

Court File No.

FEDERAL COURT OF CANADA

B E T W E E N:

GREAT LAKES UNITED and
MININGWATCH CANADA

Applicants

- and -

MINISTER OF THE ENVIRONMENT

Respondent

APPLICATION PURSUANT TO sections 18 and 18.1 of the *Federal Court Act*.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicants' solicitor, or where the Applicants are self-represented, on the Applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 7, 2007

Issued by: _____

Registry Officer

Address of
local office: Federal Court of Canada
Registry Office
180 Queen St. W.
Toronto, ON

TO: MINISTER OF THE ENVIRONMENT

c/o THE ATTORNEY GENERAL OF CANADA
East Memorial Building
284 Wellington Street
Ottawa, ON K1A 0H8

APPLICATION

This is an application for judicial review of the ongoing course of action of the Minister of the Environment (the Minister) in relation to the reporting of pollutants from mining activities to the National Pollutant Release Inventory (NPRI).

The Minister is currently making representations to and communicating with mining facilities in relation to the reporting of releases or transfers of pollutants to tailings impoundment and waste rock disposal areas in a manner that conflicts with the Minister's exercise of discretion under sections 46 and 47 of the *Canadian Environmental Protection Act, 1999*, R.S.C. 1999, c. C-33 (CEPA).

CEPA was designed to ensure public transparency and accountability in achieving pollution reductions which are not ensured through the ongoing course of action of the Minister.

The Minister has therefore been acting, and continues to act, without jurisdiction or beyond his jurisdiction; has erred in law; and is acting contrary to law within the meaning of section 18.1 of the *Federal Courts Act*.

The Applicants make application for:

1. An order or orders in the form of a declaration:
 - a. Declaring that the Minister had exercised discretion in relation to criteria for reporting of releases and transfers by mining facilities to the NPRI for 2006 when the Notice was published to the Gazette and that the reporting of releases or transfers of pollutants considered substances of concern to tailings impoundment and waste rock disposal areas to the NPRI is required for 2006;
 - b. Declaring that the Minister has abused his discretion by communicating to mining facilities in a manner that permits them to violate CEPA;

- c. Declaring, alternatively, that the representations and communications with mining facilities by the Minister or his delegates in relation to the reporting of releases or transfers of pollutants to tailings impoundment and waste rock disposal areas conflicting with the Gazetted Notice requirements and Guidance document for the 2006 reporting year was given without jurisdiction; and
 - d. Declaring that any representations and communications by the Minister to facilities responsible for reporting must be consistent with NPRI reporting requirements as published in the Gazetted Notice and Guidance document.
2. An order or orders in the nature of mandamus directing the Minister to publish the NPRI with data to be submitted by mining facilities for the 2006 reporting year in accordance with section 50 of CEPA.
 3. An order that the Applicants shall not be required to pay costs to the Respondent of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.

The grounds for the Application are:

The Canadian Environmental Protection Act and the National Pollutant Release Inventory

1. CEPA was enacted primarily, according to the Declaration and Preamble to the Act, to contribute to sustainable development through pollution prevention. In recognition of those principles, section 2 of CEPA imposes overarching duties on the Federal government to, among other things, encourage the participation of the people of Canada in the making of decisions that affect the environment; endeavour to exercise powers that require the provision of information in a

coordinated manner; and apply and enforce CEPA in a fair, predictable and consistent manner.

2. Part 3 of CEPA provides for the gathering of information on pollution in Canada, the publication of such information and its provision to the public.
3. The NPRI is the system that has been created to provide predictable and consistent information to the public on pollutant releases nationally from a wide variety of sources.
4. The yearly NPRI reporting requirements are established through a two-step process through sections 46 and 47 of CEPA:
 - a. The Minister first establishes who must report and what must be reported yearly to the NPRI under the authority of section 46. These yearly reporting requirements are published annually through a Notice in the Canada Gazette. The 2006 Notice was published in the Gazette on February 25, 2006 with an amendment published on March 3, 2007.
 - b. Section 47 of CEPA then requires that a Guidance document be published to assist facilities in meeting reporting requirements. The 2006 Guidance document stipulates that in the case of any inconsistencies between the Guidance document and the Notice, the Notice prevails.
5. Sections 48 and 50 of CEPA require that the Minister establish an inventory of pollutants and publish the inventory publicly.

NPRI Reporting by Mining Facilities

6. Until 2006 there was an exemption from reporting for mining facilities which provided that pollutant releases and transfers from extraction or primary crushing did not need to be reported.

7. Mining facilities did have to report and have been reporting on releases and transfers of air contaminants from processes other than mining and on releases and transfers outside company property.
8. In 2006, the Minister exercised discretion under section 46 of CEPA to remove the exemption from reporting pollutant releases and transfers from extraction or primary crushing previously enjoyed by mining facilities.
9. Consistent with the Gazetted Notice, the Guidance document issued by the Minister for 2006 highlighted the fact that the mining exemption had been removed.
10. Despite the exemption removal however, subsequent actions by the Minister and his delegates have conflicted with the Gazetted Notice requirements relating to the reporting of releases and transfers to waste rock dumps and tailing impoundment areas from mining.
11. In particular, after the Minister exercised jurisdiction to remove the exemption for mining facilities, Environment Canada officials made numerous representations and communications to mining facilities advising that mining facilities would not be required to report releases or transfers of substances of concern to tailings areas and waste rock areas for 2006.
12. Analysis of NPRI data indicates that mining facilities have so far failed to report releases and transfers of substances of concern to tailings areas and waste rock areas for 2006 as they are required to do pursuant to the Gazetted Notice.
13. The Applicants assert that as the Minister had already exercised discretion under section 46 of CEPA to delete the mining exemption and subsequently under 47 to issue consistent Guidance to those required to report, the Minister or his staff could not thereafter provide representations or communications to mining facilities that conflicted with such decisions.

Data Collected by Mining Facilities for 2006 Reporting Year

14. Mining facilities have been collecting the data at issue in this application but have not provided such information to the Minister through the NPRI as a result of the communications by Environment Canada inconsistent with the Gazetted Notice and Guidance document.

Notices Given by Applicants of Conflicting NPRI Reporting Requirements

15. The Applicants have sought assurances from the Minister and Environment Canada staff that the NPRI reporting requirements for mining facilities will be properly implemented by Environment Canada.

Nature of the Applicants

16. The Applicant Great Lakes United is a twenty-five year old binational environmental group dedicated to leading efforts to protect and restore the Great Lakes and St. Lawrence River. It is a coalition of organizational members representing environmental groups, conservation organizations, labour, and indigenous groups. Ninety-four of its member groups are located in Canada.
17. The Applicant MiningWatch Canada is a national non-profit coalition. Established in 1999, MiningWatch Canada is an alliance of twenty labour, Aboriginal, environmental, social justice and development organizations from across Canada with a mandate to support communities affected by mining in Canada, and affected by Canadian mining companies around the world.
18. The Applicants have both been deeply involved in the issue of public accountability and transparency of the mining industry in Canada and internationally. In addition, the Applicants have been involved in the development of policy with governments, First Nations, industry, environmental groups and others regarding the reporting of pollutant releases and transfers by the mining industry to the NPRI.

Issue of Public Importance

19. Mining activities are a significant source of pollutants to land, water and air.
There is a significant public interest in having information about such pollutants available to the public in a predictable, accessible and searchable manner through the NPRI consistent with the underlying purposes of CEPA.
20. Furthermore, as the Notice for 2007 reporting requirements has been Gazetted with the mining exemption absent, this application will clarify what has to be legally reported as a pollutant release or transfer from mining activities for 2007 and possibly subsequent years.
21. It is for these public interest reasons that the Applicants bring this application.

The Applicants rely on the following statutory provisions, rules and principles:

1. *Canadian Environmental Protection Act, 1999*, R.S.C. 1999, c. C-33 as amended and sections 46-50 in particular;
2. Notice with Respect to Substances in the National Pollutant Release Inventory for 2006 published in the *Canada Gazette*, Part I, February 25, 2006 and amendment published in the *Canada Gazette*, Part I, March 3, 2007;
3. Notice with Respect to Substances in the National Pollutant Release Inventory for 2007 published in the *Canada Gazette*, Part I, March 3, 2007;
4. *Federal Courts Act*, ss. 18 and 18.1; and
5. *Federal Courts Rules*.

This Application will be supported by the following material:

1. the affidavit of John Jackson, Great Lakes United, to be sworn;
2. the affidavit of Joan Kuyek, MiningWatch Canada, to be sworn;
3. the record of the Minister's course of conduct, including all documents providing advice and representations to industry with regards to pollutant releases and transfers to tailings areas and waste rock piles, and public comments or submissions regarding same;
4. such further and other affidavits and material as counsel may advise and this Honourable Court permit.

The Applicants request that the Minister send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Minister, to the Applicants and to the Registry:

1. the record of all documents and other materials considered by the Minister to the date hereof, and to the date of the hearing of this application, in relation to the reporting of pollutant releases and transfers by mining facilities to tailings impoundment and waste rock disposal areas under the NPRI.
2. such further and other material that may be in the possession, power or control of the Minister and which may be relevant to these proceedings.

November 7, 2007

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