traffic. Shifting the designations to Third Street and its new sweeping curve would require through-traffic on each highway to make only one 90-degree turn at a city intersection.

The court cannot say, of course, that the Third Street project would have zero independent utility. That is not the test, however. See Swain v. Brinegar, 542 F.2d 364, 369-70 (7th Cir. 1976) (en banc) (shorter local segments of new highway presumably would have had slight utility for local traffic, but not "substantial utility independent of future expansion"). The issue is whether the Third Street project has substantial independent utility, and the answer on this record is that it does not.

Further showing that the Third Street project is improper segmentation, its construction will tend to limit INDOT's and FHWA's options for the U.S. 33 project. First, the Third Street project was designed to link with the widened Madison Street, which was at the time INDOT's "preferred alternative" for improving U.S. 33. With the wider version of Third Street and its sweeping turn from south to east on Madison, the invitation to use the Madison Street alternative becomes significantly more attractive. Second, the Third Street project will impose significant restrictions on the details of the U.S. 33 project on the (reasonable) assumption that widening Madison Street will again turn out to be the preferred alternative. The city designed the curve from Third to Madison to avoid having to acquire an expensive bank building. The result is that the completed roadway will enter the Main and Madison intersection further north than might otherwise be preferable. To coordinate the intersection, the city's design of the Third Street project will put significant pressure on INDOT and FHWA to see that Madison is widened on the north side of the street so as to avoid forcing the Madison Street traffic to jog to the right as it passes Main Street.

As further evidence of improper segmentation, the record shows clearly that the city chose to try to pursue the Third Street project on its own precisely because the city did not want to subject

its decision to the environmental and historic impact review that would otherwise be required. Mayor Kauffman's letter of March 7, 2002 to INDOT Commissioner Nicol made that purpose very plain. See Ex. 10.

In terms of the law of segmentation, suppose for purposes of argument that city, state, and federal officials had all recognized that U.S. 33 would be widened along Madison Street and that the improved Third Street should be redesignated as U.S. 33 and State Road 15 through downtown Goshen for all the reasons argued persuasively by Mayor Kauffman and Wightman Petrie. Suppose then that they all agreed that the environmental and historic impact review process would cause problems for the Third Street project. And then suppose that they agreed that the city should pay for and complete the Third Street improvements, following which the city and INDOT would agree to swap Third Street and Main Streets so that U.S. 33 and State Road 15 would then follow Third Street, which would link up with INDOT's and FHWA's eventual improvements to U.S. 33 along Madison Street. And finally, suppose that all agreed that no federal dollars would be used for the Third Street project.

Under this scenario, surely there can be no doubt that the agreement would violate NEPA, NHPA, and the Transportation Act as an improper "segmentation" of the Third Street portion of a larger federal undertaking, even though no federal dollars were spent directly on the Third Street segment. Such deliberate evasion of these federal laws by carefully carving up one project into smaller segments cannot and should not be tolerated. See, e.g., Dickman v. City of Santa Fe, 724 F. Supp. 1341, 1345-48 (D.N.M. 1989) (granting preliminary injunction where fourth phase of a four-phase project was improperly segmented even though no federal money would be spent on that fourth phase); accord, Ross v. Federal Highway Admin., 162 F.3d 1046, 1052-53 (10th Cir. 1998) (affirming finding of improper segmentation despite withdrawal of federal funding from disputed segment of highway project).

The real world is more complex than this simple hypothetical, of course, and in this case, the officials who testified all deny that there was any explicit agreement to the effect hypothesized above. But the evidence shows the following.

First, the local, state, and federal officials discussed the very possibility of such an agreement in 1999 and 2000. Second, at least from the perspective of officials responsible for solving traffic problems in Goshen and on state and federal highways, the hypothesized course of action makes a great deal of practical sense.

Third, the local, state, and federal officials have all acted in ways that are consistent with such an agreement to evade applicable federal laws.

In the face of this evidence, the defendants' denials of such an intention and understanding do not win or deserve great credibility. On the present record, the court finds it is more likely than not that the defendants have a tacit understanding that, after the city's expected completion of the Third Street project, the U.S. 33 project is likely to go forward with the widening of Madison Street east of Main, with INDOT shifting U.S. 33 and State Road 15 to the newly widened Third Street. This tacit understanding is not legally binding on any agency, of course, but the evidence offered thus far strongly indicates that the agreement exists.

10 [10] Plaintiffs can prove their segmentation case without a direct admission from a witness to the effect that the agencies reached this agreement. Cf. JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 779 (7th Cir. 1999) (reversing summary judgment for defendants in antitrust conspiracy case: "an inference of conspiracy — of, in this case, an informal agreement among the applicators and the producers to deny supply to firms that tried to break into the applicators' cosily divided

market — can be drawn from circumstantial evidence as well as from admissions or other direct testimony of the conspirators' communications with each other").

II. Irreparable Harm

In addition to showing a likelihood of success on the merits, plaintiffs must show that they are likely to suffer irreparable harm without a preliminary injunction. Plaintiffs have made that showing in this case. Plaintiffs have lawfully protected interests in having a thorough and careful consideration of the environmental and historic impacts of the Third Street project, as part of the larger U.S. 33 project. If the Third Street project moves further forward without such consideration, the opportunity for such consideration will be gone. That is why injunctive relief to enforce NEPA, Section 106 of NHPA, and Section 4(f) of the Transportation Act is often granted when a violation has been shown. E.g., Wisconsin v. Weinberger, 745 F.2d 412, 426 (7th Cir. 1984) (noting that nothing in NEPA restricts the courts' traditional jurisdiction in equity); accord, Davis v. Mineta, 302 F.3d 1104, 1114-16 (10th Cir. 2002) (reversing district court's finding that plaintiffs would not suffer irreparable harm from violations of NEPA and Section 4(f) and directing entry of preliminary injunction); Dickman v. City of Santa Fe, 724 F. Supp. at 1344-45, 1348 (granting motion for preliminary injunction on grounds that defendants had improperly segmented one portion of a highway project to avoid compliance with NEPA).

The fact that construction began about three weeks before plaintiffs filed this action affects the scope of injunctive relief, but it does not undermine plaintiffs' entitlement to some injunctive relief. The evidence indicates that only the two northern-most blocks of Third Street, from Lincoln to Pike, have had the pavement removed. The court can block further destruction and widening of the existing portions of Third Street while still allowing the city to take reasonable actions to stabilize the two northern-most blocks until a final decision is made about whether to proceed with the Third Street project.

[11] [11] For example, in the face of the litigation threat, the city chose to tear up the portion of Third Street directly in front of the Goshen Fire Department headquarters. Since construction began, the fire department has been using its back entrance. The court sees no reason why the city should not be permitted to repave temporarily the portion of Third Street in front of the fire department.

III. The Balance of Harms, the Public Interest, and the City's Laches Argument

The court must also consider the harm that an erroneous grant of a preliminary injunction would inflict on the defendants and others, including the general public and others who are not parties to this case. E.g., Abbott Laboratories v. Mead Johnson Co., 971 F.2d 6, 11-12 (7th Cir. 1992).

An injunction stopping further progress on the Third Street project is likely to inflict substantial expense on the City of Goshen and/or its contractor.

However, the court does not intend to bar the city from repaving Third Street on at least a temporary basis, so traffic can be restored to its prior flow. The city asserts that it would suffer additional expenses of $27,000 per day if construction is delayed. That estimate was based on hearsay evidence from the construction company and is not persuasive. The city did not offer its construction contract into evidence, despite plaintiffs' questions about force majeure provisions. Also, expenses are difficult to estimate because of the project's dependence on winter weather. The parties to the contract presumably factored in substantial risks that weather would delay progress through much of the winter. Nevertheless, it is reasonable to expect significant

expenses may result from an injunction, whether those expenses are imposed on the City of Goshen or on its construction contractor.

The city has argued that plaintiffs are guilty of laches for having waited until October 1, 2002, about three weeks after construction started, before filing this action and seeking a preliminary injunction. The court disagrees. Even before construction began at all, plaintiffs gave the city and the other defendants ample warning of the legal problems posed by the city's planned construction. The plaintiffs sent their warning letter in August 2002. The city then chose to go forward, taking a calculated risk that its construction project could be enjoined.

In terms of the laches doctrine, after the city received the letter from plaintiffs, the city could not have been reasonably relying on the absence of any legal challenge from the plaintiffs. The city itself also chose to begin its construction at the north end of the planned project, where the road would be torn up first right in front of the fire department. The city has not established that plaintiffs are guilty of laches.

Under these circumstances, the court finds that the balance of harms weighs in favor of granting an injunction. Plaintiffs have made a strong showing of likelihood of success on the merits, and of irreparable harm to them and to the public interest if defendants are allowed to violate federal law and complete the Third Street project without appropriate review of environmental and historic impacts. The harm to defendants results from a decision to go forward with a high risk strategy with ample notice of the legal problems they were likely to encounter. Nevertheless, the court can shape its injunction in ways that will mitigate harm to the public interest by, for example, ensuring that the fire department can have access to a paved Third Street as soon as the needed work can physically be performed.

IV. The Bond Requirement

The court must establish a bond under Rule 65 of the Federal Rules of Civil Procedure. As the Tenth Circuit recently explained: "Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered." Davis v. Mineta, 302 F.3d 1104, 1126 (10th Cir. 2002) (reversing denial of preliminary injunction), citing Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322, 322-23 (9th Cir. 1975) (reversing district court decision to require $4.5 million bond in NEPA case and finding that bond of $1,000 was reasonable). The court finds in this case that a bond of $10,000 is reasonable under the circumstances, which include these private not-for-profit organizations' efforts to vindicate the public interest served by NEPA, NHPA, and Section 4(f).

V. Subject Matter Jurisdiction

The federal and state defendants have moved to dismiss this action for lack of subject matter jurisdiction. Recognizing that subject matter jurisdiction is a threshold action, the court has chosen to discuss the issue at the end of this entry because the unusual problems posed by segmentation cases under NEPA and the Administrative Procedures Act ("APA") can be best understood once plaintiffs' claims are understood in detail. Subject matter jurisdiction under the NHPA also appears to be proper on simpler grounds.

A. NHPA

Defendants argue that the NHPA creates no private cause of action, and that since plaintiffs have not tried to invoke the APA, this court lacks subject matter jurisdiction. Section 305 of the NHPA provides:

> In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

16 U.S.C. § 470w-4. Based on that provision, many courts have determined that a private cause of action under the NHPA exists. See Brewery District Society v. Federal Highway Admin., 996 F. Supp. 750, 756 (S.D.Ohio 1998) (finding a private cause of action outside of the APA), citing Tyler v. Cisneros, 136 F.3d 603, 608, (9th Cir. 1998); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Bywater Neighborhood Ass'n. v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989); Vieux Carre Property Owners, Residents Assocs., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989). But see National Trust for Historic Preservation v. Blanck, 938 F. Supp. 908, 914 (D.D.C. 1996) (finding that attorney fee provision in NHPA applies to actions that are actually brought under the APA, so that APA's standards of judicial review apply to agency action). Regardless of whether the claim is deemed to arise under NHPA or the APA, the court has subject matter jurisdiction over this claim.

B. NEPA and Section 4(f) of the Transportation Act

Defendants also seek dismissal of plaintiffs' NEPA and Section 4(f) claims on the ground that the court lacks subject matter jurisdiction. It is well established that NEPA and Section 4(f) alone do not create a private cause of action to challenge agency determinations. See Davis v. Mineta, 302 F.3d 1104, 1110 (10th Cir. 2002) ("Judicial review of agency NEPA and § 4(f) decisions is made available through the Administrative Procedures Act."); Sierra Club v. Slater, 120 F.3d 623, 630 (6th Cir. 1997) (NEPA does not provide a private cause of action for review of agency decisions). Rather, judicial review of agency determinations is available under and governed by the APA. 5 U.S.C. § 551 et seq.; id. § 702 (a "person suffering legal wrong because of agency action . . . is entitled to judicial review"). Thus, to challenge an agency determination under NEPA and Section 4(f), plaintiffs must file suit under the APA. Defendants argue that plaintiffs have disavowed reliance on the APA, that there is no other jurisdictional basis for plaintiffs' suit, and that, as a result, the claims must be dismissed for lack of subject matter jurisdiction. This argument is not persuasive.

As defendants correctly point out, the sovereign cannot be sued without its consent, United States v. Sherwood, 312 U.S. 584, 586 (1941), and the terms of that consent define the court's jurisdiction to entertain such suit, United States v. Testan, 424 U.S. 392, 399 (1976). One such example of consent is the APA.

Plaintiffs have been reluctant to rely on the APA, apparently because a segmentation violation may never produce anything that looks like a final agency decision of the sort most often challenged in APA cases. See Tr. 9 (argument on jurisdictional issue).

In the type of segmentation violation plaintiffs have asserted in this case, however, there is a threat of irreparable harm resulting from an agency's participation in a scheme to act contrary to federal law. Also, there are no apparent administrative procedures available for these plaintiffs to use. The Supreme Court and lower federal courts have recognized that these circumstances can support exceptions to requirements for final agency action and exhaustion of administrative remedies. See, e.g., Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) ("Doctrines of 'ripeness' and 'exhaustion' contain exceptions, however, which exceptions permit early review when, for example, the legal question is 'fit' for resolution and delay means hardship, or when

exhaustion would prove `futile' . . . .") (citations omitted); Rhodes v. United States, 574 F.2d 1179, 1181 (5th Cir. 1978) ("Exhaustion is not required when there is no adequate administrative remedy. A clear showing of irreparable injury may also support an exception. In short only those remedies which provide a real opportunity for adequate relief need be exhausted."), citing Greene v. United States, 376 U.S. 149, 163 (1964); McNeese v. Board of Education, 373 U.S. 668, 674-75 (1963), Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974), and Hodges v. Callaway, 499 F.2d 417, 420 (5th Cir. 1974); see also Wisconsin v. Weinberger, 745 F.2d 412, 426 (7th Cir. 1984) (noting in NEPA case brought under the APA that courts could apply familiar principles of equity to shape remedy for violation). These exceptions under the APA must be narrowly confined to make sure they do not undermine orderly resolution of disputes, but the exceptions appear to apply to this case.

12 [12] Counsel for the FHWA agreed that, at least in theory, the APA would permit an action for injunctive relief on the theory that there has been improper segmentation. Tr. 12-13, 5-6.

With respect to the state defendants, while it is true that NEPA applies only to federal agencies, state and local defendants agree that the U.S. 33 project is a major federal undertaking. The U.S. 33 project must comply with federal law and may not be improperly segmented into separate parcels to avoid the environmental review process. See Scottsdale Mall v. Indiana, 549 F.2d 484 (7th Cir. 1977). The showing of segmentation in this case is sufficient to bring the state and local defendants into the sweep of NEPA. Id.

VI. The Scope of the Preliminary Injunction

The purpose of the court's preliminary injunction is to preserve the status quo while the case is pending, or until the defendants go through the environmental and historic review process for the Third Street project as that review is also conducted for the U.S. 33 project. The fact that work on the Third Street project has already begun requires some practical accommodations. First, it appears that the city and its contractor have not torn up pavement and curbs on Third Street south of Lincoln Street. The court will enjoin such work south of Lincoln Street. North of Lincoln Street, however, Third Street has already been torn up, and this work has interfered with traffic, including the fire department's access to Third Street. The court will enjoin further work designed to widen Third Street north of Lincoln Street, but the court does not intend to prohibit efforts to stabilize the construction site during the winter and/or further litigation. Nor does the court intend to prohibit efforts to make temporary arrangements for traffic on those two blocks of Third Street. To the extent that the parties need further clarification of specific details, the court will address requests for such clarification or modification on an expedited basis.

A preliminary injunction to this effect is being issued today.

So ordered.

JUDGMENT OF THE COURT (Second Chamber)

16 September 2004 *

In Case C-227/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 7 June 2001,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.N. Cunha Rodrigues, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: L. Poiares Maduro,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 February 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2004,

gives the following

Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that in failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations

under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

Legal framework

Community legislation

2 According to the first and sixth recitals in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

3 As is clear from the fifth recital in the preamble, to that end the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

4 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

5 The provisions of Directive 85/337 relevant in this case, in their wording prior to Council Directive 97/11/EC of 3 March 1997 amending that directive (OJ 1997 L 73, p. 5), are as follows.

6 Article 1 of Directive 85/337 reads:

— '1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

— 2. For the purposes of this Directive:

— "project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape ...'.

7 Article 2 of the Directive states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter

alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

...'

8 Article 3 of the Directive provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

9 Article 4 of Directive 85/337, to which the second subparagraph of Article 2(1) thereof refers, states:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

10 Point 7 of Annex I to that directive refers, among other projects, to 'construction of ... lines for long-distance railway traffic'.

11 Point 12 of Annex II to the Directive refers, inter alia, to 'modifications to development projects included in Annex I'.

12 Article 5(1) and (2) of Directive 85/337 state:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.'

13 According to Article 6(2) of the Directive:

'Member States shall ensure that:

— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

— the public concerned is given the opportunity to express an opinion before the project is initiated.'

14 Article 12 of Directive 85/337 provides:

'1. Member States shall take the measures necessary to comply with this Directive within three years of its notification.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

15 The Directive was notified to the Member States on 3 July 1985.

National legislation

16 The Spanish legislation which implements point 7 of Annex I to Directive 85/337 lists, among the projects which must be made subject to an environmental impact assessment procedure, 'long-distance railway lines which involve a new route'.

The pre-litigation procedure

17 Following receipt of a complaint in May 1999 and an exchange of letters between the Commission and the Spanish authorities, the Commission gave the Kingdom of Spain formal notice by letter of 13 April 2000 to submit its observations within two months. It took the view that those authorities had incorrectly implemented Directive 85/337 by not subjecting to a prior environmental impact assessment the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor'.

18 Since it was not satisfied with the explanations provided by the Spanish Government, the Commission sent a reasoned opinion to the Kingdom of Spain on 26 September 2000, requesting that it adopt, within two months from the notification of that opinion, the measures necessary to comply therewith.

19 After the Spanish Government replied to that reasoned opinion by a letter of 2 January 2001 in which it repeated its earlier arguments, the Commission decided to bring the present action.

The application

20 The Commission complains that the Spanish Government failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337 by not carrying out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of

the project known as the 'Mediterranean corridor' linking the Spanish region of Levante to Catalonia and the French border.

Admissibility

21 At the hearing, the Spanish Government challenged the admissibility of the action on the ground that the application was based on a complaint different from that relied on during the pre-litigation procedure.

22 That Government maintains that during the pre-litigation procedure, the subject-matter of the dispute was clearly limited to a 13.2-km-long section of the railway line which separates Las Palmas from the town of Oropesa. At that stage of the proceedings the Commission complained more particularly that the Spanish Government had not complied with the requirements of Directive 85/337 as regards a 7.64-km-long part of that section, where the route was moved a maximum of 800 m to the west in order to bypass the town of Benicasim. The Commission did not, however, in either the letter of formal notice or the reasoned opinion, refer to the doubling of the track on the rest of the section, which is 13.2 km in length; in particular, it at no point stated that the doubling of existing track falls within the scope of the Directive.

23 In its application, the Commission insists that such a doubling of the track of an existing railway line should be held to be subject to the requirements of the Directive. In addition, it refers to the entire length of the Valencia-Tarragona line, which is 251 km.

24 Under those conditions, the subject-matter of the dispute has clearly been expanded.

25 First of all, in this case, the Court notes that the validity of the reasoned opinion and of the procedure which preceded it is not in dispute. Nevertheless, the Spanish Government maintains that the complaint put forward in the application differs from that contained in the letter of formal notice and the reasoned opinion.

26 It is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18).

27 In the present case, however, it cannot be maintained that the subject-matter of the dispute as defined during the pre-litigation procedure has been expanded or modified.

28 First, in response to a question by the Court, the Commission confirmed that the subject-matter of the present action is limited to a 13.2-km-long section between Las Palmas and Oropesa and that, contrary to the Spanish Government's assertion, it in no way extends to the whole of the route of the Valencia-Tarragona line, which is 251 km in length.

29 Secondly, both the letter of formal notice and the reasoned opinion sent by the Commission to the Kingdom of Spain refer, as does the application, to the 'Las Palmas-Oropesa section', which the defendant Government does not deny is 13.2 km in length. Moreover, the defence lodged by the Spanish Government shows unambiguously that it in no way misunderstood the scope of the proceedings, since it itself considers that the project at issue concerns the 13.2 km section which separates the towns of Las Palmas and Oropesa, on which the existing track is doubled and adapted for speeds of up to 220 km/h, a 7.64-km-long section of which constitutes a new route intended to bypass the town of Benicasim.

30 Consequently, the present action is admissible.

Substance

Arguments of the parties

31 In support of its action, the Commission states that it is common ground that the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', was not made subject to the environmental impact assessment procedure laid down in Directive 85/337.

32 According to the Commission, such an assessment was mandatory in the present case, since it involved one of the projects mentioned in point 7 of Annex I to the Directive, to which Article 4(1) thereof refers.

33 The Commission infers from this that Directive 85/337 was incorrectly implemented in respect of the project in question and that the Kingdom of Spain has therefore infringed Articles 2, 3, 5(2) and 6(2) of the Directive.

34 In the opinion of the Commission, none of the reasons relied on by the Spanish Government to justify its method of proceeding in the present case can be accepted.

35 The line of argument put forward by that Government conflicts with the letter of Directive 85/337, and in particular the actual wording of point 7 of Annex I thereto, and is incompatible with the spirit and purpose of that directive.

36 The Spanish Government admits that the project at issue was not formally made subject to the environmental impact assessment procedure laid down by Directive 85/337, but it takes the view that that procedure was not necessary in the present case.

37 That directive was not applicable since the work undertaken merely consisted in improving an already existing railway line by doubling the original single track without constructing a new railway line and with no need for a new long-distance route.

38 That view is supported by the wording of the national legislation transposing point 7 of Annex I to Directive 85/337 into Spanish law, which the Commission at no time claimed was incompatible with the requirements of the Directive. Moreover, as regards the wording of point 7, the English-language version also uses the term 'lines' rather than the term 'tracks'.

39 In addition, the project at issue is not intended for long-distance traffic within the meaning of point 7, since it links two towns which are only 13.2 km distant from one another.

40 Moreover, the doubling of the tracks does not in fact have environmental effects beyond those caused by the construction of the original line and, in any event, the Commission has not furnished evidence of the existence of such effects.

41 The Spanish Government adds, in the alternative, that the requirements of the Directive have in the present case been complied with in substance, since the revision of the general development plan for Benicasim, which took place in 1992, was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration. Since the subject-matter of that revision was precisely the setting aside of an area for construction of the loop line around the town of Benicasim, a new study on the effects of the work undertaken for that purpose was not required.

42 Finally, the competent national authorities acted in good faith in the present case and demonstrated their cooperative spirit by accepting the Commission's position as regards the part of the project where it was still possible to do so, since they submitted 'modification No 3' of that project, which in essence relates to the construction of a 754.5-m-long viaduct, to a public inquiry before completion of the works.

Findings of the Court

43 Given the line of argument of the defendant Government, in order to assess the merits of the Commission's action it is appropriate to establish whether Directive 85/337 and, in particular, the obligation which it lays down to carry out an environmental impact assessment, apply to the project in question and, if so, whether that project was carried out in compliance with the rules set out in that directive.

44 As regards the first point, the argument put forward by the Spanish Government that point 7 of Annex I to the Directive refers only to the construction of a new line in the sense of a new railway connection between two towns and therefore does not apply to a doubling of existing tracks cannot be upheld.

45 While it is not necessary in the context of these proceedings to give a ruling on whether all the language versions of point 7 of Annex I to Directive 85/337 use a

term equivalent to the term 'tracks' ('vias' in the Spanish-language version) or on the compatibility with the Directive of the Spanish legislation adopted to implement that provision inasmuch as it uses the term 'lines' ('líneas'), it is clear from the Court's case-law that the need for a uniform interpretation of Community law requires, in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, inter alia, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28).

46 The Court has already held that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (*Kraaijeveld and Others*, cited above, paragraphs 31 and 39).

47 In particular, Articles 1(1) and 2(1) and the first, fifth, sixth, eighth and 11th recitals in the preamble make clear that the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects (see to that effect Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52).

48 On the basis of those considerations alone, point 7 of Annex I to Directive 85/337 must be understood to include the doubling of an already existing railway track.

49 A project of that kind can have a significant effect on the environment within the meaning of that directive, since it is likely to have lasting effects on, for example, flora and fauna and the composition of soil or even on the landscape and produce significant noise effects, inter alia, so that it must be included in the scope of the Directive. The objective of Directive 85/337 would be seriously undermined if that type of project for the construction of new railway track, even parallel to existing track, could be excluded from the obligation to carry out an assessment of its effects on the environment. Accordingly, a project of that sort cannot be considered a mere modification to an earlier project within the meaning of point 12 of Annex II to the Directive.

50 Moreover, that conclusion is all the more obvious when, as in the present case, the execution of the project at issue involves a new track route, even if that applies only to part of the project. Such a construction project is by its nature likely to have significant effects on the environment within the meaning of Directive 85/337.

51 The argument of the Spanish Government that the conditions for applying point 7 of Annex I to the Directive are not fulfilled, since the project in question does not relate to long-distance traffic within the meaning of that provision but rather only to a 13.2 km section between neighbouring towns, is also without substance.

52 As the Commission rightly maintains, the project in question is part of a 251-km-long railway line between Valencia and Tarragona, which forms part of the project known as the 'Mediterranean corridor', linking the Spanish region of Levante to Catalonia and the French border.

53 If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.

54 In the light of all those considerations, the project which is the subject of the Commission's action, which concerns laying a supplementary 13.2-km-long railway track, a 7.64 km section of which covers a new route in order to bypass the town of Benicasim, and which is part of a 251-km-long railway line, belongs in one of the categories listed in Annex I to Directive 85/337 which must in principle be made subject to a mandatory systematic assessment pursuant to Articles 4(1) and 5(1) of the Directive.

55 As to whether that project was carried out in compliance with the rules set out in Directive 85/337, it should be noted that the Spanish Government admits that the project as such was not made subject to the requirements of the Directive as regards assessment of its effects on the environment. Moreover, that Government does not claim that the conditions laid down in Article 2(3) of the Directive are fulfilled in this case.

56 Next, as regards the Spanish Government's argument that the 1992 revision of the general development plan for Benicasim was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration, it must be pointed out that even if that plan included all the information necessary to fulfil the

minimum conditions set by Directive 85/337 it could not, in any event, be considered adequate since, as the Commission claims without being seriously contradicted on that point by the defendant Government, the plan involves only the territory of the town of Benicasim and, more specifically, the bypass around that town, while the parties agree that the contested project is far broader. It follows that, at least for the remaining part of that project, the Directive's requirements have not been correctly applied.

57 Nor is the Spanish Government's assertion that the competent authorities complied with the requirements of that directive as regards 'modification No 3' of the project justified. First, according to the defendant Government, the information intended for the public was published only after work on the project had begun. Such a method of proceeding is clearly contrary to the requirements of Article 6(2) of Directive 85/337, which states that the public concerned is to be given the opportunity to express an opinion before the project is initiated. The fact, invoked by the Spanish Government, that the public inquiry took place before the work was completed is therefore wholly irrelevant. Secondly, that procedure related to only one part of the section in question, which is 13.2 km in length, namely 'modification No 3', relating essentially to the construction of a viaduct of some 750 m in length.

58 Moreover, the fact that the national authorities acted in good faith is also irrelevant. It is settled case-law that an action for failure to fulfil obligations is objective in nature and the fact that a failure to fulfil obligations results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure (Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19).

59 Finally, as regards the Spanish Government's contention that the Commission failed to provide a proper statement of reasons for the alleged infringement since it did not furnish evidence that the doubling of an existing track has effects on the environment beyond those produced by the construction of the original line, suffice it to point out that the relevant criterion for the implementation of Directive 85/337 is the significant effect that a particular project is 'likely' to have on the environment (see, in that regard, Article 1(1) of the Directive and the fifth and sixth recitals in the preamble thereto). Under those conditions, it is not for the Commission to establish the concrete negative effects that a project in fact has on the environment. On the other hand, the Commission has in the present case proved to the requisite legal standard that the project in question falls within the scope of one of the provisions of Annex I to that directive and must therefore be made subject to a mandatory environmental impact assessment. Moreover, it is indisputable that a project of this type is such as to create significant new nuisances, even if only as the result of the adaptation of the railway line with a view to traffic which can attain a speed of 220 km/h.

60 In the light of all the foregoing considerations, the Commission's application must be considered well-founded.

61 Consequently, it must be held that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment;**

2. **Orders the Kingdom of Spain to pay the costs.**

Signatures.

OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 24 March 2004 [1]

1. This action seeks a declaration that the Kingdom of Spain has failed to fulfil its obligations under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, [2] in not submitting to an environmental impact assessment the 'Valencia-Tarragona railway project, Las Palmas-Oropesa section. Roadbed', forming part of the project known as the 'Mediterranean corridor'.

I — Facts and pre-litigation procedure

2. In May 1999 the Commission of the European Communities received a complaint that the Spanish authorities had misapplied the Directive. The complaint referred to the construction of a 13.2 km railway line crossing the communes of Castellón, Benicassim and Oropesa without a public inquiry being held and without a report on the environmental impact being made. The railway project comprises a new line intended to bypass the commune of Benicassim (7.64 km) and the duplication of the existing tracks between Las Palmas and Oropesa (13.2 km).

3. By letter of 28 October 1999 the Commission requested the Spanish authorities to submit their observations on the complaint.

4. On 13 January 2000 Spain confirmed in a letter that the project had not undergone the procedure for an environmental impact assessment. According to the Spanish authorities, such an assessment was not necessary because the route adopted for the section referred to by the complaint was included in the railway reservation provided for in the 1992 general development plan, which had been the subject of an environmental impact report and had been approved on 17 March 1994 by decision of the Director-General for the Quality of the Environment of the Autonomous Government of Valencia (Spain).

1 — Original language: Portuguese.

2 — OJ 1985 L 175, p. 40 ('the Directive').

5. On 13 April 2000 the Commission sent Spain a letter of formal notice pursuant to Article 226 EC for incorrect application of the Directive, on the ground that a study of the environmental impact of the 'Valencia-Tarragona railway project, Las Palmas-Oropesa section. Roadbed' had not been carried out.

6. In its reply dated 21 June 2000, the Spanish Government observed, first, that the project referred to by the Commission's letter did not entail the construction of a new railway line. It went on to state that the formalities completed for the approval of the general development plan for Benicassim were sufficient. Finally, the Spanish Government indicated that it was prepared to conduct any additional procedure deemed necessary by the Commission.

7. On 26 September 2000 the Commission sent Spain a reasoned opinion requesting it to adopt the measures necessary to fulfil its obligations under the Directive.

8. By letter of 2 January 2001 Spain replied to the reasoned opinion, referring to its previous submissions and stating that a study of the environmental impact of Amendment No 3 to the project in question was to be the subject of a public inquiry. A copy of the notice published in the *Boletín Oficial del Estado* (Spanish Official Journal) of 3 January 2001 by the Directorate-General of Railways announcing a public inquiry concerning the said study was sent to the Commission on 19 January 2001. Amendment No 3 relates mainly to the construction of a viaduct 754.5 m in length.

9. As the Commission was not satisfied with the information provided by Spain, the Commission brought an action before the Court for failure to fulfil obligations.

10. In the course of the written procedure, in reply to the Commission's single complaint that Spain had misapplied the Directive in relation to the 'Valencia-Tarragona railway project, Las Palmas-Oropesa section. Roadbed', Spain repeated its argument that the project did not fall within the ambit of Annex I to the Directive (requiring a mandatory assessment of the impact of the project on the environment). Spain also considers that the formalities which have been carried out ensured in any case that the Directive was applied in full.

11. A hearing took place on 19 February 2004. In particular, the Commission gave details of the scope of its action in reply to a written question sent by the Court on 9 December 2003. The Commission confirmed

that its action related to the whole section between Las Palmas and Oropesa, a total length of 13.2 km.

II — The legal context

12. The object of the Directive is to prevent pollution and other damage to the environment by subjecting certain public and private projects to a preliminary assessment of their effects on the environment. [3] The Directive requires the environmental issues to be taken into account in the decision-making process in relation to numerous projects.

13. The directive in force at the material time was amended by Council Directive 97/11/EC of 3 March 1997. [4] However, the relevant provisions of the Directive, in particular point 7 of Annex I and point 12 of Annex II were not amended by the new text.

14. The Directive distinguishes two classes of projects. The first comprises projects which are likely to have significant effects on the environment and are listed in Annex I to the Directive. For these, the Member States must carry out an assessment of their likely environmental effects before these projects are carried out. [5] For the second class, listed in Annex II to the Directive, the Member States have a discretion to decide whether to carry out a prior assessment of their environmental effects. [6]

15. Therefore classifying a project as falling within class I has important consequences as to the need to carry out a prior assessment of the environmental effects.

16. To give an answer in the present case, it will be necessary first to examine Spain's submissions at the hearing concerning the admissibility of the action and then determine whether the Directive is applicable to the project in question. Finally, if the project falls within the ambit of the Directive, it will be necessary to ascertain whether Spain has correctly applied it in the present case.

3 — Sixth recital of the preamble to the Directive.

4 — OJ 1997 L 73, p. 5.

5 — Article 4(1) of the Directive.

6 — Article 4(2) of the Directive.

III — Assessment

A — *Admissibility of the action*

17. At the hearing Spain objected that the action was inadmissible. It argued that, during the pre-litigation procedure, the Commission had referred only to the new line, 7.64 km in length, intended to bypass the commune of Benicassim, and not the duplication of the tracks over the whole section of 13.2 km between Las Palmas and Oropesa. Therefore Spain considers that the action is inadmissible in so far as it has enlarged the subject-matter of the dispute between the administrative stage and the litigation stage.

18. This argument must be dismissed because the letter of formal notice, the reasoned opinion addressed by the Commission to Spain and also the application to the Court expressly refer to the 'Las Palmas-Oropesa section', which Spain does not dispute is 13.2 km in length. Contrary to Spain's submission, it must therefore be concluded that the subject-matter of the dispute was not changed between the administrative stage and the litigation stage.

B — *Applicability of the Directive to the project in question*

19. It is possible to argue that the Directive applies to the project in question by following two different lines of argument, pursuant either to point 7 of Annex I or point 12 of Annex II to the Directive. The Commission favours the former approach while Spain prefers the latter.

20. Point 7 of Annex I to the Directive refers in particular to 'to the construction of lines for long-distance railway traffic'. Point 12 of Annex II designates 'modifications to development projects included in Annex I'.

21. The Commission considers that the project for the Las Palmas-Oropesa section of the Valencia-Tarragona line should be classified as a railway line within the meaning of point 7 of Annex I to the Directive. Spain, on the contrary, submits that this project is only a modification of an existing project, which as such is subject to point 12 of Annex II because it does not entail the construction of a new line in the sense of a new route between two destinations, but merely the duplication of tracks. According to Spain, point 7 of Annex I refers only to the construction of new railway routes. Spain

also considers that the project in question is not intended for long-distance traffic because it connects two localities which are 13.2 km apart.

1. The definition of line within the meaning of point 7 of Annex I to the Directive

22. To support its argument that point 7 of Annex I to the Directive refers only to new routes, Spain contends that certain language versions of the Directive speak of railway lines, not railway tracks. This language difference must mean that point 7 is to be interpreted as covering only the construction of new railway routes between two destinations which were not previously connected.

23. The Spanish version of point 7 refers to 'vías', the Italian version likewise to 'vie', the Portuguese version to 'vias' and the French version to 'voies'. It seems that only the English version, cited by Spain, might lead to confusion. At the hearing, however, the Commission cited a definition in the *Oxford Dictionary*, which gives the word 'line' the meaning of 'voie' and not a railway route connecting two destinations. Consequently no discrepancy appears to have been established between the different language versions of the Directive.

24. In any case, and according to settled case-law, the need for a uniform interpretation of Community regulations prevents the text of a provision from being considered in isolation, but in cases of doubt requires it to be interpreted and applied in the light of the versions existing in the other languages, all the language versions being equally authentic, in accordance with Article 314 EC. [7] In the event of divergence between them, the provision in question is to be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [8]

25. It follows from the case-law that any difficulty in interpretation due to the language divergence found by Spain concerning point 7 of Annex I to the Directive must be resolved by interpreting that provision in the light of the general scheme and the purpose of the Directive.

7 — Case 19/67 *Van der Vecht* [1967] ECR 345, 354; Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 18; and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 15.

8 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14; Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28; Case C-72/95 *Kraaijeveldand Others* [1996] ECR I-5403, paragraph 28; and Case C-437/97 *EKW and Wein& Co.* [2000] ECR I-1157, paragraph 42.

26. The Directive aims to prevent pollution and other damage to the environment. According to the sixth recital of the preamble and Article 2, the Directive's fundamental objective is that, before consent is given, projects likely to have significant effects on the environment should be subjected to an assessment. [9] More generally, the objective of the Directive is that no project likely to have significant effects on the environment should be exempt from assessment. [10]

27. Therefore, if the interpretation proposed by Spain were accepted, an environmental assessment would be required only for the construction of railway lines entailing a new route. The construction of new tracks or the conversion of tracks for regional use into tracks for long-distance traffic would not be subject to an environmental assessment, even though they could have significant effects on the environment. To interpret the Directive in this way would be contrary to its fundamental objective.

28. Consequently, it seems that point 7 of Annex I to the Directive must be interpreted as including the construction of tracks and not only the construction of new railway routes.

2. Must a new line and duplication of tracks also be classified as the construction of lines within the meaning of the Directive?

29. I shall examine one after the other the questions of the new line and the duplication of tracks.

30. The Commission observes that the project in question entails the construction of a new double railway track suitable for a speed of 200/220 km/h, whereas previously trains travelled at only 90 km/h, and at the same time necessitates a new line in the commune of Benicassim.

31. The Spanish implementing measures (Real Decreto-Legislativo (Royal Legislative Decree) of 28 June 1986 on the assessment of the environmental impact and the regulation implementing this legislative measure, approved by the Real Decreto (Royal Decree) of 30 September 1988), [11] which are said by Spain to conform with the Directive, require an environmental assessment only in the

9 — Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52.

10 — Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 45.

11 — BOE 155, 30 June 1986, p. 23733.

case of 'long-distance railway lines comprising a new route'. According to Spain, this provision requires both a new line and a new route. The condition relating to a new line has been discussed in points 22 to 28 of this Opinion.

32. Although the present action does not seek to establish whether the national legislation generally conforms with the Directive, it is necessary to determine whether Spain's reasoning in this particular case conforms with the Directive. [12]

33. The relevant criterion for ascertaining whether a project must undergo a mandatory assessment for its effect on the environment is whether it may have 'significant effects' on the environment pursuant to Article 2(1) of the Directive. However, the construction of a railway line on a new route is by nature likely to have significant effects on the environment because of the changes in the environment which it entails.

34. Therefore the construction of a new railway line requires a prior compulsory assessment under the Directive.

35. Can the duplication of a railway track likewise be included in the definition of 'construction of lines' or is it rather a 'modification' of a project within the meaning of point 12 of Annex II to the Directive? The Commission and the Spanish authorities have opposing views on this subject.

36. The Commission submits that the duplication of tracks falls within point 7 of Annex I to the Directive for two reasons. First, it finds that the duplication of a track entails the construction of a new track, even though it is parallel to an existing track. Second, a different interpretation of the Directive would be contrary to its objectives because the impact assessment provided by Spain shows that the duplication of tracks on the section concerned was likely to have significant effects on the environment. [13]

12 — It may be observed that a judgment has already been given against Spain for incorrectly implementing the Directive (Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293).

13 — This assessment, which was carried out in 1994 in connection with the adoption of a new development plan (referred to at paragraph 7 of the Commission's reply), identifies the following risks: 'erosion processes and instability of embankments ... loss of arable land, noise pollution ... changes in surface drainage'.

37. The Spanish authorities consider that the project in question is only an improvement of an existing project. Furthermore, the duplication of a railway track would have no effect, or no 'significant' effect, on the environment in addition to those produced by the construction of the original line.

38. As the Commission points out, a literal interpretation of the words 'construction of lines' includes the duplication of existing lines. Moreover, interpretation in the light of the objective and purpose of the Directive leads to the same conclusion.

39. Interpreting point 7 of Annex I to the Directive by reference to the objective and purpose of the Directive means ensuring that projects likely to have significant effects on the environment are made subject to an assessment by the Member States with regard to the effects of those projects. [14]

40. In principle, the possibility cannot be ruled out that the duplication of railway tracks may have significant effects on the environment. The construction of additional tracks may have an environmental impact because there will be changes in the use of the tracks as a result. In this connection it must be observed that the project in question does not consist in the laying of identical tracks, but includes the adaptation of the tracks for high-speed trains. The greater frequency of traffic on the tracks as a result of duplication will also have a significant noise effect: the equivalent noise level will exceed 45 decibels, which is the maximum level recommended by the World Health Organisation for night-time environments. Such a modification in the ultimate use of the tracks therefore entails significant effects on the environment.

41. However, Spain considers that including the duplication of tracks in the definition of 'construction of [railway] lines' would be absurd because, under point 10(d) of Annex II to the Directive, the construction of roads is not subject to a mandatory assessment of the environmental impact.

42. In reality, this interpretation is consistent with the system introduced by the Directive, which distinguishes between projects likely to have significant effects on the environment and other projects. The Directive lays down different rules for the construction of motorways and express roads (mandatory assessment is required by their inclusion in Annex I) and the construction of other roads (included in Annex II). In the same way, only the construction of

14 — See *WWF and Others*, cited above, paragraph 45, and *Linster*, cited above, paragraph 52.

lines for long-distance railway traffic is made subject to a prior mandatory assessment by the Directive.

43. The conversion of a road into a motorway, just like the construction of a motorway where there is no existing road, is a project covered by Annex I to the Directive and, as such, is subject to a prior mandatory assessment. Likewise, the conversion of a railway line used for regional traffic into a line for long-distance traffic will be subject to the conditions of Annex I.

44. Finally, the Spanish authorities submit that, if the Commission really took the view that the duplication of tracks necessitated a prior assessment of the effects on the environment pursuant to point 7 of Annex I to the Directive, the Commission ought to have brought an action for failure to fulfil obligations in relation to the duplication of the entire Valencia-Tarragona line of 251 km.

45. On this point it must be observed that the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. [15] Therefore Spain's argument concerning the scope of the Commission's action for failure to fulfil obligations must be dismissed.

3. 'Long-distance traffic' within the meaning of point 7 of Annex I to the Directive

46. Spain denies that the project in question can be classified as covered under point 7 of Annex I to the Directive because it does not involve long-distance traffic, but a section of 13.2 km connecting two localities which are close to each other.

47. The Commission's response to this argument is that the new track is laid on a railway line 251 km long between Valencia and Tarragona, forming part of the 'Mediterranean corridor' connecting the region of eastern Spain with Catalonia and the French frontier, so that it was not a question of a local line. According to the Commission, the decisive factor is that the section forms part of a new long-distance railway line.

15 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22; Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 38; and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 30.

48. As a railway line 251 km long is constructed in stages, if Spain's reasoning were followed it would mean that a specific project would never be regarded as involving long-distance traffic because the successive sections of the line would all cover small distances and would connect neighbouring places. Adopting this interpretation of the Directive would be likely to restrict its scope considerably and to jeopardise the attainment of its objective.

49. The Commission's reasoning on this point cannot be said to be contradictory, as it merely assesses the conditions for applying point 7 of Annex I to the Directive by ascertaining, first, that the project in question concerns the construction of 'railway lines' and, second, that the lines in question are intended for 'long-distance traffic'. The length of the lines when completed is not a relevant criterion for determining whether the Directive is applicable to the project in question. The classification of the project is determined by the use of the line for long-distance traffic.

50. Consequently, the project in question ought, pursuant to Article 4(1) of the Directive, to have been the subject of an environmental impact assessment in accordance with the requirements of Articles 5 to 10 of the Directive.

C — *Failure in the obligation to carry out an assessment*

51. The Commission contends that Spain did not adhere to the procedure for assessing environmental effects laid down in Articles 5 to 10 of the Directive. More specifically, Spain is said to have failed in its obligations arising from Articles 5(2) and 6(2) of the Directive.

52. Article 5(2) lists the minimum information to be provided by the developer. This includes 'a description of the project comprising information on the site, design and size of the project'.

53. Article 6(2) lays down disclosure requirements relating to the assessment procedure. It provides that 'any request for development consent and any information gathered pursuant to Article 5 are to be made available to the public' and adds that the public concerned are to be given 'the opportunity to express an opinion before the project is initiated'.

54. Spain contends that it fulfilled all the obligations arising from the Directive. First, it asserts that the review of the 1992 general development plan for Benicassim was preceded by an impact assessment which was the subject of a public inquiry and by a report concerning the effects on the environment. According to Spain, this submission is confirmed by the reasoning adopted by the Tribunal Superior de Justicia de la Communidad Valenciana (Spain) on 26 October 1998.[16] Second, Spain pleads its good faith and its acceptance of the Commission's argument concerning Amendment No 3 to the project.

55. Regarding the review of the general development plan for Benicassim, it is clear from the file produced to the Court that the plan lacks details in two respects: it considers the route of the railway only briefly and it does not include the locality of Oropesa, where the construction of the track may also have an impact on the environment.

56. Under Article 5(2) of the Directive, the information provided by the developer must include at least a description of the site, design and size of the project in question.

16 — This judgment confirmed that the environmental procedure which had been followed in accordance with national law was sufficient, without construing the legislation in accordance with the Directive.

57. Therefore, as the general development plan for Benicassim does not meet the minimum conditions laid down by the Directive, I consider that Spain has not fulfilled its obligations arising from the Directive.

58. Regarding Amendment No 3 to the project, it is sufficient to observe that the environmental assessment procedure initiated by Spain took place after the construction work had begun.

59. Although the environmental impact assessment of Amendment No 3 provided by Spain dates from February 1999 for a project authorised on 26 November 1999, the public notice was not published in the *Boletín Oficial del Estado* until 3 January 2001, well after the work began in March 1999.

60. As this procedure does not conform with Article 6(2) of the Directive, which requires the public to be notified before the project is initiated, I think it has been shown that Spain failed to fulfil its obligations under the Directive with regard to the procedure followed for Amendment No 3 to the project.

IV — Conclusion

61. Therefore I propose that the Court:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations arising from Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, by reason of the fact that it did not carry out an environmental impact assessment of the 'Valencia-Tarragona railway project, Las Palmas-Oropesa section. Roadbed';

(2) order the Kingdom of Spain to pay the costs.

JUDGMENT OF THE COURT (Third Chamber)

25 July 2008 (*)

(Directives 85/337/EEC and 97/11/EC – Assessment of the effects of projects on the environment – Refurbishment and improvement works on urban roads – Whether subject to assessment)

In Case C-142/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Contencioso-Administrativo No 22 de Madrid (Spain), made by decision of 23 January 2007, received at the Court on 12 March 2007, in the proceedings

Ecologistas en Acción-CODA

v

Ayuntamiento de Madrid,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2008,

after considering the observations submitted on behalf of:

– Ecologistas en Acción-CODA, by J. Doreste Hernández, abogado,

– the Ayuntamiento de Madrid, by I. Madroñero Peloche, acting as Agent, and A. Sánchez Cordero, abogada,

– the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the Commission of the European Communities, by A. Alcover San Pedro and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the

environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('the amended directive').

2 The reference was made in the course of proceedings between Ecologistas en Acción-CODA ('CODA') and the Ayuntamiento de Madrid (Municipality of Madrid) concerning an administrative act approving various projects forming part of the refurbishment and improvement of virtually the whole of the Madrid urban ring road.

Legal background

Community legislation

3 Directive 85/337 was adopted with the aim of harmonising the principles for the assessment of the environmental effects of certain private and public projects, the main obligations of the developers and the content of the assessment of those effects. Annex I to the directive sets out the projects subject to such an assessment, while Annex II sets out the projects that, in accordance with Article 4(2) of the directive, the Member States could make subject to that assessment where they considered that the characteristics of the projects concerned so required.

4 The amendments that Directive 97/11 made to Directive 85/337 principally concern making projects likely to have effects on the environment subject to a requirement for development consent and an assessment of those effects, and the harmonisation of the criteria that the Member States must use in order to determine whether or not a project falling into one of the categories covered by Annex II must be made subject to such an assessment. Those criteria are henceforth listed in Annex III to the amended directive.

5 Article 1(2) of the amended directive contains the following definitions:

'"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape …

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

6 Article 2(1) of the amended directive provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. …'

7 Article 3 of the amended directive provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

8 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an assessment, subject to the exceptional cases exempted under Article 2(3) of that directive.

9 In accordance with Article 4(2) and (3) of the amended directive, each Member State is to determine, through a case-by-case examination or on the basis of thresholds or criteria which it sets, by taking account of the selection criteria set out in Annex III to the directive, whether the projects referred to in Annex II are to be made subject to an assessment.

10 Point 7 of Annex I to the amended directive mentions, under heading (b), projects for '[c]onstruction of motorways and express roads' and, under heading (c), projects for 'construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length'.

11 Point 7(b) refers, for the definition of 'express roads', to that in the European Agreement on Main International Traffic Arteries of 15 November 1975 ('the agreement').

12 In point 10 of Annex II to the amended directive, entitled 'Infrastructure projects', subheading (b) mentions '[u]rban development projects' and subheading (e) projects for '[c]onstruction of roads … (projects not included in Annex I)'.

13 The first indent of point 13 of Annex II covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

The agreement

14 The agreement was ratified by all the Member States except seven. The Kingdom of Spain did not ratify it.

15 Under Title II thereof, entitled 'Classification of International Roads', Annex II to the agreement contains inter alia the following definitions:

'II.2 Motorways

"Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:

(i) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;

(ii) Does not cross at level with any road, railway or tramway track, or footpath; and

(iii) Is specially sign-posted as a motorway.

II.3 Express roads

An express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 By decision of 17 January 2005, the Concejala del Área de Gobierno de Urbanismo, Vivienda e Infraestructuras del Ayuntamiento de Madrid (Councillor for Planning, Housing and Infrastructure of the Municipality of Madrid) approved various projects for refurbishment and improvement of the Madrid urban ring road, identified under number M-30.

17 Those projects concern specifically the re-routing underground, first, of the M−30 between Marquès de Monistrol and Puente de Segovia, between Puente de Segovia and Puente de San Isidro, between Puente de San Isidro and Puente de Praga and between Puente de Praga and Nudo Sur and, second, of the Avenida de Portugal as far as the San Vicente roundabout. According to CODA's observations, which are not contradicted in that respect, the M−30 is a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks.

18 The projects are part of a complex civil engineering scheme which consists in improving and refurbishing virtually the whole of the Madrid urban ring road. That scheme, also called 'Madrid calle 30', aims, according to the observations of the Ayuntamiento de Madrid, to reduce congestion on the roads and the risk of accidents, and not to increase the traffic capacity on that road.

19 After its administrative appeal against the abovementioned decision of 17 January 2005 had been rejected by decision of 23 May 2005, CODA brought an action before the referring court for annulment of the latter decision. Like the administrative appeal, the action for annulment is based, inter alia, on a plea alleging infringement of the national rules on environmental impact assessment applicable to such projects and which derive in part from the amended directive.

20 It is apparent from the order for reference that the Madrid City Council has split the larger 'Madrid calle 30' project into 15 independent sub-projects, treated separately, only one of which concerns alteration or rehabilitation work on any existing road on a section exceeding five kilometres, the threshold at which the regional rules applicable make a project subject to an environmental impact assessment, while the larger project taken as a whole substantially exceeds that threshold. It is also clear from the referring court's explanations that, according to certain estimates, the execution of the overall scheme will lead to an increase in traffic of nearly 25% and will involve different kinds of works in the urban area surrounding the M−30.

21 Having regard to the scale and the implications of the scheme, the referring court wonders whether, in accordance with the amended directive, it should not be made subject to an environmental impact assessment.

22 Before the referring court, the Ayuntamiento de Madrid, while asserting that it had never had the intention of preventing the application of the amended directive, pointed out that the dispute arose from an interpretation common to all the national authorities which have reviewed the legality of the relevant projects. It also submitted that to extend, in this case, the judgment in Case C−332/04 *Commission* v *Spain* of 16 March 2006 to situations other than that at issue in the case which gave rise to that judgment would require detailed reasoning by the Court of Justice.

23 The referring court also set out the observations submitted by the Communidad autónoma de Madrid (Autonomous Community of Madrid), according to which there is confusion between preliminary ruling proceedings and actions for failure to fulfil obligations, because the hearing mainly concerned possible infringements of Community law.

24 In those circumstances the national court decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to urban road projects, having regard to their nature, size and effect on densely populated areas or on landscapes of historical, cultural or archaeological significance?

(2) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to the projects which form the subject-matter of these administrative appeal proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, density of population, budget and the possible splitting up of a larger project which contemplates similar works on the same road?

(3) Are the criteria set out in [*Commission* v *Spain*, paragraphs 69 to 88] applicable to the projects which are the subject-matter of these proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, budget and the possible splitting up of a larger project which contemplates similar works on the same road, such that there was a requirement to submit them to the prescribed environmental impact assessment procedure?

(4) Do the relevant administrative records and, specifically, the studies and reports contained therein, demonstrate that the Spanish authorities have, in practice, complied with the obligations arising from [the amended directive] relating to the environmental assessment of the projects which are the subject-matter of these proceedings, even if the project was not formally made subject to the prescribed environmental assessment procedure set out in the directive?’

The questions referred for a preliminary ruling

The first three questions

25 By the first three questions, which it is appropriate to examine together, the referring court asks essentially whether the amended directive must be interpreted as meaning that projects for the refurbishment and improvement of virtually the whole of an urban ring road must be made subject to an environmental impact assessment taking account, inter alia, of the nature of those projects, the type of road in question, the characteristics and size of the projects, their effect on densely populated areas or landscapes having a historical, cultural or archaeological significance, and the fact that they are the result of the splitting up of a larger project concerning the execution of a series of similar works on the same road.

26 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an environmental impact assessment. According to Article 4(2), the Member States are to determine, by taking account of the conditions set out in that provision, which projects listed in Annex II to the directive must be made subject to such an assessment.

27 According to the Ayuntamiento de Madrid, the ring road concerned in the main proceedings is an urban road. The amended directive does not refer to that type of road in Annexes I and II, which mention only motorways, express roads and roads. Furthermore, those terms are not defined, except, with respect to the notion of express road, by reference to the definition given by the agreement. According to the defendant in the main proceedings, in the absence of clarification as to those terms, the Spanish law transposing the amended directive repeated its exact words. Since urban roads are not mentioned there, it was entitled to take the view that projects for the alteration of such a road

were not covered by the amended directive and, consequently, did not have to be made subject to an environmental impact assessment.

28 That argument cannot be accepted. The Court has stated on numerous occasions that the scope of Directive 85/337 and that of the amended directive is very wide (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40; and Case C-2/07 *Abraham and Others* [2008] ECR I-0000, paragraph 32). It would, therefore, be contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road.

29 Point 7(b) and (c) of Annex I to the amended directive mentions among the projects which must be made subject to an environmental impact assessment 'motorways', 'express roads' and '[c]onstruction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length'. As to Annex II, it mentions in point 10(e) and the first indent of point 13 respectively '[c]onstruction of roads' and '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment' among the projects for which the Member States may require an environmental impact assessment to be carried out in accordance with Article 4(2) of that directive. In that regard it must be stated, first, as the Commission of the European Communities rightly submits, that the concepts in those annexes are Community law concepts which must be interpreted independently and, second, that it is conceivable that the types of road which are mentioned therein are sited both in and outside built-up areas.

30 The amended directive does not define the concepts mentioned above with the exception of 'express roads', for which it refers to the agreement thereby including the definition of 'express road' contained therein. Since not all the Member States are parties to that agreement, this reference concerns the version of the agreement in force when Directive 85/337 was adopted, that is the agreement of 15 November 1975

31 According to Annex II to the agreement, an express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which stopping and parking are prohibited on the running carriageway(s). It does not follow from that definition that roads sited in urban areas would a priori be excluded. On the contrary, unless roads in built-up areas are expressly excluded, the words 'express roads' cover urban roads which have the characteristics set out in that annex.

32 The same agreement defines the concept of 'motorway' as inter alia a road specially designed and built for motor traffic, which does not serve properties bordering on it, does not cross at level with any road, railway or tramway track, or footpath, and is specially sign-posted as a motorway. Even though the amended directive does not make express reference to that definition, the agreement may be a useful tool for understanding the similar concept in Annex I to the directive.

33 It follows from case-law which is now well established that the Member States must implement the amended directive, in the same way as Directive 85/337, in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I−11025, paragraph 36).

34 Accordingly, urban road projects must be regarded as falling within the scope of the amended directive.

35 As is clear from CODA's observations, which are not contradicted in that respect, the projects at issue in the main proceedings concern a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks. It is for the referring court to make the findings of fact from which it may verify those aspects in order to determine, taking account of the guidance set out in paragraphs 30 to 33 of this judgment, whether those projects are covered by one of the concepts in Annex I to the amended directive and must therefore be made subject to an environmental impact assessment.

36 For that purpose, the fact that point 7(b) and (c) of Annex I to the amended directive refers to projects for the 'construction' of the types of road mentioned, whereas the case in the main proceedings concerns projects for refurbishment and improvement of an existing road, does not mean that the latter are excluded from the scope of the amended directive. A project for refurbishment of a road which would be equivalent, by its size and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of that annex (see, to that effect, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 46, and *Abraham and Others*, paragraph 32).

37 If it appeared that the projects at issue in the main proceedings do not concern motorways or express roads within the meaning of point 7(b) of Annex I to the amended directive or projects referred to in point 7(c) thereof, the referring court would still be required to examine whether the projects at issue in the main proceedings are covered by Annex II to the amended directive, either under point 10(e), inasmuch as they concern construction of a road, or under the first indent of point 13 read together with point 10(e) of Annex II, in so far as they concern a change to a road construction project.

38 In that respect, it must be recalled that if, like Article 4(2) of Directive 85/337, the same provision of the amended directive confers on Member States a measure of discretion in order to determine whether a project falling in the categories listed in Annex II thereto must be made subject to an environmental impact assessment, the limits of that discretion are to be found in the obligation set out in Article 2(1) of the amended directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see, regarding Directive 85/337, *Kraaijeveld and Others*, paragraph 50, and *Abraham and Others*, paragraph 37). In applying their discretion, the Member States must take account of each of those criteria in order to determine whether projects are likely to have an effect on the environment (Case C-332/04 *Commission* v *Spain*, paragraph 77).

39 In that regard, in the same way as Directive 85/337, the amended directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works (see, as regards Directive 85/337, *Abraham and Others*, paragraphs 42 and 43).

40 As far as concerns the location of projects, point 2(g) and (h) of Annex III to the amended directive mentions densely populated areas and landscapes of historical, cultural or archaeological significance as selection criteria which the Member States must take into account, in accordance with Article 4(3) of the directive, for the case-by-case examination or the setting of the thresholds or criteria provided for in Article 4(2), in order to determine whether a project must be made subject to an assessment. Those selection criteria may also concern urban road projects (see, to that effect, Case C-332/04 *Commission* v *Spain*, paragraph 79).

41 However, the fact relied on by the Ayuntamiento de Madrid that the projects at issue in the main proceedings should have beneficial effects on the environment is not relevant in determining whether it is necessary to make those projects subject to an assessment of their environmental

42 Moreover, like that in Article 3 of Directive 85/337, the list in Article 3 of the amended directive of the factors to be taken into consideration, such as the effects of a project on, inter alia, human beings, fauna and flora, soil, water, air or cultural heritage, shows, in itself, that the environmental impact whose assessment the amended directive is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out (see, to that effect, *Abraham and Others*, paragraph 44).

43 As the Advocate General rightly stated, in point 28 of her Opinion, projects concerning roads may have many environmental effects both within and outside urban areas, since those areas are particularly sensitive because of population density, existing pollution, but also given the presence of any places of historical, cultural or archaeological importance (see, to that effect, Case C−332/04 *Commission* v *Spain*, paragraph 81).

44 Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 *Commission* v *Ireland* [1999] ECR I−5901, paragraph 76, and *Abraham and Others*, paragraph 27).

45 As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project 'Madrid calle 30'. It is for the referring court to verify whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.

46 Therefore, the answer to the first three questions must be that the amended directive must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.

The fourth question

47 By its fourth question, the referring court asks essentially whether the studies undertaken and reports compiled on the projects at issue in the main proceedings satisfy the requirement of an environmental impact assessment as prescribed by the amended directive.

48 Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered only to rule on the interpretation or validity of Community provisions on the basis of the facts which the national court puts before it (see, in particular, Case C-235/95 *Dumon and Froment* [1998] ECR I−4531, paragraph 25, and Case C-467/04 *Gasparini and Others* [2006] ECR I−9199, paragraph 41).

49 This question invites the Court to express a view on certain factual elements on which the dispute in the main proceedings is based, that is to determine whether the inquiries, hearings and analyses carried out by the national authorities constitute, with respect to the projects concerned, an environmental impact assessment within the meaning of the amended directive.

50 It is for the national court to undertake such an examination, in the knowledge that a formal

assessment may be replaced by equivalent measures where they satisfy the minimum requirements set out in Article 3 and Articles 5 to 10 of the amended directive.

51 Therefore there is no need to answer the fourth question.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.

[Signatures]

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* Language of the case: Spanish.

MiningWatch Canada *Appellant*

v.

Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada *Respondents*

- and -

MiningWatch Canada *Appellant*

v.

Red Chris Development Company Ltd. and BCMetals Corporation *Respondents*

and

Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Canadian Environmental Law Association, West Coast Environmental Law Association, Sierra Club of Canada, Quebec Environmental Law Centre, Friends of the Earth Canada and Interamerican Association for Environmental Defense *Interveners*

Mines Alerte Canada *Appelante*

c.

Ministre des Pêches et des Océans, ministre des Ressources naturelles et procureur général du Canada *Intimés*

- et -

Mines Alerte Canada *Appelante*

c.

Red Chris Development Company Ltd. et BCMetals Corporation *Intimées*

et

Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Association canadienne du droit de l'environnement, West Coast Environmental Law Association, Sierra Club du Canada, Centre québécois du droit de l'environnement, Les Amis de la Terre Canada et Interamerican Association for Environmental Defense *Intervenants*

Indexed as: MiningWatch Canada *v.* Canada (Fisheries and Oceans)

2010 SCC 2

File No.: 32797.

2009: October 16; 2010: January 21.

Present: Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Environmental law — Federal environmental assessment process — Comprehensive study — Scope of project — Project as proposed by mining company requiring comprehensive environmental study — Responsible authority excluding certain aspects from scope of

Répertorié : Mines Alerte Canada *c.* Canada (Pêches et Océans)

2010 CSC 2

N^o^ du greffe : 32797.

2009 : 16 octobre; 2010 : 21 janvier.

Présents : Les juges Binnie, LeBel, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit de l'environnement — Processus fédéral d'évaluation environnementale — Étude approfondie — Portée du projet — Projet tel que proposé par une société minière nécessitant une étude environnementale approfondie — Décision de l'autorité responsable

project — Comprehensive study no longer necessary and assessment proceeding by way of screening — Whether environmental assessment should have proceeded by way of screening or comprehensive study — Whether federal environmental assessment track is determined by project as proposed by proponent or by discretionary scoping decision of responsible authority — Meaning of the word "project" — Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 15, 21.

Administrative law — Judicial review — Remedy — Federal environmental assessment process — Project as proposed by mining company requiring comprehensive environmental study — Responsible authority excluding certain aspects from scope of project — Comprehensive study no longer necessary and assessment proceeding by way of screening — Public interest litigant filing application for judicial review — Substantive decisions made by responsible authority not challenged — Judicial review brought as test case to determine federal government's obligations under s. 21 of Canadian Environmental Assessment Act — Federal Court setting aside decision to proceed by way of screening, quashing decision to issue permits and approvals to proceed with the project and prohibiting issuance of such permits and approvals until completion of comprehensive study — Whether Federal Court granted broader relief than was appropriate — Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(3).

In order to develop a copper and gold open pit mining and milling operation in British Columbia, a mining company submitted a project description to the BC Environmental Assessment Office. Public comment was sought and the Office subsequently determined that the project was not likely to cause significant adverse, environmental, heritage, social, economic or health effects and issued a provincial environmental assessment certificate. The company also submitted to the federal Department of Fisheries and Oceans applications for dams required to create a tailings impoundment area. Initially, the Department stated that a comprehensive study was required because the project fell within the provisions of the *Comprehensive Study List Regulations* ("CSL") promulgated under the *Canadian Environmental Assessment Act* ("CEAA"). It subsequently scoped the project as to exclude the mine

d'exclure certains aspects de la portée du projet — Étude approfondie plus nécessaire et évaluation par examen préalable — L'évaluation environnementale aurait-elle dû s'effectuer sous forme d'examen préalable ou sous forme d'étude approfondie? — La voie à suivre pour l'évaluation environnementale fédérale est-elle déterminée en fonction du projet tel qu'il est proposé par le promoteur ou en fonction de la décision que prend l'autorité responsable en vertu de son pouvoir discrétionnaire de définir la portée du projet? — Sens du mot « projet » — Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 15, 21.

Droit administratif — Contrôle judiciaire — Réparation — Processus fédéral d'évaluation environnementale — Projet tel que proposé par une société minière nécessitant une étude environnementale approfondie — Décision de l'autorité responsable d'exclure certains aspects de la portée du projet — Étude approfondie plus nécessaire et évaluation par examen préalable — Demande de contrôle judiciaire déposée par une partie représentant l'intérêt public — Décisions de fond prises par l'autorité responsable incontestée — Demande de contrôle judiciaire présentée à titre de cause type à l'égard des obligations incombant au gouvernement fédéral selon l'art. 21 de la Loi canadienne sur l'évaluation environnementale — Cour fédérale infirmant la décision de procéder par examen préalable, annulant la décision de délivrer les permis et d'octroyer les approbations ou autorisations pour la mise en œuvre du projet et interdisant la délivrance de ces permis et l'octroi de ces approbations ou autorisations jusqu'à la réalisation d'une étude approfondie — La Cour fédérale a-t-elle accordé une réparation plus large que nécessaire? — Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 18.1(3).

Pour établir une exploitation d'extraction minière à ciel ouvert et une usine de concentration en vue de la production de cuivre et d'or en Colombie-Britannique, une société minière a soumis une description de projet au BC Environmental Assessment Office (le « Bureau »). On a demandé au public de faire part de ses observations; par la suite, le Bureau a conclu que le projet n'était pas susceptible d'avoir des effets négatifs importants sur le plan environnemental, patrimonial, social, économique ou sanitaire et a délivré le certificat d'évaluation environnementale provinciale. La société minière a aussi présenté au ministère fédéral des Pêches et des Océans des demandes concernant la construction de bassins servant au dépôt de résidus miniers. Au départ, le ministère a conclu qu'une étude approfondie devait être menée parce que le projet était visé par le *Règlement sur la liste d'étude approfondie*

and mill and, given this, concluded that a comprehensive study was no longer necessary and that the assessment would proceed by way of screening. Additional public comment was not sought and the screening instead relied on information collected through the cooperative federal/provincial environmental assessment process. The federal screening report concluded that the project was not likely to cause significant adverse environmental effects and the responsible authority made the decision to allow the project to proceed. MiningWatch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study. The Federal Court allowed the application, concluding that the responsible authority had breached its duty under the CEAA by scoping the environmental assessment so that it only required a screening. The court quashed the decision to issue permits and approvals and prohibited further action by the responsible authority until it had conducted public consultation and completed a comprehensive study pursuant to s. 21 of the CEAA. The Federal Court of Appeal set aside the decision.

Held: The appeal should be allowed.

The CEAA and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a responsible authority to change that level. An interpretation which provides that the word "project" in s. 21 of the CEAA means "project as proposed" by the proponent, rather than "project as scoped" by the responsible authority, is consistent with the statutory definition of that word in s. 2 of the CEAA, the language of the relevant regulations, and with Parliament's intent as found in the respective roles of the responsible authority and the Minister in conducting environmental assessments under the CEAA. Where, as here, a project as proposed is listed in the CSL, the requirements in s. 21 are mandatory.

Tracking and scoping are distinct steps in the CEAA process. While the responsible authority does not have the discretion to determine the assessment track, once the appropriate track is determined, it has the discretion to determine the scope of the project for the purposes of assessment under s. 15(1)(*a*) of the CEAA. In the event that the project is referred to a mediator or a

(« LEA »), pris sous le régime de la *Loi canadienne sur l'évaluation environnementale* (« LCEE »). Par la suite, il a défini la portée du projet de manière à exclure la mine et l'usine de concentration et, de ce fait, a conclu qu'une étude approfondie n'était plus nécessaire et que l'évaluation se ferait plutôt par examen préalable. On n'a pas sollicité d'autres observations du public; l'examen préalable reposait plutôt sur des renseignements recueillis dans le cadre du processus fédéral-provincial d'évaluation environnementale coopérative. Le rapport d'examen préalable fédéral a conclu que le projet n'était pas susceptible d'entraîner des effets environnementaux négatifs importants, et l'autorité responsable a décidé d'autoriser la mise en œuvre du projet. Mines Alerte a déposé une demande de contrôle judiciaire de la décision d'effectuer un examen préalable au lieu d'une étude approfondie. La Cour fédérale a accueilli la demande, concluant que l'autorité responsable avait manqué à l'obligation imposée par la LCEE en limitant la portée de l'évaluation environnementale aux aspects du projet qui nécessitaient seulement un examen préalable. La cour a annulé la décision de délivrer les permis et d'accorder les approbations ou autorisations, et a interdit à l'autorité responsable de prendre toute autre mesure jusqu'à ce qu'elle ait tenu une consultation publique et effectué une étude approfondie conformément à l'art. 21 de la LCEE. La Cour d'appel fédérale a infirmé la décision.

Arrêt : Le pourvoi est accueilli.

La LCEE et son règlement exigent que la voie à suivre en matière d'évaluation environnementale soit déterminée selon le projet tel qu'il est proposé; en général, il n'appartient pas à l'autorité responsable de modifier ce niveau d'évaluation. L'interprétation selon laquelle le mot « projet » à l'art. 21 de la LCEE signifie « projet tel qu'il est proposé » par le promoteur, et non « projet dont la portée a été définie » par l'autorité responsable, est compatible avec la définition législative de ce terme à l'art. 2 de la LCEE, le texte du règlement pertinent et l'intention du législateur qui se dégage des fonctions respectives de l'autorité responsable et du ministre lors des évaluations environnementales effectuées en application de la LCEE. Si le projet tel qu'il est proposé est visé dans la LEA, comme c'est le cas en l'espèce, les exigences de l'art. 21 doivent être respectées.

Déterminer la voie à suivre et définir la portée constituent deux étapes distinctes dans le processus prévu par la LCEE. Certes, l'autorité responsable n'a pas le pouvoir discrétionnaire de déterminer la voie à suivre pour l'évaluation. Cependant, une fois cette voie déterminée, elle a le pouvoir discrétionnaire de définir la portée du projet pour l'évaluation en vertu du par. 15(1)

review panel under s. 21.1(1)(*b*), the scope of the project is determined by the Minister after consulting with the responsible authority pursuant to s. 15(1)(*b*). The presumed scope of the project to be assessed is the project as proposed by the proponent, but, as an exception to this general proposition, the responsible authority or Minister may enlarge the scope in the circumstances set out in s. 15(2) or (3). The responsible authority or Minister cannot reduce the scope of the project to less than what is proposed by the proponent. For a project subject to a comprehensive study, the responsible authority can, and should, minimize duplication by using the coordination mechanisms provided for in the CEAA. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments.

In the present case, the federal environmental assessment should have been conducted for the project as proposed by the proponent. Since the proposed project was described in the CSL, the requirements of s. 21 applied. The responsible authority was free to use any and all federal-provincial coordination tools available, but it was still required to comply with the provisions of the CEAA pertaining to comprehensive studies. By conducting a screening, the responsible authority acted without statutory authority.

In exercising his discretion to grant the relief he did, the trial judge did not take account of a number of relevant and significant considerations and granted broader relief than was appropriate. MiningWatch has no proprietary or pecuniary interest in the outcome of the proceedings and did not participate in the environmental assessment conducted by the provincial authority. No evidence of dissatisfaction with the environmental assessments conducted by the BC Environmental Assessment Office or the responsible authority and no evidence of dissatisfaction with the assessment process from anyone else was brought forward. MiningWatch has brought this judicial review as a test case of the federal government's obligations under s. 21. They made a strategic decision not to challenge the substantive scoping decision. When all the relevant considerations are taken into account, the appropriate relief is to allow the application for judicial review and declare that the responsible authority erred in failing to conduct a comprehensive study. No further relief is warranted. The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond and there is no justification in requiring the proponent of the project to repeat the environmental

de la LCEE. Si le projet est renvoyé à la médiation ou à l'examen par une commission conformément à l'al. 21.1(1)*b*), le ministre en détermine la portée après consultation de l'autorité responsable conformément au par. 15(1). La portée présumée du projet à évaluer est la portée du projet tel qu'il est proposé par le promoteur, mais, comme exception à cette thèse générale, l'autorité responsable ou le ministre peut l'élargir dans les circonstances prévues aux par. 15(2) et (3). L'autorité responsable ou le ministre ne peut réduire la portée du projet au point que celle-ci devient plus restreinte que la portée proposée par le promoteur. Dans le cas d'un projet à l'égard duquel une étude approfondie doit être effectuée, l'autorité responsable peut et doit minimiser le double emploi en recourant aux mécanismes de coordination prévus par la LCEE. En particulier, les gouvernements fédéral et provincial peuvent adopter des modalités acceptables pour les deux parties pour coordonner les évaluations environnementales.

En l'espèce, le projet tel qu'il est proposé par le promoteur aurait dû faire l'objet d'une évaluation environnementale fédérale. Comme il est visé dans la LEA, les exigences de l'art. 21 s'appliquent. L'autorité responsable est libre d'utiliser tous les mécanismes de coordination fédéraux-provinciaux dont elle dispose, mais elle doit respecter les dispositions de la LCEE concernant les études approfondies. En effectuant un examen préalable, l'autorité responsable a outrepassé les pouvoirs qui lui sont reconnus par la loi.

Lorsqu'il a exercé son pouvoir discrétionnaire en matière de réparation, le juge de première instance n'a pas tenu compte de plusieurs éléments pertinents et importants et a accordé une réparation plus large que nécessaire. Mines Alerte n'a aucun intérêt propriétal ou pécuniaire dans l'issue de l'instance et n'a pas participé à l'évaluation environnementale réalisée par l'autorité provinciale. Elle n'a produit aucun élément de preuve établissant son insatisfaction à l'égard des évaluations environnementales effectuées par le Bureau ou l'autorité responsable, et personne d'autre n'a présenté la preuve de son insatisfaction à l'égard du processus d'évaluation. Mines Alerte a déposé cette demande de contrôle judiciaire à titre de cause type à l'égard des obligations qui incombent au gouvernement fédéral selon l'art. 21. Elle a pris la décision stratégique de ne pas contester la décision de fond concernant la détermination de la portée du projet. Compte tenu de tous les éléments pertinents, la réparation appropriée est d'accueillir la demande de contrôle judiciaire et de déclarer que l'autorité responsable a fait erreur en ne procédant pas à une étude approfondie. Il n'y a pas lieu d'accorder d'autre réparation. L'intérêt central de Mines Alerte, en tant que partie représentant l'intérêt public, est la

assessment process when there was no challenge to the substantive decisions made by the responsible authority.

Cases Cited

Referred to: *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, aff'g 2004 FC 1265, 257 F.T.R. 212; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

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Comprehensive Study List Regulations, SOR/94-638, Preamble, s. 3, Sch., s. 16.

Exclusion List Regulations, 2007, SOR/2007-108, s. 2, Sch. 1, s. 1.

Explosives Act, R.S.C. 1985, c. E-17.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(3).

Interpretation Act, R.S.C. 1985, c. I-21, s. 15(2).

Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements, SOR/97-181.

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question de droit à laquelle répondra le jugement déclaratoire. Rien ne justifie que l'on exige du promoteur du projet qu'il recommence le processus d'évaluation environnementale alors que les décisions de fond prises par l'autorité responsable n'ont fait l'objet d'aucune contestation.

Jurisprudence

Arrêts mentionnés : *Friends of the West Country Assn. c. Canada (Ministre des Pêches et Océans)*, [2000] 2 C.F. 263; *Prairie Acid Rain Coalition c. Canada (Ministre des Pêches et des Océans)*, 2006 CAF 31, [2006] 3 R.C.F. 610, conf. 2004 CF 1265, [2004] A.C.F. nº 1518 (QL); *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Schreiber c. Canada (Procureur général)*, 2002 CSC 62, [2002] 3 R.C.S. 269; *Thomson c. Canada (Sous-ministre de l'Agriculture)*, [1992] 1 R.C.S. 385; *R. c. Campbell*, [1999] 1 R.C.S. 565; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Reza c. Canada*, [1994] 2 R.C.S. 394; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339.

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APPEAL from a judgment of the Federal Court of Appeal (Desjardins, Sexton and Evans JJ.A.), 2008 FCA 209, [2009] 2 F.C.R. 21, 379 N.R. 133, 36 C.E.L.R. (3d) 159, [2008] F.C.J. No. 945 (QL), 2008 CarswellNat 1699, setting aside a decision of Martineau J., 2007 FC 955, [2008] 3 F.C.R. 84, 33 C.E.L.R. (3d) 1, 318 F.T.R. 160, [2007] F.C.J. No. 1249 (QL), 2007 CarswellNat 3169. Appeal allowed.

Gregory J. McDade, *Q.C.*, and *Lara Tessaro*, for the appellant.

Kirk Lambrecht, *Q.C.*, and *Michele E. Annich*, for the respondents the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Attorney General of Canada.

Brad Armstrong, *Q.C.*, *Diana Valiela* and *Heather M. Cane*, for the respondents the Red Chris Development Company Ltd. and the BCMetals Corporation.

Gary A. Letcher and *Laura M. Gill*, for the interveners the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia.

Richard D. Lindgren and *Kaitlyn Mitchell*, for the interveners the Canadian Environmental Law Association, the West Coast Environmental Law Association, the Sierra Club of Canada, the Quebec Environmental Law Centre, Friends of the Earth Canada and the Interamerican Association for Environmental Defense.

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POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Desjardins, Sexton et Evans), 2008 CAF 209, [2009] 2 R.C.F. 21, 379 N.R. 133, 36 C.E.L.R. (3d) 159, [2008] A.C.F. no 945 (QL), 2008 CarswellNat 3030, qui a infirmé une décision du juge Martineau, 2007 CF 955, [2008] 3 R.C.F. 84, 33 C.E.L.R. (3d) 1, 318 F.T.R. 160, [2007] A.C.F. no 1249 (QL), 2007 CarswellNat 4635. Pourvoi accueilli.

Gregory J. McDade, *c.r.*, et *Lara Tessaro*, pour l'appelante.

Kirk Lambrecht, *c.r.*, et *Michele E. Annich*, pour les intimés le ministre des Pêches et des Océans, le ministre des Ressources naturelles et le procureur général du Canada.

Brad Armstrong, *c.r.*, *Diana Valiela* et *Heather M. Cane*, pour les intimées Red Chris Development Company Ltd. et BCMetals Corporation.

Gary A. Letcher et *Laura M. Gill*, pour les intervenantes Mining Association of British Columbia et Association for Mineral Exploration British Columbia.

Richard D. Lindgren et *Kaitlyn Mitchell*, pour les intervenants l'Association canadienne du droit de l'environnement, West Coast Environmental Law Association, le Sierra Club du Canada, le Centre québécois du droit de l'environnement, Les Amis de la Terre Canada et Interamerican Association for Environmental Defense.

The judgment of the Court was delivered by

ROTHSTEIN J. —

1. Introduction

[1] The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA" or "Act"), is a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed. The Act and its regulations provide for different levels of intensity with which environmental assessments are to be performed depending upon the nature of the project under scrutiny. In practice, the intensity with which an environmental assessment should be conducted determines the "track" on which the assessment proceeds, whether by screening, comprehensive study, mediation or review panel.

[2] The issue in this appeal is whether the environmental assessment track is determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority. In my opinion, the Act and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a federal authority to change that level.

2. Facts

[3] Red Chris Development Company Ltd. and BCMetals Corporation ("Red Chris") seek to develop a copper and gold open pit mining and milling operation in northwestern British Columbia. The appellant (MiningWatch) is a non-profit society interested in the environmental, social, economic, health and cultural effects of mining and in particular its effects on indigenous people.

A. *The Provincial Assessment Process*

[4] On October 27, 2003, Red Chris submitted a project description to the BC Environmental

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

1. Introduction

[1] La *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37 (« LCEE » ou « Loi »), constitue un ensemble détaillé de procédures auxquelles les autorités fédérales doivent se conformer avant que des projets susceptibles d'entraîner des effets environnementaux négatifs puissent être mis en œuvre. La Loi et ses règlements d'application prévoient différents niveaux d'évaluation environnementale, selon la nature du projet visé. En pratique, le niveau d'évaluation environnementale requis détermine la voie à suivre : examen préalable, étude approfondie, médiation ou examen par une commission.

[2] Il s'agit de décider en l'espèce si la voie à suivre en matière d'évaluation environnementale est déterminée en fonction du projet tel qu'il est proposé par le promoteur ou en fonction de la décision que prend une autorité fédérale en vertu de son pouvoir discrétionnaire de définir la portée du projet. À mon avis, la Loi et ses règlements exigent que la voie à suivre soit déterminée selon le projet tel qu'il est proposé; en général, il n'appartient pas à une autorité fédérale de modifier ce niveau d'évaluation.

2. Les faits

[3] Red Chris Development Company Ltd. et BCMetals Corporation (« Red Chris ») souhaitent établir une exploitation d'extraction minière à ciel ouvert et une usine de concentration en vue de la production de cuivre et d'or dans le nord-ouest de la Colombie-Britannique. L'appelante (Mines Alerte) est une société à but non lucratif qui s'intéresse aux effets de l'exploitation minière sur les plans environnemental, social, économique, sanitaire et culturel, en particulier à ses effets sur les peuples autochtones.

A. *Processus provincial d'évaluation*

[4] Le 27 octobre 2003, Red Chris a soumis une description de projet au British Columbia

Assessment Office ("BCEAO"). The BCEAO issued an order stating that the project would require an environmental assessment certificate before proceeding. The BC assessment proceeded smoothly. Red Chris prepared terms of reference covering all aspects of the project and made them available for comment by a working group (which included provincial and federal agencies, and the local First Nations groups). Red Chris also sought public comment on the project through several open house meetings. Once Red Chris submitted its application, the BCEAO posted the application online for public comment. Members of the public submitted several comments in response to the proponent's application. On July 22, 2005, the BCEAO released its environmental assessment, concluding that the project "is not likely to cause significant adverse environmental, heritage, social, economic, or health effects". On August 24, 2005, the province issued an assessment certificate.

Environmental Assessment Office (« BCEAO »). Le BCEAO a ensuite délivré une ordonnance déclarant qu'il faudrait obtenir un certificat d'évaluation environnementale avant la mise en œuvre du projet. L'évaluation environnementale effectuée en Colombie-Britannique s'est bien déroulée. Red Chris a établi un cadre de référence couvrant tous les aspects du projet et l'a mis à la disposition d'un groupe de travail pour que ses membres (notamment des organismes provinciaux et fédéraux ainsi que des groupes des Premières nations) puissent présenter leurs observations. Red Chris a également tenu des consultations publiques sous forme de séances portes ouvertes au sujet du projet. Après que Red Chris a présenté sa demande, le BCEAO l'a mise en ligne pour obtenir des commentaires du public. Des membres du public ont fait plusieurs observations en réponse à la demande du promoteur. Le 22 juillet 2005, le BCEAO a rendu public son rapport d'évaluation environnementale, concluant que le projet [TRADUCTION] « n'était pas susceptible d'avoir des effets négatifs importants sur le plan environnemental, patrimonial, social, économique ou sanitaire ». Le 24 août 2005, la province a délivré le certificat d'évaluation environnementale.

B. *The Federal Assessment Process*

[5] On or about May 3, 2004, Red Chris triggered the federal environmental assessment process under ss. 5(1)(*d*) and 5(2) of the CEAA by submitting to the Department of Fisheries and Oceans ("DFO") applications for dams required to create a tailings impoundment area (an area in a small valley to be used for the permanent storage of mining effluent). DFO concluded that a federal environmental assessment would be required. On or about May 21, 2004, a "Notice of Commencement of an environmental assessment" was posted on the Canadian Environmental Assessment Registry website stating that DFO, as a "responsible authority" ("RA"), would conduct a comprehensive study of the project and described the project as an

OPEN PIT MINE WITH ASSOCIATED INFRASTRUCTURE INCLUDING TAILINGS IMPOUNDMENT AREA, ACCESS

B. *Processus fédéral d'évaluation*

[5] Le 3 mai 2004, ou vers cette date, Red Chris a déclenché le processus fédéral d'évaluation environnementale dans le cadre de l'al. 5(1)*d*) et du par. 5(2) de la LCEE lorsqu'elle a présenté au ministère des Pêches et des Océans (« MPO ») des demandes concernant la construction de bassins servant au dépôt de résidus miniers (un espace dans une petite vallée destiné au stockage permanent des effluents des mines). Le MPO a conclu qu'une évaluation environnementale fédérale devait être menée. Le 21 mai 2004, ou vers cette date, un « Avis de lancement d'une évaluation environnementale » a été affiché sur le site Web du Registre canadien d'évaluation environnementale, annonçant que le MPO, à titre d'« autorité responsable » (« AR »), procéderait à une étude approfondie et décrivant ainsi le projet :

MINE À CIEL OUVERT ET INSTALLATIONS CONNEXES, DONT UNE ZONE DE DÉPÔTS DE RÉSIDUS MINIERS,

ROADS, WATER INTAKE, TRANSMISSION LINES AND ACCESSORY BUILDINGS (E.G. MAINTENANCE, CAMPSITE) The scope of project will be added when available.

In a letter from DFO to other federal departments, DFO stated that a comprehensive study was required because the project's proposed ore production was great enough that it fell within the provisions of the *Comprehensive Study List Regulations*, SOR/94-638 ("CSL"), promulgated under the CEAA.

[6] On June 2, 2004, Natural Resources Canada ("NRCan") responded to this letter and announced that it was also an RA in addition to DFO because Red Chris required an approval under the *Explosives Act*, R.S.C. 1985, c. E-17. DFO and NRCan prepared to conduct a comprehensive study until December 9, 2004, when DFO wrote a letter to the Canadian Environmental Assessment Agency advising that it had scoped the project such that it excluded the mine and the mill. DFO later finalized the scope of the project as only including the tailings impoundment area, the water diversion system with ancillary facilities and the explosives storage and/or manufacturing facility. As a result, DFO determined that, as the mine and mill were no longer included in the project as scoped for environmental assessment, a comprehensive study was not necessary and the assessment would proceed by way of screening. On December 14, 2004, the online notice of commencement was retroactively amended to indicate that the project would be subject to a screening rather than a comprehensive study.

[7] On or about April 19, 2006, the federal screening report was released. The report stated that it was "based on information collected through the cooperative federal/provincial EA [environmental assessment] process". The RAs did not seek additional public comment, relying instead on the BC environmental assessment and the public notice and responses under it. The report concluded that the project is not likely to cause significant adverse environmental effects. On May 2, 2006, the RAs

DES ROUTES D'ACCÈS, UNE PRISE D'EAU, DES LIGNES DE TRANSMISSION ET DES BÂTIMENTS SECONDAIRES (NOTAMMENT POUR L'ENTRETIEN ET LES CAMPS) La portée du projet sera ajoutée lors de sa disponibilité.

Dans une lettre destinée à d'autres ministères fédéraux, le MPO a indiqué que le projet devait faire l'objet d'une étude approfondie, car la capacité de production de minerai proposée était suffisamment élevée pour être visée par le *Règlement sur la liste d'étude approfondie*, DORS/94-638 (la « LEA »), pris sous le régime de la LCEE.

[6] Le 2 juin 2004, Ressources naturelles Canada (« RNC ») a répondu à la lettre du MPO pour l'informer qu'il était également une AR parce que Red Chris devait obtenir une autorisation conformément à la *Loi sur les explosifs*, L.R.C. 1985, ch. E-17. Le MPO et RNC se préparaient à effectuer une étude approfondie jusqu'au 9 décembre 2004, date à laquelle le MPO a écrit à l'Agence canadienne d'évaluation environnementale pour l'aviser que, selon son évaluation, la portée du projet n'englobait ni la mine ni l'usine de concentration. Le MPO a ensuite finalisé la portée du projet en incluant uniquement le dépôt de résidus miniers, le système de dérivation d'eau et ses installations auxiliaires ainsi que l'installation de fabrication ou de stockage d'explosifs. Il a donc conclu que, comme la mine et l'usine de concentration ne faisaient plus partie du projet dont la portée a été définie pour l'évaluation environnementale, une étude approfondie n'était plus nécessaire et l'évaluation se ferait plutôt par un examen préalable. Le 14 décembre 2004, l'avis de lancement mis en ligne a été rétroactivement modifié de manière à indiquer que le projet ferait l'objet d'un examen préalable plutôt que d'une étude approfondie.

[7] Le 19 avril 2006, ou vers cette date, le rapport d'examen préalable fédéral a été publié. Il indiquait qu'il était [TRADUCTION] « fondé sur des renseignements recueillis dans le cadre du processus fédéral-provincial d'EE [évaluation environnementale] coopérative ». Les AR n'ont pas sollicité d'autres observations du public, s'appuyant plutôt sur l'évaluation environnementale du BCEAO ainsi que sur l'avis public et les réponses s'y rapportant. Le rapport a conclu que le projet n'est pas susceptible

made their decision to allow the project to proceed. A few days after this decision, the Screening Report was posted on the Canadian Environmental Assessment Registry website.

C. *Application for Judicial Review*

[8] On June 9, 2006, MiningWatch Canada filed an application in the Federal Court for judicial review of the decision to conduct a screening rather than a comprehensive study. It alleged a breach of the duty under the CEAA to conduct a comprehensive study and to consult the public on the scope of the assessment.

3. Judicial History

A. *Federal Court, 2007 FC 955, [2008] 3 F.C.R. 84*

[9] Martineau J. allowed the application for judicial review. He concluded that DFO had been correct in first determining that the project required a comprehensive study. He found that the language of s. 21 of the CEAA, as amended in 2003, made public consultation mandatory for comprehensive studies and that DFO and NRCan had breached their duty under the CEAA by scoping the environmental assessment to include only those aspects of the project that fell under federal jurisdiction.

[10] Martineau J. quashed the decision of DFO to issue permits and approvals to Red Chris and prohibited further action by DFO and NRCan until they had conducted public consultation under s. 21, completed a comprehensive study and complied with all other prerequisites to permit the project to be carried out.

B. *Federal Court of Appeal, 2008 FCA 209, [2009] 2 F.C.R. 21*

[11] Desjardins J.A., writing for a unanimous Federal Court of Appeal, allowed the appeal.

d'entraîner des effets environnementaux négatifs importants. Le 2 mai 2006, les AR ont décidé d'autoriser la mise en œuvre du projet. Quelques jours après cette décision, le rapport d'examen préalable a été affiché sur le site Web du Registre canadien d'évaluation environnementale.

C. *Demande de contrôle judiciaire*

[8] Le 9 juin 2006, Mines Alerte Canada a déposé devant la Cour fédérale une demande de contrôle judiciaire de la décision d'effectuer un examen préalable au lieu d'une étude approfondie. Elle invoquait un manquement à l'obligation imposée par la LCEE d'effectuer une étude approfondie et de consulter le public au sujet de la portée de l'évaluation.

3. Historique judiciaire

A. *Cour fédérale, 2007 CF 955, [2008] 3 R.C.F. 84*

[9] Le juge Martineau a accueilli la demande de contrôle judiciaire. Il a conclu que le MPO avait eu raison de décider initialement que le projet devait faire l'objet d'une étude approfondie. Il a estimé que le texte de l'art. 21 de la LCEE, selon sa version modifiée de 2003, faisait en sorte que la consultation publique était obligatoire pour les études approfondies et que le MPO et RNC avaient manqué à l'obligation que leur impose la LCEE en limitant la portée de l'évaluation environnementale aux seuls aspects du projet relevant de la compétence fédérale.

[10] Le juge Martineau a annulé la décision du MPO de délivrer les permis et d'accorder les autorisations à Red Chris et a interdit au MPO et à RNC de prendre toute autre mesure à l'égard de la mise en œuvre du projet jusqu'à ce qu'ils aient tenu une consultation publique conformément à l'art. 21, qu'ils aient effectué une étude approfondie et qu'ils se soient conformés à toute autre condition préalable.

B. *Cour d'appel fédérale, 2008 CAF 209, [2009] 2 R.C.F. 21*

[11] La juge Desjardins, qui a rédigé la décision unanime de la Cour d'appel fédérale, a accueilli

The Court of Appeal found that "project" for federal environmental assessment purposes means "project as scoped" by a federal RA. Accordingly, a comprehensive study and public consultation are only mandatory where a project as scoped by the RA is listed in the CSL. Desjardins J.A. relied on the Federal Court of Appeal's earlier decisions in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 ("*Sunpine*"), and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 ("*TrueNorth*"), and its conclusion that "project" in s. 5(1)(*d*) and s. 15(3) of the Act means "project as scoped". Despite a recent amendment to s. 21, Desjardins J.A. found that *TrueNorth* was still binding because the introductory text in s. 21(1) was not altered by the amendment. The Federal Court of Appeal allowed the appeal, set aside Martineau J.'s order and dismissed the application for judicial review.

l'appel. La Cour d'appel a conclu que le « projet » dans le cadre de l'évaluation environnementale fédérale s'entend du « projet dont la portée a été définie » par une AR fédérale. Par conséquent, une étude approfondie et une consultation publique ne sont obligatoires que si le projet dont la portée a été définie par l'AR est visé dans la LEA. La juge Desjardins s'est appuyée sur les décisions antérieures de la Cour d'appel fédérale dans *Friends of the West Country Assn. c. Canada (Ministre des Pêches et Océans)*, [2000] 2 C.F. 263 (« *Sunpine* »), et *Prairie Acid Rain Coalition c. Canada (Ministre des Pêches et des Océans)*, 2006 CAF 31, [2006] 3 R.C.F. 610 (« *TrueNorth* »), ainsi que sur la conclusion de la cour que la mention de « projet » à l'al. 5(1)*d*) et au par. 15(3) de la Loi s'entend du « projet dont la portée a été définie ». Malgré une modification récemment apportée à l'art. 21, la juge Desjardins a conclu que l'arrêt *TrueNorth* était toujours applicable, car la partie introductive du par. 21(1) était demeurée inchangée. La Cour d'appel fédérale a accueilli l'appel, annulé l'ordonnance du juge Martineau et rejeté la demande de contrôle judiciaire.

4. Issue

[12] The issue in the present case is whether DFO and NRCan, as responsible authorities under the CEAA, have been conferred discretion under the CEAA to determine whether an environmental assessment proceeds by way of a screening or comprehensive study.

4. Question en litige

[12] Il s'agit en l'espèce de décider si le MPO et RNC, à titre d'AR prévues par la LCEE, ont le pouvoir discrétionnaire en vertu de la LCEE de déterminer si l'évaluation environnementale doit s'effectuer sous forme d'examen préalable ou d'étude approfondie.

5. Analysis

[13] The relevant legislative and regulatory provisions are attached in the Appendix.

5. Analyse

[13] Les dispositions législatives et réglementaires pertinentes sont jointes à l'annexe.

A. *Procedural Options Under the CEAA*

[14] The CEAA is, in the words of its formal title, "[a]n Act to establish a federal environmental assessment process". It provides a process for integrating environmental considerations into planning and decision making (CEAA, Preamble; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 71). In broad overview, the Act sets forth five

A. *Procédures prévues par la LCEE*

[14] La LCEE est, comme l'indique son titre officiel, une « [l]oi de mise en œuvre du processus fédéral d'évaluation environnementale ». Elle prévoit un mécanisme permettant de prendre en compte des facteurs environnementaux dans la planification et la prise de décisions (préambule de la LCEE; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 71).

potential procedural options or tracks for environmental assessment depending upon the nature of the project, i.e. the physical work or physical activity to be reviewed. These five tracks vary in levels of intensity of assessment:

1. No Assessment
2. Screening
3. Comprehensive Study
4. Mediation
5. Review Panel

(1) No Assessment

[15] Section 7(1) provides that if a project is described on the *Exclusion List Regulations, 2007*, SOR/2007-108, or is required in response to an emergency, no environmental assessment need be carried out. Projects on this list are considered to have insignificant environmental effects. Projects in the *Exclusion List Regulations, 2007* include, for example, the proposed maintenance or repair of a physical work (so long as it is not carried out in a national park, park reserve, national historic site or historic canal) (Sch. 1, s. 1).

(2) Screening

[16] The least intense environmental assessment track is termed a "screening". If a proposed project does not appear in the exclusion list or the comprehensive study list (discussed below), then a screening is required pursuant to s. 18 of the Act. Projects requiring a screening are those considered to have some potential for adverse environmental effects, but those effects are not considered to be significant enough to warrant the more intense assessments discussed below.

(3) Comprehensive Study, Mediation, and Review Panel

[17] Finally, comprehensive studies, mediation and review panels all arise from the listing of a proposed project in the CSL. Under s. 21.1(1) of the Act,

En termes très généraux, la Loi prévoit cinq procédures ou voies possibles dans le cadre de l'évaluation environnementale, selon la nature du projet, c'est-à-dire l'ouvrage ou l'activité concrète à examiner. Elles varient selon le niveau d'évaluation :

1. Aucune évaluation
2. Examen préalable
3. Étude approfondie
4. Médiation
5. Examen par une commission

(1) Aucune évaluation

[15] Le paragraphe 7(1) dispose que les projets visés par le *Règlement de 2007 sur la liste d'exclusion*, DORS/2007-108, ou mis en œuvre en réaction à une situation d'urgence n'ont pas à faire l'objet d'une évaluation. On considère que les projets sur cette liste ont des effets environnementaux négligeables. Il s'agit, par exemple, de projets d'entretien ou de réparation d'un ouvrage (pourvu qu'ils soient réalisés dans des lieux autres que des parcs nationaux, des réserves, des lieux historiques nationaux ou des canaux historiques) (*Règlement de 2007 sur la liste d'exclusion*, ann. 1, art. 1).

(2) Examen préalable

[16] C'est le plus bas niveau d'évaluation environnementale. Les projets non visés dans la liste d'exclusion ou dans la liste d'étude approfondie (dont il sera question plus loin) doivent faire l'objet d'un examen préalable en application de l'art. 18 de la Loi. Il s'agit de projets dont on considère que la réalisation peut entraîner des effets environnementaux négatifs, qui ne sont toutefois pas jugés suffisamment graves pour justifier les évaluations plus poussées examinées ci-dessous.

(3) Étude approfondie, médiation et examen par une commission

[17] Enfin, l'étude approfondie, la médiation et l'examen par une commission découlent du fait que le projet proposé est visé dans la LEA. En effet, en

if a project is described in the CSL, the Minister of the Environment has three options. One is to refer the project to an RA (generally a federal department or agency) to proceed with a comprehensive study. A second is to refer the project to a mediator if all interested parties agree. A third is to refer the project to a review panel. Projects in the CSL are those considered likely to have significant adverse environmental effects (CSL, Preamble). A mine or mill with a proposed capacity above the specified threshold is listed in the CSL (CSL, Sch., s. 16).

[18] Some of the more important requirements pertaining to projects in the CSL that do not apply to projects that require only a screening assessment are:

(1) Mandatory public consultation at the outset and throughout the environmental assessment process (ss. 21-23).

(2) A government funding program to facilitate public participation in the environmental assessment process (s. 58(1.1)).

(3) Determination by the Minister as to whether the environmental assessment should be conducted as a comprehensive study by the RA or be referred to mediation or to a review panel (s. 21.1).

(4) Determination by the Minister rather than an RA as to whether the project will cause significant adverse effects to the environment (s. 23).

(5) Assessment of the purpose of the project and consideration of alternative means of carrying out the project and the environmental effects of the alternatives (s. 16(2)).

(6) The need for a follow-up program (s. 16(2)).

(7) The capacity of affected renewable resources to meet present and future needs (s. 16(2)).

vertu du par. 21.1(1) de la Loi, dans le cas où un projet est visé dans la LEA, le ministre de l'Environnement a trois options. Il peut renvoyer le projet à une AR (généralement un ministère ou organisme fédéral) pour qu'elle effectue une étude approfondie, le renvoyer à la médiation si toutes les parties intéressées y consentent, ou le renvoyer à l'examen par une commission. Les projets dans la LEA sont ceux que l'on considère comme susceptibles d'entraîner des effets environnementaux négatifs importants (préambule de la LEA). Une mine ou usine dont la capacité proposée excède le seuil prévu est visée dans la LEA (LEA, ann., art. 16).

[18] Voici certaines des exigences plus importantes relatives aux projets visés dans la LEA qui ne s'appliquent pas aux projets nécessitant seulement un examen préalable :

(1) Consultation publique obligatoire au début et tout au long du processus d'évaluation environnementale (art. 21-23).

(2) Programme d'aide financière gouvernementale pour faciliter la participation du public au processus d'évaluation environnementale (par. 58(1.1)).

(3) Le ministre doit décider si l'évaluation environnementale doit être renvoyée à une AR pour qu'elle procède à l'étude approfondie, ou bien à la médiation ou à l'examen par une commission (art. 21.1).

(4) Le ministre, et non une AR, doit décider si le projet entraînera des effets environnementaux négatifs importants (art. 23).

(5) Évaluation des raisons d'être du projet et examen des solutions de rechange et de leurs effets environnementaux (par. 16(2)).

(6) Nécessité d'un programme de suivi (par. 16(2)).

(7) Capacité des ressources renouvelables touchées par le projet de répondre aux besoins du présent et à ceux des générations futures (par. 16(2)).

Generally speaking, in comparison to a screening, projects in the CSL are subjected to more intensive assessment, ministerial oversight and mandatory public consultation.

B. *Interpretation of Section 21*

[19] The provision under scrutiny in the present appeal is s. 21 of the CEAA. Section 21 initiates the set of procedures that RAs must follow when a project is listed in the CSL. The relevant portion of the section reads as follows:

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

[20] The decision of the Federal Court of Appeal and the positions of the government and Red Chris on the proper interpretation of s. 21 are largely based on their interpretation of the application of s. 15(1) of the CEAA. They argue that s. 15(1), which grants the discretion to "scope" the project (i.e. define what aspects of the project will be included in the federal environmental assessment), includes the discretion to "track" the project (i.e. determine the level of assessment). In other words, they argue that determining the assessment track and determining the scope of the project are the same step in the assessment process. The "scoping" provision, s. 15(1), provides:

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(*a*) the responsible authority; or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

D'une façon générale, par rapport aux projets nécessitant seulement l'examen préalable, ceux figurant dans la LEA doivent faire l'objet d'une évaluation plus approfondie, d'un contrôle ministériel et de consultations publiques.

B. *Interprétation de l'art. 21*

[19] La disposition litigieuse en l'espèce est l'art. 21 de la LCEE. Cette disposition établit l'ensemble des procédures que les AR doivent respecter lorsque le projet visé figure dans la LEA. Voici le texte de la partie pertinente de l'article :

21. (1) Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet.

[20] La décision de la Cour d'appel fédérale et les positions du gouvernement et de Red Chris quant à l'interprétation qu'il convient de donner à l'art. 21 sont largement fondées sur leur interprétation de l'application du par. 15(1) de la LCEE. Ils soutiennent que le par. 15(1), qui accorde le pouvoir discrétionnaire de « détermine[r] la portée » du projet (c.-à-d. de définir les aspects du projet à inclure dans l'évaluation environnementale fédérale), comprend celui de décider de la voie à suivre pour le projet (c.-à-d. de déterminer le niveau d'évaluation). Autrement dit, selon eux, décider de la voie à suivre pour l'évaluation et déterminer la portée du projet constituent la même étape dans le processus d'évaluation. La disposition concernant la définition de la portée du projet, soit le par. 15(1), prévoit :

15. (1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.

[21] Red Chris and the government argue that s. 15(1) is of "general application" and confers on an RA the discretion to determine the scope of the project in relation to which an environmental assessment is to be conducted. Therefore, even though a project as proposed by a proponent (in this case a mine and mill) appears in the CSL, it is open to an RA to scope the project for federal environmental assessment purposes in a more limited way. The result is that the project as scoped by the RA is not in the CSL and therefore requires only a screening and not a comprehensive study. They, therefore, support the approach taken in this case by DFO and NRCan which scoped the project as the tailings impoundment area, water diversion system and explosives storage/manufacturing facility, none of which are listed in the CSL.

[22] They further point out that ss. 18 to 20 which set out the screening process and ss. 21 to 24 which set out the comprehensive study process follow s. 15. Section 18(1) commences with the words "[w]here a project is not described in the comprehensive study list". Section 21(1) commences with the words "[w]here a project is described in the comprehensive study list". Red Chris and the government argue that these "screening" and "comprehensive study" provisions follow directly after the "general" provisions which include s. 15(1). Therefore, the reference to "project" in ss. 18 and 21 is subject to the scoping discretion in s. 15(1). In other words, s. 15(1) gives RAs the discretion to scope a project *and* determine the track for assessment. (See Red Chris factum, at paras. 71-73.)

[23] Red Chris and the government also argue that their interpretation provides the RAs with the flexibility required to address the specific circumstances of each project. This flexibility allows for the consideration of the nexus between the assessment and the federal authority, the area of expertise of the RA, the provincial assessment process, the coordination between the province and federal

[21] Selon Red Chris et le gouvernement, le par. 15(1) est une disposition « d'application générale » et il confère à l'AR le pouvoir discrétionnaire de déterminer la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée. Par conséquent, même si le projet tel qu'il est proposé par le promoteur (une mine et une usine en l'espèce) figure dans la LEA, il est loisible à l'AR d'en restreindre la portée pour l'évaluation environnementale fédérale. De ce fait, le projet dont la portée a été ainsi définie par l'AR n'est pas visé dans la LEA et, par conséquent, doit faire l'objet non pas d'une étude approfondie mais seulement d'un examen préalable. Cette thèse appuie donc l'approche adoptée en l'espèce par le MPO et RNC, qui ont déterminé que la portée du projet englobait le dépôt de résidus miniers, le système de dérivation d'eau et l'installation de fabrication ou de stockage d'explosifs, dont aucun ne figure dans la LEA.

[22] De plus, ils soulignent que les art. 18 à 20 (examen préalable) et les art. 21 à 24 (étude approfondie) suivent l'art. 15. Le paragraphe 18(1) commence par « [d]ans le cas où le projet n'est pas visé dans la liste d'étude approfondie ». Le paragraphe 21(1) commence par « [d]ans le cas où le projet est visé dans la liste d'étude approfondie ». Selon Red Chris et le gouvernement, ces dispositions sur « l'examen préalable » et « l'étude approfondie » viennent directement après les dispositions « d'application générale » dont fait partie le par. 15(1). Par conséquent, le « projet » dont il est question aux art. 18 et 21 est assujetti au pouvoir discrétionnaire de déterminer la portée qui est prévu au par. 15(1). En d'autres termes, le par. 15(1) confère aux AR le pouvoir discrétionnaire de déterminer la portée d'un projet *et* de déterminer la voie à suivre pour l'évaluation. (Voir mémoire de Red Chris, par. 71-73.)

[23] Red Chris et le gouvernement soutiennent également que leur interprétation fournit aux AR la flexibilité nécessaire pour étudier les circonstances particulières de chaque projet. Cette flexibilité permet d'examiner le lien entre l'évaluation et l'autorité fédérale, le domaine d'expertise de l'AR, le processus provincial d'évaluation et la coordination entre la province et les autorités fédérales,

authorities, and the elimination of duplication (Red Chris factum, at para. 97, and government factum, at para. 77). They argue that the appellant's interpretation, which provides that "project" means "project as proposed by the proponent", leads to a rigid, inflexible and arbitrary approach to environmental assessment (Red Chris factum, at para. 85).

[24] There is perhaps a rationale for the interpretation proposed by Red Chris and the government. Where projects are subject to environmental assessment by both provincial and federal authorities, it is not unreasonable to think that such projects should not be subject to two, duplicative, environmental assessments. Duplication could be minimized by scoping the project for federal environmental assessment purposes on a more limited basis than the project as proposed by the proponent, and by focussing on matters within federal jurisdiction and the specific approvals sought from the federal government by the proponents of the project.

[25] However, s. 12(4) of the CEAA provides that in such cases, a federal RA may cooperate with the province in respect of the environmental assessment. Detailed provisions for coordination are set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), and similar provincial-federal harmonization agreements across the country. Thus, Red Chris and the government's policy arguments regarding duplication and coordination have been recognized in the CEAA and its regulations.

[26] Red Chris and the government rely heavily on two prior Federal Court of Appeal decisions, *TrueNorth* and *Sunpine*. In reaching its conclusion, the Federal Court of Appeal also relied on these prior decisions. However, I am of the opinion that the approach of the Federal Court of Appeal and that advocated by Red Chris and the government

ainsi que d'éliminer le double emploi (mémoire de Red Chris, par. 97, et mémoire du gouvernement, par. 77). Ils affirment que l'interprétation de l'appelante, selon laquelle « projet » s'entend du « projet tel qu'il est proposé par le promoteur », conduit à un processus d'évaluation environnementale rigide, inflexible et arbitraire (mémoire de Red Chris, par. 85).

[24] Il existe peut-être une raison justifiant l'interprétation proposée par Red Chris et le gouvernement. Il n'est pas déraisonnable de penser que les projets soumis à une évaluation environnementale tant par les autorités fédérales que provinciales ne devraient pas faire l'objet de deux évaluations environnementales, qui feraient double emploi. On pourrait minimiser celui-ci en restreignant la portée du projet pour l'évaluation environnementale fédérale par rapport au projet tel qu'il est proposé par le promoteur et en se concentrant sur les questions relevant de la compétence fédérale et sur les autorisations demandées par les promoteurs du projet au gouvernement fédéral.

[25] Toutefois, le par. 12(4) de la LCEE prévoit que, dans de tels cas, une AR fédérale peut coopérer avec la province pour l'évaluation environnementale. Des dispositions détaillées relatives à la coordination sont prévues dans le *Règlement sur la coordination par les autorités fédérales des procédures et des exigences en matière d'évaluation environnementale*, DORS/97-181, l'*Entente de collaboration entre le Canada et la Colombie-Britannique en matière d'évaluation environnementale* (2004), ainsi que dans les ententes d'harmonisation similaires entre le gouvernement fédéral et les provinces dans tout le pays. Ainsi, les arguments de principe de Red Chris et du gouvernement au sujet du double emploi et de la coordination ont été reconnus dans la LCEE et dans ses règlements.

[26] Red Chris et le gouvernement se fondent en grande partie sur deux arrêts antérieurs de la Cour d'appel fédérale, soit *TrueNorth* et *Sunpine*. En rendant sa décision dans la présente affaire, la Cour d'appel fédérale s'est également appuyée sur ces arrêts. Toutefois, j'estime que l'approche adoptée par la Cour d'appel fédérale et celle préconisée

cannot be sustained. To the extent that the decisions relied on by Red Chris, the government and the Federal Court of Appeal are inconsistent with the analysis that follows, these reasons now govern.

[27] The duty of this Court is to interpret the Act based on its text and context. A close reading of the relevant provisions of the CEAA leads to the conclusion that it is not within the discretion of the RA to conduct only a screening when a proposed project is listed in the CSL.

[28] The starting point in the statutory interpretation exercise is the definition section, s. 2, of the CEAA. "[P]roject" in relation to a physical work is defined in English as "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work". "*Projet*" is defined in French as "*Réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b)*". The English definition of "project" expressly uses the word "proposed" and therefore means "project as proposed by the proponent". Although the French definition does not use the word "proposed", implicit in the French meaning of the word "*projet*" is the notion of proposal: [TRANSLATION] "Idea of something one proposes to accomplish. . . . The word *projet* relates to something done before the project is carried out, unlike the English word, which covers both senses." (*Multidictionnaire de la langue française* (5th ed. 2009), at p. 1313). In any event, even if "*projet*" were broader than the English equivalent, the common meaning would favour the more restricted meaning (see *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 56, *per* LeBel J.). Therefore, the starting point of this analysis is that the statutory definition of project is "project as proposed".

par Red Chris et le gouvernement ne peuvent être retenues. En cas d'incompatibilité entre les arrêts invoqués et l'analyse qui suit, les présents motifs font autorité.

[27] La Cour doit interpréter la Loi d'après son texte et son contexte. Une lecture attentive des dispositions pertinentes de la LCEE nous amène à conclure qu'il ne relève pas du pouvoir discrétionnaire de l'AR d'effectuer seulement un examen préalable lorsque le projet proposé figure dans la LEA.

[28] L'interprétation législative doit commencer par l'examen de l'art. 2 de la LCEE, qui est l'article définitoire. Dans la version anglaise de la Loi, « *project* » s'entend, relativement à un ouvrage, de « *any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work* ». Dans la version française de la Loi, « projet » est ainsi défini : « Réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59*b*) ». La définition anglaise de « *project* » emploie expressément le mot « *proposed* » et signifie donc « projet tel qu'il est proposé par le promoteur". Bien que « *proposed* » ne soit pas explicitement rendu en français, cette notion est implicite dans le mot « projet » : « Idée d'une chose que l'on se propose d'exécuter. [. . .] Le projet se définit par un caractère d'antériorité à la réalisation, contrairement au terme anglais qui recouvre les deux acceptions » (*Multidictionnaire de la langue française* (5e éd. 2009), p. 1313). Quoi qu'il en soit, même si le mot « projet » de la version française avait un champ sémantique plus large que son équivalent anglais, le sens commun aux deux versions favorise le sens le plus restreint (voir *Schreiber c. Canada (Procureur général)*, 2002 CSC 62, [2002] 3 R.C.S. 269, par. 56, le juge LeBel). Par conséquent, le point de départ de cette analyse est que, selon la définition législative de « projet », il s'agit du « projet tel qu'il est proposé ».

[29] It is certainly possible that this definition may not apply to every use of the term "project" in the statute — particularly in the case of the CEAA where the term "project" appears well over 300 times. But displacement of the defined term requires express words or necessarily implied context that Parliament did not intend for the definition to apply to that particular use of the term (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 15(2); *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 400; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 215). There is nothing in s. 18 or 21 to suggest that the term "project" as defined is not applicable or is displaced by the project as scoped by the RA under s. 15.

[30] The CSL itself provides some further support that "project" in s. 21 does not mean "project as scoped" by the RA. The English version of the CSL describes projects in terms of proposals. For example, the Schedule states:

> **16.** The proposed construction, decommissioning or abandonment of
>
> (*a*) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;

The French equivalent reads:

> **16.** *Projet de construction, de désaffectation ou de fermeture :*
>
> *a) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;*

Inclusion of the word "proposed" in the English version of the CSL suggests that the opening words of s. 21 should be interpreted as "[w]here a project [as proposed] is described in the comprehensive study list" and not "[w]here a project [as scoped by the RA] is described in the comprehensive study list". While again the French regulation does not expressly refer to "proposed", as discussed above, implicit in the French definition of "*projet*" is the notion of proposal. In any case, there is certainly

[29] Il est fort possible que cette définition ne s'applique pas à tous les emplois du mot « projet » dans la Loi, surtout que dans la LCEE le mot « projet » est employé plus de 300 fois. Toutefois, pour déroger à cette définition, le législateur doit avoir expressément indiqué son intention d'employer ce terme dans un sens différent ou cette intention doit ressortir implicitement du contexte (*Loi d'interprétation*, L.R.C. 1985, ch. I-21, par. 15(2); *Thomson c. Canada (Sous-ministre de l'Agriculture)*, [1992] 1 R.C.S. 385, p. 400; R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 215). Rien aux art. 18 ou 21 ne permet de penser que le « projet », tel qu'il est défini, n'est pas applicable ou qu'il est remplacé par le projet dont la portée a été définie ou déterminée par l'AR conformément à l'art. 15.

[30] La LEA elle-même appuie la thèse que « projet » à l'art. 21 n'a pas le sens de « projet dont la portée a été définie » par l'AR. La version anglaise de la LEA décrit les projets comme étant des propositions. Par exemple, l'art. 16 de l'annexe :

> **16.** Projet de construction, de désaffectation ou de fermeture :
>
> *a*) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;

Version anglaise :

> **16.** *The proposed construction, decommissioning or abandonment of*
>
> *(a) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;*

L'emploi de « *proposed* » dans la version anglaise de la LEA permet de penser qu'il faut interpréter les premiers mots du texte de l'art. 21 comme signifiant « [d]ans le cas où le projet [tel qu'il est proposé] est visé dans la liste d'étude approfondie » et non « [d]ans le cas où le projet [dont la portée a été définie par l'AR] est visé dans la liste d'étude approfondie ». Encore une fois, même si la version française du règlement ne mentionne pas expressément « proposé », comme nous l'avons déjà indiqué,

nothing in the term "*projet*" that suggests it means "project as scoped".

[31] While it would be inappropriate to solely rely on regulations to interpret a provision of the governing legislation, the language in the regulations in the present case is consistent with the interpretation gleaned from the Act itself. In addition, the CSL is tightly linked to the CEAA. The CSL is one of the "[f]our regulations . . . needed to make the Act work" (B. Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (loose-leaf), at p. III-1), and the proclamation of ss. 1 to 60, 71, 72, 74, 76 and 77 of the CEAA was delayed until the CSL and other key regulations were already in force (*Order Fixing January 19, 1995 as the Date of the Coming into Force of Certain Sections of the Act*, SI/95-11; CSL Registration date: October 7, 1994). In these circumstances it is appropriate to consider the regulations when interpreting the governing statute because "[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together and to be mutually informing" (Sullivan, at p. 370). See also Binnie J. in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26, and Deschamps J. in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 35.

[32] A further indication that this interpretation is consistent with the intent of Parliament is found in the respective roles of the RA and the Minister in conducting environmental assessments under the CEAA. The CEAA grants the Minister the authority to prescribe that certain projects or classes of projects are subject to a comprehensive study. Section 58(1)(*i*) provides:

58. (1) For the purposes of this Act, the Minister may

. . .

la notion de proposition est implicite dans la définition de « projet ». Quoi qu'il en soit, il est certain que rien dans le mot « projet » ne permet de penser qu'il signifie « projet dont la portée a été définie ».

[31] Il serait déplacé de s'appuyer uniquement sur les règlements pour interpréter une disposition de la loi habilitante, mais le texte du règlement en l'espèce est conforme à l'interprétation dégagée de la Loi elle-même. De plus, la LEA est étroitement liée à la LCEE. La LEA est l'un des [TRADUCTION] « [q]uatre règlements [. . .] nécessaires à l'application de la Loi » (B. Hobby et autres, *Canadian Environmental Assessment Act : An Annotated Guide* (feuilles mobiles), p. III-1), et la proclamation des art. 1 à 60, 71, 72, 74, 76 et 77 de la LCEE a été reportée à l'entrée en vigueur de la LEA et d'autres règlements clés (*Décret fixant au 19 janvier 1995 la date d'entrée en vigueur de certains articles de la Loi*, TR/95-11; date d'enregistrement de la LEA : 7 octobre 1994). Dans ces circonstances, il convient d'examiner les règlements lors de l'interprétation de la loi habilitante, car, [TRADUCTION] « [l]orsqu'un règlement sert à compléter le régime législatif, il est clair que l'intention du législateur est que la loi et le règlement soient appliqués ensemble et forment un tout » (Sullivan, p. 370). Voir également les motifs du juge Binnie dans *R. c. Campbell*, [1999] 1 R.C.S. 565, par. 26, et ceux de la juge Deschamps dans *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, par. 35.

[32] Une autre indication que cette interprétation est conforme à l'intention du législateur réside dans les fonctions respectives de l'AR et du ministre lors des évaluations environnementales effectuées en application de la LCEE. La LCEE accorde au ministre le pouvoir de désigner, par règlement, des projets ou des catégories de projets devant faire l'objet d'une étude approfondie. Voici le texte de l'al. 58(1)*i*) :

58. (1) Pour l'application de la présente loi, le ministre peut :

. . .

(*i*) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

Red Chris and the government's interpretation of s. 21 would render this authority subject to the overriding authority of the RA, presumably under s. 15(1), to determine on a case-by-case basis whether the project would be subject to a comprehensive study. In other words, decisions of the Minister would be subordinate to decisions of the RA. The presumption in Canada, with a democratically elected responsible government, must be the other way around.

[33] I am unable to agree with the Federal Court of Appeal's finding that there is "nothing in the context of the CEAA which indicates . . . a different interpretation from [the project as scoped by the RA]" (para. 49). The CSL includes classes of projects which the Minister has determined are likely to have significant adverse environmental effects (CEAA, s. 58(1)(*i*); CSL, Preamble). It would follow that by authorizing the Minister to make such regulations and thereby determine which projects require a comprehensive study, Parliament intended the Minister to determine which projects did or did not require comprehensive study, not the RA. The *Regulatory Impact Analysis Statement*, SOR/94-636, supports that view:

The Comprehensive Study List . . . supplies greater certainty and efficiency by identifying which major projects will automatically be assessed more extensively. [Emphasis added.]

[34] In sum, subject to my comments below about s. 15(2) and (3), when the term "project" in ss. 18 and 21 is considered in context, the correct interpretation is "project as proposed" and not "project as scoped". This means that the determination of whether a project requires a comprehensive study is not within the discretion of the RA. If the project as proposed is listed in the CSL, a comprehensive study is mandatory.

i) prendre des règlements désignant des projets ou des catégories de projets pour lesquels une étude approfondie est obligatoire, s'il est convaincu que ceux-ci sont susceptibles d'entraîner des effets environnementaux négatifs importants.

L'interprétation de l'art. 21 par Red Chris et le gouvernement aurait pour effet d'assujettir au pouvoir prépondérant de l'AR, probablement selon le par. 15(1), le pouvoir du ministre de déterminer au cas par cas si un projet devrait faire l'objet d'une étude approfondie. En d'autres termes, les décisions du ministre seraient subordonnées à celles de l'AR. Au Canada, compte tenu du principe du gouvernement responsable démocratiquement élu, la présomption doit opérer en sens inverse.

[33] Je ne puis souscrire à la conclusion de la Cour d'appel fédérale qu'il n'y a « rien dans le contexte de la LCEE qui permette de penser qu'il faille s'inspirer d'une interprétation différente de celle [du projet dont la portée a été définie par l'AR] » (par. 49). La LEA comprend des catégories de projets qui, selon le ministre, sont susceptibles d'entraîner des effets environnementaux négatifs importants (LCEE, al. 58(1)*i*); préambule de la LEA). Ainsi, en autorisant le ministre à prendre de tels règlements et donc à déterminer si les projets doivent faire l'objet d'une étude approfondie, le législateur entendait confier au ministre, et non à l'AR, le pouvoir de décider des projets nécessitant une étude approfondie. Le *Résumé de l'étude d'impact de la réglementation*, DORS/94-636, étaye ce point de vue :

La Liste d'étude approfondie [. . .] donne plus de certitude et d'efficience en précisant quels types de grands projets nécessiteront automatiquement une étude plus poussée. [Je souligne.]

[34] En résumé, sous réserve de mes observations ci-dessous concernant les par. 15(2) et (3), l'interprétation qu'il convient de donner à « projet » aux art. 18 et 21 est « projet tel qu'il est proposé » et non « projet dont la portée a été définie ». Par conséquent, il ne relève pas du pouvoir discrétionnaire de l'AR de déterminer si un projet doit faire l'objet d'une étude approfondie. Si le projet tel qu'il est proposé est visé dans la LEA, l'étude approfondie est obligatoire.

C. *The Discretion to Scope*

[35] How, then, does the discretion conferred on the RA or Minister under s. 15(1) to determine the scope of a project for the environmental assessment fit within the scheme of the Act? I am of the opinion that tracking and scoping are distinct steps in the CEAA process. Generally, the RA *does not* have the discretion to determine the assessment track. However, once the appropriate track is determined, the RA *does* have the discretion to determine the scope of the project for the purposes of assessment.

[36] In the case of a project not in the CSL, a screening is conducted in accordance with the scope of the project as determined by the RA under s. 15(1)(*a*), subject to the requirements of s. 15(2) and (3). The RA's scoping decision is determinative.

[37] In the case of a project in the CSL, the answer is not as clear. However, I think it can be described in the following way. The RA, in its discretion under s. 15(1), and after ensuring public consultation in accordance with s. 21(1), determines the proposed scope of the project for purposes of the comprehensive study. Under s. 21(2)(*a*), the RA reports to the Minister on its determination of the scope of the project for the comprehensive study (and on the other matters on which the public was consulted under s. 21(1)) and recommends to the Minister to continue with the environmental assessment by means of a comprehensive study to be conducted by the RA, or alternatively that the Minister refer the project to a mediation or review panel under s. 21(2)(*b*).

[38] The Minister may remit the project to the RA to conduct the comprehensive study in accordance with its report on the scoping of the project under s. 21.1(1)(*a*), or refer the project to a mediator or to a review panel under s. 21.1(1)(*b*). In the event that the project is referred to a mediator or a review panel under s. 21.1(1)(*b*), the scope of the project is

C. *Le pouvoir discrétionnaire de déterminer la portée du projet*

[35] Comment, alors, le pouvoir discrétionnaire conféré par le par. 15(1) à l'AR ou au ministre de déterminer la portée d'un projet pour l'évaluation environnementale entre-t-il dans le cadre de la Loi? À mon avis, déterminer la voie à suivre et définir la portée constituent deux étapes distinctes dans le processus prévu par la LCEE. De façon générale, l'AR *n*'a *pas* le pouvoir discrétionnaire de déterminer la voie à suivre pour l'évaluation. Cependant, une fois cette voie déterminée, l'AR a *effectivement* le pouvoir de définir la portée du projet pour l'évaluation.

[36] Dans le cas d'un projet non visé dans la LEA, l'examen préalable est effectué selon la portée du projet tel qu'elle est déterminée par l'AR en vertu du par. 15(1), sous réserve des exigences des par. 15(2) et (3). La décision de l'AR à cet égard est déterminante.

[37] Dans le cas d'un projet visé dans la LEA, la réponse n'est pas claire. Je crois, toutefois, qu'on peut la décrire comme suit. En se fondant sur le pouvoir discrétionnaire que lui confère le par. 15(1) et après avoir veillé à la tenue d'une consultation publique conformément au par. 21(1), l'AR détermine la portée proposée du projet pour les besoins de l'étude approfondie. Selon l'alinéa 21(2)*a*), l'AR fait rapport au ministre de sa décision sur la portée du projet pour l'étude approfondie (ainsi que d'autres questions pour lesquelles il y avait consultation publique conformément au par. 21(1)) et lui recommande de poursuivre l'évaluation environnementale par une étude approfondie qu'elle doit effectuer, ou de renvoyer le projet à un médiateur ou à une commission conformément à l'al. 21(2)*b*).

[38] Le ministre peut renvoyer le projet à l'AR pour qu'elle effectue l'étude approfondie recommandée dans son rapport sur la portée du projet conformément à l'al. 21.1(1)*a*), ou le renvoyer à la médiation ou à l'examen par une commission conformément à l'al. 21.1(1)*b*). Si le projet est renvoyé à la médiation ou à l'examen par une commission conformément

determined by the Minister after consulting with the RA pursuant to s. 15(1)(*b*).

D. *Limits on the Discretion to Scope a Project*

[39] Regardless of the assessment track, the RA or Minister's discretion to scope a project and to scope the environmental assessment is outlined in s. 15. Section 15(1) grants the discretion to scope to either the Minister, in the case of mediation or a review panel, or the RA. However, the exercise of this discretion is limited by s. 15(3). Section 15(3) provides that an environmental assessment of a physical work shall be conducted in respect of every "construction, operation, modification, decommissioning, abandonment or other undertaking" in relation to the project. Consistent with the view that the "project as proposed by the proponent" is to apply in the absence of text or context to the contrary, the scoping of the project performed by the RA or Minister under s. 15(1) is subject to s. 15(3). In other words, the minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project. The RA or Minister is also granted further discretion by s. 15(2) to combine related proposed projects into a single project for the purposes of assessment. In sum, while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances.

[40] It follows, then, that the scoping discretion under s. 15(2) and (3) acts as an exception to the general proposition that the level of assessment is determined solely based on the project as proposed by the proponent. The Act assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. However, as noted by the government, a proponent could engage in "project splitting" by representing part of a project as the whole, or proposing several parts

à l'al. 21.1(1)*b*), le ministre en détermine la portée après consultation de l'AR conformément au par. 15(1).

D. *Limite du pouvoir discrétionnaire de déterminer la portée du projet*

[39] Quelle que soit la voie à suivre dans le cadre de l'évaluation, le pouvoir discrétionnaire de l'AR ou du ministre de déterminer la portée du projet et de définir l'évaluation environnementale est décrit à l'art. 15. Le paragraphe 15(1) accorde le pouvoir discrétionnaire de déterminer la portée du projet soit au ministre, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, soit à l'AR. Toutefois, l'exercice de ce pouvoir est limité par le par. 15(3). Ce paragraphe prévoit l'évaluation environnementale obligatoire « de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage ». Selon l'opinion que le « projet tel qu'il est proposé par le promoteur » s'applique en l'absence de texte ou contexte à l'effet contraire, la détermination de la portée du projet par l'AR ou le ministre en vertu du par. 15(1) est assujettie au par. 15(3). En d'autres termes, la portée minimale du projet est celle du projet tel qu'il est proposé par le promoteur, et l'AR ou le ministre a le pouvoir de l'élargir lorsque les faits et circonstances du projet le justifient. Ils ont aussi le pouvoir discrétionnaire, en vertu du par. 15(2), de combiner des projets connexes en un seul projet pour l'évaluation. En somme, bien que la portée présumée du projet à évaluer soit la portée du projet tel qu'il est proposé par le promoteur, l'AR ou le ministre peut, en vertu des par. 15(2) et (3), l'élargir si les circonstances le justifient.

[40] Ainsi, le pouvoir discrétionnaire de déterminer la portée du projet en vertu des par. 15(2) et (3) constitue une exception à la thèse générale que le niveau d'évaluation est déterminé uniquement en fonction du projet tel qu'il est proposé par le promoteur. La Loi présume que le promoteur représentera la totalité du projet proposé lié à un ouvrage. Or, comme l'a souligné le gouvernement, un promoteur pourrait vouloir « fractionner le projet » en en présentant une partie au lieu de la totalité, ou

of a project as independent projects in order to circumvent additional assessment obligations (see government factum, at para. 73). Where the RA or Minister decides to combine projects or to enlarge the scope under s. 15(2) or (3), it is conceivable that the project as proposed by the proponent might have only required a screening. However, when the RA or Minister considers all matters in relation to the project as proposed, the resulting scope places the project in the CSL. Where this occurs, the project would be subject to a comprehensive study.

[41] I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (s. 58(1)(*c*) and (*d*)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the CEAA (see s. 12(4)).

[42] In the present case, the federal environmental assessment should have been conducted for the project as proposed by Red Chris. The proposed project was described in the CSL. Therefore, the requirements of s. 21 applied. The RAs were free to use any and all federal-provincial coordination tools available, but they were still required to comply with the provisions of the CEAA pertaining to comprehensive studies. The RAs in this case acted without statutory authority by conducting a screening.

6. Remedy

[43] The remedy awarded by the trial judge was pursuant to the discretion conferred upon him under s. 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Section 18.1(3) provides:

en présentant plusieurs parties d'un projet à titre de projets indépendants de façon à contourner des obligations additionnelles en matière d'évaluation (voir le mémoire du gouvernement, par. 73). Lorsque l'AR ou le ministre décide de combiner des projets ou d'élargir la portée d'un projet en vertu des par. 15(2) ou (3), il est concevable que le projet tel qu'il est proposé par le promoteur nécessite seulement un examen préalable. Toutefois, lorsque l'AR ou le ministre prend en compte toutes les questions liées au projet tel qu'il est proposé, il se peut que celui-ci devienne ainsi visé dans la LEA. Il devrait alors faire l'objet d'une étude approfondie.

[41] Je devrais souligner que même si, pour l'évaluation environnementale fédérale, un projet comprendra la totalité du projet tel qu'il est proposé, l'AR peut et doit minimiser le double emploi en recourant aux mécanismes de coordination prévus par la Loi. En particulier, les gouvernements fédéral et provincial peuvent adopter des modalités acceptables pour les deux parties pour coordonner les évaluations environnementales (al. 58(1)*c*) et *d*)). Le plein recours à ce pouvoir permet de réduire le double emploi inutile, coûteux et inefficace. Les procédures de collaboration et de coordination sont prévues dans la LCEE (voir par. 12(4)).

[42] En l'espèce, le projet tel qu'il est proposé par Red Chris aurait dû faire l'objet d'une évaluation environnementale fédérale. Comme il est visé dans la LEA, les exigences de l'art. 21 s'appliquent. Les AR sont libres d'utiliser tous les mécanismes de coordination fédéraux-provinciaux dont elles disposent, mais elles doivent respecter les dispositions de la LCEE concernant les études approfondies. En l'espèce, en effectuant un examen préalable, les AR ont outrepassé les pouvoirs qui leur sont reconnus par la loi.

6. Réparation

[43] Le juge de première instance a accordé la réparation en vertu du pouvoir discrétionnaire qui lui est conféré par le par. 18.1(3) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7, dont voici le texte :

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

The question here is whether this Court may and should intervene with respect to remedy. The test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations. See *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404, *Friends of the Oldman River Society*, at pp. 76-77, and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 587-88.

Il s'agit en l'espèce de décider si la Cour peut et devrait intervenir à l'égard de cette réparation. Le critère en matière de contrôle par une cour d'appel de l'exercice du pouvoir judiciaire discrétionnaire consiste à décider si le juge de première instance a accordé suffisamment d'importance à tous les éléments pertinents. Voir *Reza c. Canada*, [1994] 2 R.C.S. 394, p. 404, *Friends of the Oldman River Society*, p. 76-77, et *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 587-588.

[44] In my respectful view, in exercising his discretion to grant the broad relief he did, the learned trial judge did not take account of a number of relevant and significant considerations. Because of this, he granted broader relief than was appropriate.

[44] Soit dit en tout respect, lorsqu'il a exercé son pouvoir discrétionnaire d'accorder une réparation large comme il l'a fait, le juge de première instance n'a pas tenu compte de plusieurs éléments pertinents et importants. Pour cette raison, il a accordé une réparation plus large que nécessaire.

[45] Martineau J. set aside the RAs' decision to proceed by way of screening and prohibited the issuing of permits and approvals under s. 5(1)(*d*) and s. 5(2) until the completion of a comprehensive study pursuant to s. 21 and, based thereon, a decision whether to permit the project to be carried out in whole or in part pursuant to s. 37. In simple terms, the parties have been ordered to substantially redo the environmental assessment. I do not think such relief is warranted.

[45] Le juge Martineau a annulé la décision des AR de procéder par examen préalable et a interdit la délivrance des permis et l'octroi des autorisations ou approbations prévus à l'al. 5(1)*d*) et au par. 5(2), jusqu'à ce qu'une étude approfondie soit réalisée conformément à l'art. 21 et qu'il soit décidé, en fonction de cette étude, de mettre en œuvre le projet en tout ou en partie conformément à l'art. 37. Bref, on a ordonné aux parties de refaire en grande partie l'évaluation environnementale. Je ne crois pas qu'une telle réparation soit justifiée.

[46] First, at para. 292, the trial judge states that "[i]t is not entirely clear to the Court why, once it had been determined the Project, as described by [Red Chris], was included in the CSL, the decision was subsequently made to downgrade the extent of the assessment required to that of a screening."

[46] Tout d'abord, au par. 292 de ses motifs, le juge de première instance déclare que « [l]a Cour ne saisit pas tout à fait pourquoi, une fois qu'il a été décidé que le projet, décrit par [Red Chris] était inclus dans la LEA, il a plus tard été décidé de déclasser au niveau d'un examen préalable le

While he says that he does not define the scoping decision to be "capricious and arbitrary" (para. 294), his reasons indicate a suspicion of the motive of the RAs. However, it is apparent that the environmental assessment was converted to a screening assessment on or about December 9, 2004, because of new information and because of the issuance of the *TrueNorth* decision by the Federal Court on September 16, 2004 (2004 FC 1265, 257 F.T.R. 212), after the initial scoping decision had been made. Indeed, the trial judge, in his reasons, quoted a letter of DFO dated December 9, 2004, to the Canadian Environmental Assessment Agency explaining that the RAs were influenced by new information and by the *TrueNorth* decision (para. 108). Yet, he still questioned the motives of the RAs in scoping. It is difficult to fault the RAs for following a decision of the Federal Court on the very matter with which they were dealing.

[47] Second, the trial judge does not appear to have considered that, although it is Red Chris that will be prejudiced by incurring further delay and costs as a result of his order, Red Chris did nothing wrong. The approach to the environmental assessment was determined by the government.

[48] Third, according to the evidence, Red Chris cooperated fully with the environmental assessment conducted by the BCEAO. It proposed terms of reference for a working group which included federal and provincial agencies and local First Nation groups. Red Chris sought public comment on the project through several open house meetings. Once Red Chris submitted its application for a provincial environmental assessment certificate, the BCEAO posted the application online for public comment, and members of the public submitted several comments in response to the Red Chris application. These facts do not appear to have been considered by the trial judge in exercising his discretion to grant relief.

degré d'évaluation requis. » Bien qu'il ait affirmé que la détermination de la portée du projet n'était pas une décision « arbitraire et abusive » (par. 294), ses motifs indiquent une certaine suspicion quant aux motifs des AR. Or, il est clair que l'évaluation environnementale a été changée pour un examen préalable le 9 décembre 2004, ou vers cette date, en raison de nouveaux renseignements et de l'arrêt *TrueNorth*, rendu par la Cour fédérale le 16 septembre 2004 (2004 CF 1265, [2004] A.C.F. nº 1518 (QL)), soit après la décision initiale concernant la détermination de la portée du projet. En effet, le juge de première instance a reproduit, dans ses motifs, un passage d'une lettre du MPO datée du 9 décembre 2004 et adressée à l'Agence canadienne d'évaluation environnementale expliquant que les AR avaient été influencées par de nouveaux renseignements et par l'arrêt *TrueNorth* (par. 108). Pourtant, il mettait toujours en doute les raisons ayant poussé les AR à déterminer ainsi la portée du projet. Il est difficile de reprocher aux AR d'avoir suivi un arrêt de la Cour fédérale portant sur la même question dont ils étaient saisis.

[47] Deuxièmement, le juge de première instance ne semble pas avoir pris en compte le fait que c'est Red Chris qui subira un préjudice en raison des retards et coûts supplémentaires par suite de son ordonnance, alors qu'elle n'a commis aucune faute. La méthode employée pour l'évaluation environnementale a été établie par le gouvernement.

[48] Troisièmement, il ressort de la preuve que Red Chris a pleinement collaboré à l'évaluation environnementale effectuée par le BCEAO. Elle a proposé un cadre de référence pour un groupe de travail composé d'organismes fédéraux et provinciaux et de groupes de Premières nations locaux. Red Chris a tenu des consultations publiques sur le projet dans le cadre de plusieurs séances portes ouvertes. Après que Red Chris a soumis sa demande de certificat d'évaluation environnementale provinciale, le BCEAO l'a mise en ligne pour consultation publique, et des membres du public ont présenté plusieurs observations en réponse à la demande de Red Chris. Le juge de première instance ne semble pas avoir pris en compte ces faits lorsqu'il a exercé son pouvoir discrétionnaire d'accorder une réparation.

[49] Further, in a letter to the Deputy Minister of Natural Resources Canada dated August 24, 2006, MiningWatch stated that it "brought this application as a test case of the federal government's obligations under section 21". It would be incorrect to say that the parties in test cases may not still be interested in preserving their claims that gave rise to the litigation in the first place. However, this is not such a case.

[50] MiningWatch says it has no proprietary or pecuniary interest in the outcome of the proceedings (affidavit of Joan Kuyek, A.R., vol. II, p. 1, at para. 32). MiningWatch did not participate in the environmental assessment conducted by the BCEAO. Its first involvement was in commencing judicial review in the Federal Court. It has not brought forward any evidence of dissatisfaction with the environmental assessments conducted by the BCEAO or the RAs; nor is there evidence of dissatisfaction with the assessment process from anyone else. MiningWatch says it has brought this judicial review as a test case of the federal government's obligations under s. 21. Indeed, they made a strategic decision not to challenge the substantive scoping decision. This is an appropriate case in which to take the position expressed by MiningWatch at face value. A declaration as to the proper interpretation of s. 21 and the obligations of the federal government achieves MiningWatch's stated objective and grants a substantial portion of the relief it requested.

[51] In my opinion, the appropriate relief in this case would be to allow the application for judicial review and declare that the RAs erred in failing to conduct a comprehensive study. Pursuant to s. 18.1(3) of the *Federal Courts Act*, I would decline to grant any further relief.

[52] I acknowledge that in exercising discretion to grant declaratory relief without requiring the parties to substantially redo the environmental assessment, the result is to allow a process found not to comply with the requirements of the CEAA to stand in this case. But the fact that an appellant would otherwise

[49] De plus, dans la lettre du 24 août 2006 adressée à la sous-ministre de Ressources naturelles Canada, Mines Alerte a déclaré qu'elle [TRADUCTION] « avait présenté cette demande à titre de cause type relativement aux obligations qui incombent au gouvernement fédéral selon l'article 21 ». Il serait inexact de dire que les parties dans une cause type n'ont jamais intérêt à faire valoir, telles quelles, les réclamations qui sont à l'origine du litige. Toutefois, tel n'est pas le cas en l'espèce.

[50] Mines Alerte dit n'avoir aucun intérêt propriétal ou pécuniaire dans l'issue de l'instance (affidavit de Joan Kuyek, d.a., vol. II, p. 1, par. 32). Elle n'a pas participé à l'évaluation environnementale réalisée par le BCEAO. Sa participation a commencé au moment où elle a présenté une demande de contrôle judiciaire devant la Cour fédérale. Mines Alerte, pas plus que quiconque, n'a produit aucun élément de preuve établissant son insatisfaction à l'égard des évaluations environnementales effectuées par le BCEAO ou les AR. Elle affirme avoir déposé cette demande de contrôle judiciaire à titre de cause type à l'égard des obligations qui incombent au gouvernement fédéral selon l'art. 21. En fait, elle a pris la décision stratégique de ne pas contester la décision de fond concernant la détermination de la portée du projet. Il convient en l'espèce de ne pas mettre en doute sa position. Un jugement déclaratoire sur l'interprétation de l'art. 21 et des obligations du gouvernement fédéral répond à l'objectif déclaré de Mines Alerte et accorde à celle-ci une grande partie de la réparation qu'elle a demandée.

[51] À mon avis, la réparation appropriée en l'espèce consisterait à accueillir la demande de contrôle judiciaire et à déclarer que les AR ont fait erreur en ne procédant pas à une étude approfondie. En application du par. 18.1(3) de la *Loi sur les Cours fédérales*, je n'accorderais pas d'autre réparation.

[52] J'admets que l'exercice du pouvoir discrétionnaire d'accorder réparation au moyen d'un jugement déclaratoire sans demander aux parties de refaire substantiellement l'évaluation environnementale a pour effet en l'espèce de confirmer la validité d'un processus par ailleurs jugé non

be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought. However, because such discretionary power may make inroads upon the rule of law, it must be exercised with the greatest care. See Sir William Wade and C. Forsyth, *Administrative Law* (10th ed. 2009), at p. 599, and *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 361. In the exercise of that discretion to deny a portion of the relief sought, balance of convenience considerations are involved. See D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-88 and 3-89, referred to by Binnie J. in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 36. Such considerations will include any disproportionate impact on the parties or the interests of third parties (Brown and Evans, at p. 3-88, fn. 454). In my respectful opinion, that is the situation here. The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond. On the other hand, I can see no justification in requiring Red Chris to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the RAs.

conforme aux exigences de la LCEE. Mais le fait qu'un appelant ait droit à une réparation ne change rien au fait que le tribunal peut exercer son pouvoir discrétionnaire de ne pas accorder une telle réparation, ou du moins de ne pas accorder la totalité de la réparation demandée. Cependant, comme un tel pouvoir discrétionnaire peut empiéter sur le principe de la primauté du droit, il doit être exercé avec la plus grande diligence. Voir Sir William Wade et C. Forsyth, *Administrative Law* (10e éd. 2009), p. 599, et *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 361. L'exercice de ce pouvoir discrétionnaire de refuser d'accorder une partie de la réparation demandée fait intervenir des considérations relatives à la prépondérance des inconvénients. Voir D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-88 et 3-89, cité par le juge Binnie dans *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 36. Il faut notamment tenir compte de tout impact disproportionné sur les parties ou les intérêts des tiers (Brown et Evans, p. 3-88, note 454). À mon avis, nous sommes en présence d'un tel cas ici. L'intérêt central de Mines Alerte, en tant que partie représentant l'intérêt public, est la question de droit à laquelle répondra le jugement déclaratoire. Par ailleurs, je ne vois aucune raison d'exiger que Red Chris recommence le processus d'évaluation environnementale alors que les décisions de fond prises par les AR n'ont fait l'objet d'aucune contestation.

7. Disposition

[53] I would allow the appeal with costs throughout on a party and party basis, allow the application for judicial review and issue a declaration that the RAs erred in failing to use the project as proposed by Red Chris to determine whether the CEAA was triggered under s. 5, whether the *Exclusion List Regulations, 2007* applied, and if a federal environmental assessment was to be conducted, whether it was to proceed by way of a comprehensive study if the project was listed in the CSL and if not, by way of screening. I would decline to grant any further relief. Although requested by MiningWatch, this is not a case for solicitor-client costs. There is no misconduct or other reason for an award other than the

7. Dispositif

[53] Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours sur la base partie-partie, d'accueillir la demande de contrôle judiciaire et de rendre un jugement déclarant que les AR ont fait erreur en ne considérant pas le projet tel que proposé par Red Chris pour déterminer si l'application de la LCEE était déclenchée en vertu de l'art. 5, si le *Règlement de 2007 sur la liste d'exclusion* s'appliquait et s'il y avait lieu d'effectuer une évaluation environnementale fédérale, par une étude approfondie si le projet était visé dans la LEA, sinon par un examen préalable. Je n'accorderais pas d'autre réparation. Bien que Mines Alerte en ait fait la demande, il n'y a pas lieu en l'espèce

usual party-party award of costs that normally follows the event.

d'attribuer des dépens avocat-client. Aucune faute n'a été commise et rien ne justifie l'adjudication de dépens autres que les habituels dépens entre parties qui suivent normalement le sort de l'affaire.

APPENDIX

ANNEXE

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

Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

Attendu :

. . .

que l'évaluation environnementale constitue un outil efficace pour la prise en compte des facteurs environnementaux dans les processus de planification et de décision, de façon à promouvoir un développement durable;

2. (1) In this Act,

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

. . .

"project" means

(*a*) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(*b*) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(*b*);

« autorité responsable » L'autorité fédérale qui, en conformité avec le paragraphe 11(1), est tenue de veiller à ce qu'il soit procédé à l'évaluation environnementale d'un projet.

. . .

. . .

"responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;

« projet » Réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59*b*).

5. (1) [Projects requiring environmental assessment] An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

5. (1) [Projets visés] L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :

. . .

. . .

(*d*) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

(2) [Projects requiring approval of Governor in Council] Notwithstanding any other provision of this Act,

(*a*) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(*g*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part;

7. (1) [Exclusions] An assessment of a project is not required under section 5 or sections 8 to 10.1, where

(*a*) the project is described in an exclusion list;

(*b*) the project is to be carried out in response to a national emergency for which special temporary measures are being taken under the *Emergencies Act*; or

(*c*) the project is to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

. . .

12. . . .

(4) [Cooperation with other jurisdictions] Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

15. (1) [Scope of project] The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(*a*) the responsible authority; or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59*f*), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en œuvre du projet en tout ou en partie.

(2) [Projets nécessitant l'approbation du gouverneur en conseil] Par dérogation à toute autre disposition de la présente loi :

a) l'évaluation environnementale d'un projet est obligatoire, avant que le gouverneur en conseil, en vertu d'une disposition désignée par règlement aux termes de l'alinéa 59*g*), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou en partie;

7. (1) [Exclusions] N'ont pas à faire l'objet d'une évaluation en application des articles 5 ou 8 à 10.1 les projets :

a) qui sont visés dans les listes d'exclusion;

b) qui sont mis en œuvre en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*;

c) qui sont mis en œuvre en réaction à une situation d'urgence et qu'il importe, soit pour la protection de biens ou de l'environnement, soit pour la santé ou la sécurité publiques, de mettre en œuvre sans délai.

. . .

12. . . .

(4) [Collaboration] L'autorité responsable peut, dans le cadre de l'examen préalable ou de l'étude approfondie d'un projet, coopérer, pour l'évaluation environnementale de celui-ci, avec l'instance qui a la responsabilité ou le pouvoir d'effectuer l'évaluation des effets environnementaux de tout ou partie d'un projet.

15. (1) [Détermination de la portée du projet] L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.

(2) [Same assessment for related projects] For the purposes of conducting an environmental assessment in respect of two or more projects,

(*a*) the responsible authority, or

(*b*) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so closely related that they can be considered to form a single project.

(3) [All proposed undertakings to be considered] Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(*a*) the responsible authority, or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

16. (1) [Factors to be considered] Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(*b*) the significance of the effects referred to in paragraph (*a*);

(*c*) comments from the public that are received in accordance with this Act and the regulations;

(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(*e*) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible

(2) [Pluralité de projets] Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.

(3) [Projet lié à un ouvrage] Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage :

a) l'opération est proposée par le promoteur;

b) l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.

16. (1) [Éléments à examiner] L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

b) l'importance des effets visés à l'alinéa *a*);

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité

authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) [Additional factors] In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the purpose of the project;

(*b*) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(*c*) the need for, and the requirements of, any follow-up program in respect of the project; and

(*d*) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

18. (1) [Screening] Where a project is not described in the comprehensive study list or the exclusion list made under paragraph 59(*c*), the responsible authority shall ensure that

(*a*) a screening of the project is conducted; and

(*b*) a screening report is prepared.

21. (1) [Public consultation] Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

(2) [Report and recommendation] After the public consultation, as soon as it is of the opinion that it has sufficient information to do so, the responsible authority shall

(*a*) report to the Minister regarding

(i) the scope of the project, the factors to be considered in its assessment and the scope of those factors,

(ii) public concerns in relation to the project,

(iii) the potential of the project to cause adverse environmental effects, and

(iv) the ability of the comprehensive study to address issues relating to the project; and

responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

(2) [Éléments supplémentaires] L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

a) les raisons d'être du projet;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

18. (1) [Examen préalable] Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion établie par règlement pris en vertu de l'alinéa 59*c*), l'autorité responsable veille :

a) à ce qu'en soit effectué l'examen préalable;

b) à ce que soit établi un rapport d'examen préalable.

21. (1) [Consultation] Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet.

(2) [Rapport et recommandation] L'autorité responsable, dès qu'elle estime disposer de suffisamment de renseignements et après avoir tenu la consultation publique :

a) fait rapport au ministre de la portée du projet, des éléments à prendre en compte dans le cadre de l'évaluation, de la portée de ceux-ci, des préoccupations du public, de la possibilité d'effets environnementaux négatifs et de la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet;

(*b*) recommend to the Minister to continue with the environmental assessment by means of a comprehensive study, or to refer the project to a mediator or review panel in accordance with section 29.

21.1 (1) [Minister's decision] The Minister, taking into account the things with regard to which the responsible authority must report under paragraph 21(2)(*a*) and the recommendation of the responsible authority under paragraph 21(2)(*b*), shall, as the Minister considers appropriate,

(*a*) refer the project to the responsible authority so that it may continue the comprehensive study and ensure that a comprehensive study report is prepared and provided to the Minister and to the Agency; or

(*b*) refer the project to a mediator or review panel in accordance with section 29.

(2) [Decision final] Despite any other provision of this Act, if the Minister refers the project to a responsible authority under paragraph (1)(*a*), it may not be referred to a mediator or review panel in accordance with section 29.

22. (1) [Public notice] After receiving a comprehensive study report in respect of a project, the Agency shall, in any manner it considers appropriate to facilitate public access to the report, publish a notice setting out the following information:

(*a*) the date on which the comprehensive study report will be available to the public;

(*b*) the place at which copies of the report may be obtained; and

(*c*) the deadline and address for filing comments on the conclusions and recommendations of the report.

(2) [Public concerns] Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations and any other aspect of the comprehensive study report.

23. (1) [Decision of Minister] The Minister shall, after taking into consideration the comprehensive study report and any comments filed pursuant to subsection 22(2), refer the project back to the responsible authority for action under section 37 and issue an environmental assessment decision statement that

(*a*) sets out the Minister's opinion as to whether, taking into account the implementation of any mitigation measures that the Minister considers

b) lui recommande de poursuivre l'évaluation environnementale par étude approfondie ou de la renvoyer à un médiateur ou à une commission conformément à l'article 29.

21.1 (1) [Décision du ministre] Le ministre, prenant en compte tous les éléments qui doivent lui être signalés dans le cadre de l'alinéa 21(2)*a*) et les recommandations de l'autorité responsable et selon ce qu'il estime indiqué dans les circonstances :

a) renvoie le projet à l'autorité responsable pour qu'elle poursuive l'étude approfondie et qu'elle veille à ce qu'un rapport de cette étude lui soit présenté, de même qu'à l'Agence;

b) renvoie le projet à la médiation ou à l'examen par une commission conformément à l'article 29.

(2) [Caractère définitif de la décision] Malgré toute autre disposition de la présente loi, le projet que le ministre renvoie à l'autorité responsable au titre de l'alinéa (1)*a*) ne peut faire l'objet d'une médiation ou d'un examen par une commission conformément à l'article 29.

22. (1) [Avis public] Quand elle reçoit un rapport d'étude approfondie, l'Agence donne avis, de la façon qu'elle estime indiquée pour favoriser l'accès du public au rapport, des éléments suivants :

a) la date à laquelle le rapport d'étude approfondie sera accessible au public;

b) le lieu d'obtention d'exemplaires du rapport;

c) l'adresse et la date limite pour la réception par celle-ci d'observations sur les conclusions et recommandations du rapport.

(2) [Observations du public] Toute personne peut, dans le délai indiqué dans l'avis publié par l'Agence, lui présenter ses observations relativement aux conclusions ou recommandations issues de l'étude approfondie ou à tout autre aspect du rapport qui y fait suite.

23. (1) [Avis du ministre] Le ministre, après avoir pris en compte le rapport d'étude approfondie et les observations qui ont été présentées en vertu du paragraphe 22(2), renvoie le projet à l'autorité responsable pour qu'elle prenne une décision en application de l'article 37 et fait une déclaration dans laquelle :

a) il indique si, selon lui, le projet est susceptible ou non, compte tenu de la mise en œuvre des mesures d'atténuation qu'il estime appropriées,

appropriate, the project is or is not likely to cause significant adverse environmental effects; and

(*b*) sets out any mitigation measures or follow-up program that the Minister considers appropriate, after having taken into account the views of the responsible authorities and other federal authorities concerning the measures and program.

(2) [More information required] Before issuing the environmental assessment decision statement, the Minister shall, if the Minister is of the opinion that additional information is necessary or that there are public concerns that need to be further addressed, request that the federal authorities referred to in paragraph 12.3(*a*) or the proponent ensure that the necessary information is provided or actions are taken to address those public concerns.

(3) [Time for statement] The Minister shall not issue the environmental assessment decision statement before the 30th day after the inclusion on the Internet site of

(*a*) notice of the commencement of the environmental assessment;

(*b*) a description of the scope of the project;

(*c*) where the Minister, under paragraph 21.1(1)(*a*), refers a project to the responsible authority to continue a comprehensive study,

(i) notice of the Minister's decision to so refer the project, and

(ii) a description of the factors to be taken into consideration in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained; and

(*d*) the comprehensive study report that is to be taken into consideration by a responsible authority in making its decision under subsection 37(1) or a description of how a copy of the report may be obtained.

24. (1) [Use of previously conducted environmental assessment] Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and

(*a*) the project did not proceed after the assessment was completed,

d'entraîner des effets environnementaux négatifs importants;

b) il indique, s'il y a lieu, les mesures d'atténuation et tout programme de suivi qu'il estime appropriés, compte tenu des observations des autorités responsables et des autorités fédérales concernant ces mesures ou programmes.

(2) [Renseignements supplémentaires] Avant de faire la déclaration, le ministre, s'il estime qu'il lui faut des renseignements supplémentaires ou qu'il convient de mieux répondre aux préoccupations du public, demande aux autorités fédérales visées à l'alinéa 12.3*a*) ou au promoteur de veiller à ce que les renseignements nécessaires soient fournis ou à ce que les mesures nécessaires pour répondre aux préoccupations du public soient prises.

(3) [Versement préalable de documents] Le ministre ne peut faire la déclaration avant le trentième jour suivant la date à laquelle les documents suivants sont versés au site Internet :

a) l'avis du début de l'évaluation environnementale;

b) la description de la portée du projet;

c) dans le cas où il renvoie, au titre de l'alinéa 21.1(1)*a*), le projet à l'autorité responsable pour qu'elle poursuive l'étude approfondie :

(i) l'avis de sa décision de renvoyer le projet,

(ii) la description des éléments à prendre en compte dans le cadre de l'évaluation environnementale et de la portée de ceux-ci ou une indication de la façon d'obtenir copie de cette description;

d) le rapport de l'étude approfondie sur lequel se fonde la décision de l'autorité responsable au titre du paragraphe 37(1), ou une indication de la façon d'en obtenir copie.

24. (1) [Utilisation d'une évaluation antérieure] Si un promoteur se propose de mettre en œuvre, en tout ou en partie, un projet ayant déjà fait l'objet d'une évaluation environnementale, l'autorité responsable doit utiliser l'évaluation et le rapport correspondant dans la mesure appropriée pour l'application des articles 18 ou 21 dans chacun des cas suivants :

a) le projet n'a pas été mis en œuvre après l'achèvement de l'évaluation;

(*b*) in the case of a project that is in relation to a physical work, the proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,

(*c*) the manner in which the project is to be carried out has subsequently changed, or

(*d*) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,

the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.

(2) [Necessary adjustments] Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

37. (1) [Decision of responsible authority] Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or

(*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

b) le projet est lié à un ouvrage à l'égard duquel le promoteur propose une réalisation différente de celle qui était proposée au moment de l'évaluation;

c) les modalités de mise en œuvre du projet ont par la suite été modifiées;

d) il est demandé qu'un permis, une licence ou une autorisation soit renouvelé, ou qu'une autre mesure prévue par disposition réglementaire soit prise.

(2) [Adaptations nécessaires] Dans les cas visés au paragraphe (1), l'autorité responsable veille à ce que soient apportées au rapport les adaptations nécessaires à la prise en compte des changements importants de circonstances survenus depuis l'évaluation et de tous renseignements importants relatifs aux effets environnementaux du projet.

37. (1) [Autorité responsable] Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes :

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en œuvre du projet en tout ou en partie.

58. (1) [Powers to facilitate environmental assessments] For the purposes of this Act, the Minister may

. . .

(*c*) enter into agreements or arrangements with any jurisdiction within the meaning of paragraph 40(1)(*a*), (*b*), (*c*) or (*d*) respecting assessments of environmental effects;

(*d*) enter into agreements or arrangements with any jurisdiction, within the meaning of subsection 40(1), for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the environmental effects of projects of common interest;

. . .

(*i*) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

(1.1) [Participant funding] For the purposes of this Act, the Minister shall establish a participant funding program to facilitate the participation of the public in comprehensive studies, mediations and assessments by review panels established under either subsection 33(1) or 40(2).

Comprehensive Study List Regulations, SOR/94-638

Whereas the Governor in Council is satisfied that certain projects and classes of projects are likely to have significant adverse environmental effects;

. . .

REGULATIONS PRESCRIBING THOSE PROJECTS AND CLASSES OF PROJECTS FOR WHICH A COMPREHENSIVE STUDY IS REQUIRED

. . .

58. (1) [Évaluation environnementale] Pour l'application de la présente loi, le ministre peut :

. . .

c) conclure des accords avec toute instance au sens des alinéas 40(1)*a*), *b*), *c*) ou *d*) en matière d'évaluation des effets environnementaux;

d) conclure des accords avec toute instance, au sens du paragraphe 40(1), en matière de coordination, de consultation, d'échange d'information et de détermination des facteurs à considérer relativement à l'évaluation des effets environnementaux de projets d'intérêt commun;

. . .

i) prendre des règlements désignant des projets ou des catégories de projets pour lesquels une étude approfondie est obligatoire, s'il est convaincu que ceux-ci sont susceptibles d'entraîner des effets environnementaux négatifs importants.

. . .

(1.1) [Fonds de participation] Le ministre crée, pour l'application de la présente loi, un programme d'aide financière pour faciliter la participation du public aux études approfondies, aux médiations et aux examens par une commission constituée dans le cadre des paragraphes 33(1) ou 40(2).

Règlement sur la liste d'étude approfondie, DORS/94-638

Attendu que le gouverneur en conseil est convaincu que certains projets et certaines catégories de projets sont susceptibles d'entraîner des effets environnementaux négatifs importants . . .

. . .

RÈGLEMENT DÉSIGNANT LES PROJETS ET LES CATÉGORIES DE PROJETS POUR LESQUELS UNE ÉTUDE ENVIRONNEMENTALE APPROFONDIE EST OBLIGATOIRE

. . .

GENERAL

3. The projects and classes of projects that are set out in the schedule are prescribed projects and classes of projects for which a comprehensive study is required.

SCHEDULE
(Section 3)

COMPREHENSIVE STUDY LIST

. . .

PART V

MINERALS AND MINERAL PROCESSING

16. The proposed construction, decommissioning or abandonment of

(*a*) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;

. . .

(*c*) a gold mine, other than a placer mine, with an ore production capacity of 600 t/d or more;

Exclusion List Regulations, 2007, SOR/2007-108

Whereas the Governor in Council is satisfied that the environmental effects of certain projects in relation to physical works are insignificant;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subparagraph 59(*c*)(ii) of the *Canadian Environmental Assessment Act*, hereby makes the annexed *Exclusion List Regulations, 2007.*

. . .

GENERAL

2. The projects and classes of projects that are set out in Schedule 1 and to be carried out in places other than a national park, park reserve, national historic site or historic canal are exempted from the requirement to conduct an assessment under the Act.

. . .

DISPOSITIONS GÉNÉRALES

3. Les projets et les catégories de projets figurant à l'annexe sont ceux pour lesquels une étude approfondie est obligatoire.

ANNEXE
(article 3)

LISTE D'ÉTUDE APPROFONDIE

. . .

PARTIE V

MINERAIS ET TRAITEMENT DES MINERAIS

16. Projet de construction, de désaffectation ou de fermeture :

a) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;

. . .

c) d'une mine d'or, autre qu'un placer, d'une capacité de production de minerai de 600 t/d ou plus;

Règlement de 2007 sur la liste d'exclusion, DORS/2007-108

Attendu que la gouverneure en conseil est convaincue que les effets environnementaux de certains projets liés à un ouvrage ne sont pas importants,

À ces causes, sur recommandation du ministre de l'Environnement et en vertu du sous-alinéa 59*c*)(ii) de la *Loi canadienne sur l'évaluation environnementale*, Son Excellence la Gouverneure générale en conseil prend le *Règlement de 2007 sur la liste d'exclusion*, ci-après.

. . .

DISPOSITIONS GÉNÉRALES

2. Les projets et les catégories de projets figurant à l'annexe 1 qui sont réalisés dans un lieu autre qu'un parc national, une réserve, un lieu historique national ou un canal historique sont soustraits à l'évaluation exigée par la Loi.

. . .

SCHEDULE 1
(Section 2)

EXCLUSION LIST FOR PLACES OTHER THAN NATIONAL PARKS, PARK RESERVES, NATIONAL HISTORIC SITES OR HISTORIC CANALS

PART 1

GENERAL PROJECTS

1. The proposed maintenance or repair of a physical work.

Federal Courts Act, R.S.C. 1985, c. F-7

18.1 . . .

(3) [Powers of Federal Court] On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Interpretation Act, R.S.C. 1985, c. I-21

15. (1) [Application of definitions and interpretation rules] Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

(2) [Interpretation sections subject to exceptions] Where an enactment contains an interpretation section or provision, it shall be read and construed

(*a*) as being applicable only if a contrary intention does not appear; and

(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

Appeal allowed with costs.

Solicitors for the appellant: Ecojustice Canada, Vancouver.

ANNEXE 1
(article 2)

LISTE D'EXCLUSION POUR LES LIEUX AUTRES QUE LES PARCS NATIONAUX, LES RÉSERVES, LES LIEUX HISTORIQUES NATIONAUX ET LES CANAUX HISTORIQUES

PARTIE 1

PROJETS DE NATURE GÉNÉRALE

1. Projet d'entretien ou de réparation d'un ouvrage.

Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7

18.1 . . .

(3) [Pouvoirs de la Cour fédérale] Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Loi d'interprétation, L.R.C. 1985, ch. I-21

15. (1) [Application] Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

(2) [Restriction] Les dispositions définitoires ou interprétatives d'un texte :

a) n'ont d'application qu'à défaut d'indication contraire;

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Ecojustice Canada, Vancouver.

Solicitor for the respondents the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Attorney General of Canada: Department of Justice Canada, Edmonton.

Solicitors for the respondents the Red Chris Development Company Ltd. and the BCMetals Corporation: Lawson Lundell, Vancouver.

Solicitors for the interveners the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia: Edwards, Kenny & Bray, Vancouver.

Solicitors for the interveners the Canadian Environmental Law Association, the West Coast Environmental Law Association, the Sierra Club of Canada, the Quebec Environmental Law Centre, Friends of the Earth Canada and the Interamerican Association for Environmental Defense: Canadian Environmental Law Association, Toronto.

Procureur des intimés le ministre des Pêches et des Océans, le ministre des Ressources naturelles et le procureur général du Canada : Ministère de la Justice Canada, Edmonton.

Procureurs des intimées Red Chris Development Company Ltd. et BCMetals Corporation : Lawson Lundell, Vancouver.

Procureurs des intervenantes Mining Association of British Columbia et Association for Mineral Exploration British Columbia : Edwards, Kenny & Bray, Vancouver.

Procureurs des intervenants l'Association canadienne du droit de l'environnement, West Coast Environmental Law Association, le Sierra Club du Canada, le Centre québécois du droit de l'environnement, Les Amis de la Terre Canada et Interamerican Association for Environmental Defense : Canadian Environmental Law Association, Toronto.