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Our File: 5320

John D. Smith
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Canadian Environmental Assessment Agency
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Via email: John.smith@ceaa-acee.gc.ca

Dear Mr. Smith,

RE: Proposed amendments to the *Comprehensive Study List Regulations* related to ski area developments in national parks.

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 as a public source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. The ELC is pleased to provide comments on the proposed amendments to the *Comprehensive Study List Regulation* in relation to ski developments in national parks.

Summary of position

The ELC strongly recommends maintaining the requirement for a comprehensive study for ski hill developments as currently set out in the *Comprehensive Study List Regulation*.¹ Amendments relegating these activities to a screening process under the *Canadian Environmental Assessment Act (CEAA)* are unacceptable, as to do so nullifies mandatory legal rights to public participation in the process and diminishes the legal scope of assessment required for ski developments in national parks.² This in turn undermines transparency and department accountability for meeting important federal statutory mandates to protect wildlife and habitat.

Context

The *Comprehensive Study List Regulation* prescribes the projects or classes of projects that must undergo a comprehensive study pursuant to the *CEAA*.³ Ski developments in national parks must undergo a comprehensive study in the following prescribed instances:⁴

3.1 The proposed development of a commercial ski area in a national park or national park reserve:

¹ SOR/94-638.

² S.C. 1992, c. 37.

³ *Supra* note 1.

⁴ *Ibid.* at Schedule.

- (a) as set out in a long-range development plan that is to be submitted to the Minister responsible for the Parks Canada Agency for approval;
- (b) that is not consistent with a long-range development plan approved by the Minister responsible for the Parks Canada Agency; or
- (c) that is consistent with a long-range development plan approved before 1999 but that involves development of currently undeveloped, unskied or unserved terrain.

Commercial ski developments in the national parks do not have current long-range development plans in place.⁵ This being the case, a comprehensive study is currently required for the majority of proposed developments.

Park priorities

The number one priority in managing national parks is ecological integrity. This is expressly stated in both the *Canada National Parks Act (Parks Act)* and the *Ski Area Management Guidelines* (December 7, 2006).⁶ The *Parks Act* states:⁷

Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

The comprehensive study process under *CEAA* best facilitates meeting this mandate. Alternatives to the comprehensive study assessment process are inherently inferior, as legislative guarantees of public participation and requirements for consideration of specific environmental impacts are absent.

The importance of public participation as a legal right

The comprehensive study process under *CEAA* guarantees the public's right to participate in the environmental assessment process. This includes the ability to access participant (and intervener) funding, which facilitates the bringing of expert evidence and a thorough assessment of the evidence presented to the government.⁸

The general policy of the department to hold public consultations in relation to the development of Site Guidelines and Long-Range Plans, while laudable, is largely meaningless legally, as policy changes and policy application can be varied by unreviewable discretionary actions taken by the Minister. Similarly,

⁵ See The Canadian Environmental Assessment Agency Discussion Paper *Proposed amendments to the Comprehensive study List Regulations under the Canadian Environmental Assessment Act related to ski area developments in national parks*, online: Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A83452D-03B7-4210-A15C-687A8319C9FA>>.

⁶ Parks Canada, online: <<http://www.pc.gc.ca/pn-np/ab/banff/plan/plan5d.aspx>>.

⁷ *Canadian National Parks Act*, S.C. 2000, c. 32, at s. 8(2).

⁸ *CEAA* at s.58(1.1).

limiting ski hill activities and projects to a screening level assessment under *CEAA* leaves public participation and resulting transparency and accountability to the discretion of the Minister.⁹

It is apparent from the current language of the *Comprehensive Study List Regulation* that the intent was to have comprehensive long range development plans delineating the future plans of ski areas in the national parks. This process would provide clarity and certainty in future development within the backdrop of the environmental assessment process. It now appears that, due to operators and/or the Parks Canada failure to bring forth a public pronouncement of long term development intent, there are steps being taken to undermine public oversight and the scope of environmental assessment related to these projects.

The value of maintaining a broader scope of environmental assessments

CEAA sets a variety of factors that are required for comprehensive studies that need not be conducted under a *CEAA* screening. These considerations include:¹⁰

- (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.

These additional aspects of environmental assessment are particularly relevant to this discussion where ski hill activities are likely to impact sensitive or at risk species. For instance, the “need for, and the requirements of, any follow-up program” are likely to be highly relevant to managing existing and potential impacts of an activity on species at risk. Consider for instance the impacts of extending of a chair lift and opening up additional terrain at the Marmot Basin ski hill and the concurrent potential for increased off-piste or off lease skiing that may impact an area and its wildlife.¹¹ While general mitigation measures will be relevant to this discussion, it appears that follow-up programs may be required to ensure the long term integrity of habitat in this area of Jasper National Park.

Further, the *Marmot Basin Ski Area Site Guidelines* rely on the application of *CEAA* for a further delineation and consideration of potential impacts of proposed developments on wildlife, such as caribou.¹² Parliamentary intent for national parks is that they are to play a significant role in the protection and restoration of species at risk. This intent is reflected in the immediate protection of identified critical habitat of listed species in national parks and national wildlife areas, pursuant to section 58 of the *Species at Risk Act*.¹³ Areas outside of national parks and wildlife areas do not garner such

⁹ *CEAA* at s.18(3).

¹⁰ *CEAA* at s.16(2).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Species at Risk Act*, S.C.2002, c.29.

immediate protection.¹⁴ Further, the Preamble to the *Species at Risk Act* states that “Canada’s protected areas, especially national parks, are vital to the protection and recovery of species at risk”. A decrease in the level of environmental assessment in relation to activities in parks may therefore result in a direct undermining of both the ecological integrity mandate found in the national park legislation and Parliamentary intent to protect species at risk.

The comprehensive study requirement should also be maintained to ensure a thorough and robust assessment of cumulative effects and to assist in evaluation of what might constitute a “Substantial Environmental Gain” under the *Ski Area Management Guidelines*.

The Discussion Paper posted in relation to the proposed amendments to the *Comprehensive Study List Regulation* states that the *Ski Area Management Guidelines* and the *Site Guidelines* address cumulative effects issues.¹⁵ A review of the *Ski Area Management Guidelines* and available *Site Guidelines* for the Marmot Ski Area in Jasper National Park reveals an insufficient level of scrutiny of effects and a general lack of rigorous scientific analysis in relation to impacts.¹⁶

Further, there is a need to ensure a high level of public participation and review in decision about what constitutes a “Substantial Environmental Gain” under the *Ski Area Management Guidelines*. This public oversight can be guaranteed by maintaining the current language of the *Comprehensive Study List Regulation* and ensuring that a determination of a Substantial Environmental Gain is supported by science and subjected to an environmental assessment.

By way of example one can consider the proposed decrease in lease footprint in the *Marmot Basin Ski Area Site Guidelines* as justification for expanded lease area elsewhere and increased terrain development.¹⁷ While guideline documents indicate that a leasehold reduction may lead to Substantial Environmental Gain, it fails to address the fact that development within the current leasehold area may otherwise be restricted through department discretion under the Guidelines and may in fact end up being prohibited by identification of critical habitat for caribou pursuant to the *Species at Risk Act*.¹⁸ The ELC views this as an inappropriate application of the concept of Substantive Environmental Gain. A substantive environmental gain should only be considered where there is a net gain following rigorous application of existing laws, policies and discretionary regulatory decisions to protect ecological integrity

¹⁴ *Ibid.*

¹⁵ The Canadian Environmental Assessment Agency Discussion Paper, *Proposed amendments to the Comprehensive study List Regulations under the Canadian Environmental Assessment Act related to ski area developments in national parks*, online, Canadian Environmental Assessment Agency <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A83452D-03B7-4210-A15C-687A8319C9FA>> notes that “ski area operators argue that undertaking a comprehensive study is an excessive requirement given the limitations imposed by the Ski Area Management Guidelines, and the Site Guidelines where cumulative effects issues are addressed”.

¹⁶ For instance the nature of scoping, the collection of regional baseline data, the analysis of effects on species of interest, the evaluation of potential significance of effects and follow-up are insufficiently dealt with in the guideline documents resulting in a failure to produce a robust and scientifically valid assessment of cumulative effects. See the Canadian Environmental Assessment Agency, *Cumulative Effects Assessment Practitioners Guide* (1999) <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A83452D-03B7-4210-A15C-687A8319C9FA>>.

¹⁷ See section 4.4 of the *Site Guidelines*, online: Parks Canada <<http://www.pc.gc.ca/pn-np/ab/jasper/plan/plan8/d.aspx>>.

¹⁸ *Ibid.*



and sensitive species in national parks.¹⁹ In this regard, the environmental assessment process undertaken through a comprehensive study enables a more thorough assessment of whether a substantial environmental gain is likely to be achieved through proposed measures. This is an essential part of examining whether proposed mitigation measures are truly operating to ameliorate an activity's impacts.

Conclusion

The ELC recommends maintaining comprehensive studies for ski hill activities as currently set out in the *Comprehensive Study List Regulation*. A reduction of the level of environmental assessment to a screening level assessment undermines public participation and the scope of assessment for these projects. The paramount intent and purpose of national parks is reflected in both the *National Parks Act* and the *Species at Risk Act* and is best met by maintaining processes that ensure highly informed decisions and decision-making transparency. A comprehensive study level of environmental assessment will better ensure that decisions related to ski hill development are aimed at preserving ecological integrity and critical species habitat in our national parks for generations to come.

Should you have any questions regarding the foregoing please do not hesitate to contact the ELC.

Yours truly,

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¹⁹ In this regard, a ski development should not be enriched for a lease reduction where that lease area would have highly stringent regulations limiting its use in the first instance.