Environmental Assessment in British Columbia

Environmental Law Centre
UNIVERSITY OF VICTORIA

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Faculty of Law

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About the Environmental Law Centre

The Environmental Law Centre (ELC) is a non-profit society that operates the ELC Clinic at the Faculty of Law, University of Victoria. A key part of our mandate is to improve access to justice by advocating reforms to environmental laws through thoughtful, scientifically sound, and pragmatic legislative proposals. To that end, we are hopeful for a broad dialogue with the many interests, parties and officials who strive to protect the BC environment by taking part in the environmental assessment process.

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PREFACE

That environmental assessment (EA) must play a core role in the legal protection of the environment can hardly be disputed. And yet, it was not until 1995 that British Columbia's first-ever comprehensive EA law came into force, a legal regime that, in 2002, was significantly amended. The challenges with which EA processes must grapple are daunting: to identify and evaluate competing environmental, social, and economic interests; deliberate in an inclusive, transparent, accountable, scientifically rigourous, and effective manner; and offer recommendations that allow for the proactive avoidance or mitigation of environmental harms. This report considers whether and to what extent EA in BC is meeting these goals – the first time that an independent analysis of this kind has been mounted.

The Environmental Law Centre at the University of Victoria Faculty of Law (ELC) is a registered non-profit society which partners with the Faculty of Law to operate Canada's largest clinical program in public interest environmental law. A key part of the ELC's mandate is to promote and enhance access to justice by advocating environmental law reforms that are pragmatic, thoughtful, and scientifically sound.

We are proud to publish this new report that is based on almost two years of investigation and research. To lead this project, the ELC retained the services of Mark Haddock, one of BC's most experienced and respected public interest environmental lawyers.

He worked closely with and was ably assisted by Holly Pattison who was responsible for layout, design and editing of this report.

A team effort, this report has also been significantly informed by the research contributions of ELC clinic students Megan Shaw and Jennifer Madore. It has also significantly benefitted from editorial and conceptual contributions by ELC articled student Sarah Sharp, other members of the ELC legal team including Deborah Curran, Calvin Sandborn and Chris Tollefson, and Professors Robert Gibson and Meinhard Doelle.

We have been gratified by the respectful and constructive dialogue that this project generated to date. We are especially grateful to those who contributed their time, ideas and perspectives to this project, particularly during consultations on the discussion paper published last year. We hope that publication of this report and its recommendations will mark the beginning of an even broader dialogue around these important issues.

This project, and its sister project that explores the current status and future prospects of Environmental Tribunals in BC, were made possible through generous grants from the Law Foundation of BC. We are grateful for this support and would like especially to recognize Program Directors karima budhwani and Janna Cumming for their considerable advice and assistance for the duration of these two projects. We are also grateful to the Tula Foundation, which provided core funding for ELC operations throughout this project.

Chris Tollefson
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Executive Summary

Environmental assessment is essential to environmental protection. It is commonly accepted that environmental assessments identify damage that a proposed project might cause and stipulate how such damage should be avoided or mitigated. But proper assessments are much more than this; they should drive selection, design and implementation of undertakings at the strategic and the project level. They should help to deliver undertakings that serve the public interest, not just make those undertakings less bad.

There is ample evidence that inadequate environmental assessment can have serious consequences. For example, the U.S. decision to exempt BP's Deepwater Horizon from an environmental assessment has been identified as a factor in the catastrophic Gulf of Mexico oil spill.[1]

It is now widely accepted that effective environmental assessment laws are fundamental to a sustainable economy. Influential economists maintain that ambitious environmental regulation can enhance competitiveness.[2]

Since the U.S. *National Environmental Policy Act* of 1969 first created environmental assessment requirements, most developed countries have adopted environmental assessment laws. Environmental assessment legislation applies broadly to major projects across British Columbia, including industrial, mine, energy, water management, waste disposal, food processing, waste disposal, transportation and tourist destination resort projects. It applies to urban projects, such as Vancouver's Canada Line and Gateway program, and to remote mines, energy projects and large resort developments.

As a key sustainability-planning tool, the environmental assessment process must evaluate a range of competing environmental, social and economic values and interests. To be credible, it must strive for inclusiveness, transparency, accountability, scientific rigour, fairness, efficiency and cost effectiveness. Good assessment practice proactively avoids or mitigates environmental harm. Designing and administering a legal regime that strikes an appropriate balance between all these competing goals is no small challenge.

British Columbia replaced a piecemeal environmental assessment (EA) system with its first comprehensive *Environmental Assessment Act* in 1994. The *Act* was rewritten in 2002. Although BC has had EA legislation for more than a decade, to date it has not been reviewed for its effectiveness in meeting these goals. The purpose of this paper is to evaluate the current EA process, document the experiences and opinions of participants within it, and consider how British Columbia's environmental assessment process might be improved.

Since early 2009 we have been canvassing numerous people who have experience of the EA process in

1 The U.S. Interior Department exempted BP's Deepwater Horizon drilling operation in the Gulf of Mexico from a detailed environmental impact analysis last year, after reviews of the area concluded that a massive oil spill was unlikely. "U.S. Exempted BP's Gulf of Mexico Drilling from Environmental Impact Study," *Washington Post,* May 5, 2010.

2 Ambec, Stefan *et al.* "The Porter Hypothesis at 20: Can Environmental Regulation Enhance and Competitiveness?," *Sustainable Prosperity,* June 2010, available online at http://www.sustainableprosperity.ca/files/PH@20%20Chairs%20Paper_1.doc

BC. They represent many different interests: individual citizens, environmental groups, regulatory agencies, proponents, First Nations, and professionals engaged in the EA process (assessment experts, lawyers, engineers, biologists, consultants) and the BC Environmental Assessment Office (EAO).

In May 2010, the Environmental Law Centre released a discussion paper that outlined our research findings and posed 23 questions on which we sought input. It was distributed to a broad audience that included tribunals, government agencies, First Nations, industry and professional organizations, assessment professionals, academics, public interest groups and lawyers with a diverse practice and client base related to the research (e.g. environmental, alternative dispute resolution, Aboriginal, natural resource, administrative law, etc.) through the Canadian Bar Association (BC Branch) sections. In July 2010, the Environmental Law Centre hosted a focus group session in Vancouver to receive input and feedback on the discussion paper and identify options for reform where desirable.

This final report is the outcome of our consideration of the valuable input we received in the focus group session, written responses, interviews and follow-up research. In the spirit of continuous improvement we are making 27 recommendations for reform covering 10 broad topic areas. The detailed recommendations are interspersed throughout the report, but in general terms they are intended to:

- reconsider the thresholds and triggers for environmental assessment;
- encourage strategic environmental assessment and land use planning to address "bigger picture" issues that are more appropriately dealt with outside project-specific assessments;
- improve EA scoping decisions, procedures and methods by incorporating international best practices;
- improve opportunities for public participation and engagement opportunities and access to information;
- encourage the development of professional practice directives and accountability measures, and better oversight of the EA process within government;
- introduce decision-making rules that incorporate the purpose of EA and sustainability criteria;
- require EA Certificate conditions that are measureable and verifiable;
- introduce accountability mechanisms and dispute resolution processes;
- clarify roles and responsibilities for post-certificate monitoring and enforcement; and
- uphold the Crown's obligations to First Nations.

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Introduction — Our Overall Objective

The overall objective of this project is to identify ways to improve the environmental assessment legislation and process, based on best practices in other Canadian jurisdictions and internationally. Our research project is focused on the following issues:

1. Triggers and Scoping:

- When should an EA be required and not required?
- Does the EA process apply to the activities that are most likely to have environmental impacts?
- Are all aspects of a project assessed, and do assessments consider the cumulative impacts of other activities in the area?
- Are assessments complete and the standards consistent?

2. Public Participation and Engagement:

- What is the nature and extent of the public participation process in BC?
- Are assessments transparent and is adequate notice and information provided to interested parties throughout the process, including First Nations?
- Are there any barriers to public participation in EA?

3. Oversight and Decision-Making:

- How is relevant information obtained and evaluated?
- What decision-making process determines whether a project is likely to have acceptable environmental impacts or whether adverse impacts can be mitigated adequately?
- Are there checks and balances in place to ensure decision-making has integrity?

4. EA Certificates and Post-Certificate Issues:

- How do EA certificates protect the environment?
- What happens once the EA is approved and the project begun?
- How are environmental impacts monitored, and who ensures that conditions are complied with?
- How is new information incorporated following project approval?

Our Approach

As an environmental public interest organization, our focus in this report is the way in which EA delivers environmental protection and addresses the interests of those affected by proposed developments. As a legal organization, we bring the perspective of lawyers concerned with well-designed laws, regulations and policies. Ultimately, we will evaluate the EA process against:

- fair administrative process;
- credible fact-finding;
- public access to information;
- open and understandable decision-making;
- legally enforceable EA certificates, backed by a sound compliance and enforcement regime;
- checks and balances for accountability; and
- international environmental assessment good practice standards.

Several recent studies have documented the many concerns of First Nations with the current EA process and are referenced later in this paper. We were not aware of these studies at the commencement of our own, but it quickly became clear that the level of concern about the integrity of the EA process is indeed high among those whose interests are affected by proposed developments, and that these constituents feel increasingly isolated from EA outcomes.

There are no doubt many additional issues worthy of examination and comment from the perspective of regulators and project proponents, as well as a host of issues that arise in the other disciplines that converge in the EA arena, particularly the sciences, social sciences, political science, public policy and dispute resolution fields.

Environmental assessment is highly complex and involves broad and competing societal interests, so we do not expect or advocate for a rigid, prescriptive set of rules that would eliminate necessary discretion. We are also aware that there are sometimes differences between what the rules say and the actual practice of the Environmental Assessment Office and regulators. For example, while there was some initial concern that the 2002 major amendments to *Environmental Assessment Act* introduced a degree of discretion that could allow for otherwise reviewable projects to be exempted from assessment, this has not proven to be an issue. In this report we attempt to focus on real problems with the legislation, not hypothetical ones.

It is also apparent that some proponents and their consultants are sophisticated and demonstrate strong EA practices that go beyond what is legally required in BC. Some of them incorporate best practices that are routine in other jurisdictions. However, there are also proponents with speculative projects and minimal financing that seem to press for an EA certificate as soon as possible with the minimum expenditure necessary. Our view is that the system must be robust enough to effectively govern both the good actors and bad actors. And it must be structured to deliver environmental protection and due process for all types of projects, applicants and affected parties.

Background to the BC Environmental Assessment Regime

In the decade preceding the passage of the first provincial *Environmental Assessment Act*, British Columbia carried out environmental assessments (EA) through four separate, somewhat *ad hoc* processes:

1. The *Environment Management Act* of 1981 allowed the Minister of Environment to require "any person who proposes to do anything that would have a detrimental environmental impact" to prepare an environmental impact assessment.[3]

2. The *Utilities Commission Act* regulations since 1980 required applications for energy project certificates to identify and assess "any impacts by the project on the physical, biological and social environments; and proposals for reducing negative impacts."[4] This became known as the "Energy Projects Review Process."

3. The *Mine Development Assessment Act* of 1990 required new mines capable of producing 10,000 tonnes of ore per year to obtain a mine development certificate. The application had to contain "information, analyses and an environmental protection plan" acceptable to the Minister of Energy and Mines and the Minister of Environment.[5] The ministers could approve or reject an application or refer it to an independent assessment panel to conduct an inquiry.

4. The Province also adopted in 1990 a "Major Projects Review Process" policy that applied to numerous industrial projects, most of which remain subject to environmental assessment today. Two high profile projects which this policy applied to were the Celgar pulp mill expansion and a proposed ferrochromium plant on Vancouver Island.

The 1994 *Act*

In 1994, the NDP government consolidated these processes by passing BC's first *Environmental Assessment Act*[6] and establishing the Environmental Assessment Office (EAO) in the Ministry of Environment to oversee its administration. The intent of this office was "to provide an open, accountable and neutrally administered process for the assessment" of a broader range of "reviewable projects."[7] The *Reviewable Projects Regulation*[8] set thresholds that triggered the EA requirement for certain industrial, mine, energy, waste management, water management, tourism resort, transportation and food processing projects based on proposed size or production capacity. Projects falling within the thresholds, or designated as reviewable by the Minister of Environment, required a project approval certificate before any construction or operation could occur.

The 1994 *Act* adopted much of the basic structure of the *Mine Development Assessment Act* and the Major Projects Review Process but introduced considerable procedural detail to the process, including:

- Project committees comprised of provincial, federal, municipal, regional and First Nations government

3 *Environment Management Act*, S.B.C. 1981, c.14, s.3.

4 B.C. Reg.388/80, s.1(1)(b)(iv).

5 *Mine Development Assessment Act*, S.B.C. 1990, c.55, s.2. Prior to passage of this *Act*, the Province adopted a policy known as the Mine Development Review Process that was very similar.

6 *Environmental Assessment Act*, S.B.C.1994, c.35. The *Act* came into effect in 1995.

7 *Environmental Assessment Act*, S.B.C.1994, c.35, s.2.

8 B.C. Reg. 276/95

representatives, to provide the ministers with expertise, advice, analysis and recommendations;

- Public advisory committees to make recommendations to the project committee on matters of public concern;
- Mandatory public notice provisions inviting comment at four stages of the EA process; and
- An Environmental Assessment Board, with powers of inquiry to conduct public hearings on high profile projects or matters referred to the board by the ministers.

The *Act* defined its legislative purposes, including: "to promote sustainability by protecting the environment and fostering a sound economy and social well-being" and "to prevent or mitigate adverse effects of reviewable projects" through "timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects."[9]

Changes in the 2002 *Act*

The 1994 *Act* was repealed and replaced in 2002 by the Liberal government as part of a broad deregulation of many environmental laws. The Liberal government criticized the "inflexibility of the current one-size-fits-all process" and argued for a "more streamlined and flexible process."[10] The government concluded that "during the almost seven years of experience with the current *Act*, the process has proven to have serious limitations in terms of procedures becoming too rigid and inflexible."[11]

One of the main changes to the *Act* was the elimination of provisions requiring engagement of local governments and First Nations on project committees, and provisions allowing for inclusion of other stakeholders on public advisory committees.[12] The new 2002 *Ac*t placed considerably more decision-making flexibility in the minister and the executive director of the Environmental Assessment Office for many aspects of environmental assessment, such as whether reviewable projects would require assessment and what the terms of reference for those assessments would be. Minister Hagen stated that "consistent with this government's deregulation goals, the process will be more timely and cost-efficient. It will be less regimented and will allow proponents more freedom to determine best how to tackle issues without impinging on government's oversight and review functions."[13]

In the course of reducing 93 sections of the 1994 *Act* to 51, the 2002 *Act* also eliminated the purposes clause which guided decision-makers and courts in determining the *raison d'être* of environmental assessment.[14] It also repealed the mandatory requirement that assessment reports consider and evaluate alternative sites and methods to the proposed project.[15] One of the more controversial provisions in the new *Act* was its requirement that the executive director "take into account and reflect government policy identified…by a government agency or organization responsible for the identified policy area" when determining the scope, procedures and methods of an assessment

9 *Environmental Assessment Act*, S.B.C.1994, c.35, s.2.

10 Hagen, Stanley. British Columbia. Legislature. Debates. 37th Parliament, 3rd Session, Volume 7, Number 10, May 9, 2002, p.3333. (Online) Available: <http://www.leg.bc.ca/HANSARD/37th3rd/h20509p.htm>

11 Hagen, Stanley. British Columbia. Legislature. Debates. 37th Parliament, 3rd Session, Volume 7, Number 14, May 15, 2002, p.3463. (Online) Available: <http://www.leg.bc.ca/HANSARD/37th3rd/h20514p.htm>

12 *Environmental Assessment Act*, S.B.C.1994, c.35, ss.9,10.

13 Hagen, Stanley. British Columbia. Legislature. Debates. 37th Parliament, 3rd Session, Volume 7, Number 14, May 15, 2002, p.3464. (Online) Available: <http://www.leg.bc.ca/HANSARD/37th3rd/h20514p.htm>

14 For example, see George v. Marczyk, 1988 CanLII 6737 (B.C.S.C.) at paras.44, 54 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para.5.

15 *Environmental Assessment Act*, S.B.C.1994, c.35, s.22.

or in the course of the assessment. [16]

Some saw this as politicizing the EA process.[17] The EAO has stated that this requirement is simply consistent with all government programs and that it is appropriate that "the assessment process must be conducted within the limits of, and be consistent with, overall government policy, goals and direction."[18] The differences between these two positions may go to the ability, authority or likelihood of the EAO to question political level policy decisions that may in themselves cause significant adverse environmental effects.

The BC Court of Appeal recently described the changes between the 1994 and 2002 *Acts* as follows:[19]

> ***The most significant differences between the former and the current Act are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations.***

These statutory changes were followed by regulatory changes that sought further streamlining and deregulation. Some thresholds in the new *Reviewable Projects Regulation*[20] were increased, excluding a larger number of projects from environmental assessment.

While there may be considerable debate about the significance of the 2002 changes, much of the basic structure of the 1994 and 2002 *Acts* is the same. There are many different models for environmental assessment regimes internationally, and among them the BC process is considered to be a proponent-driven, project-specific regime in which those proposing to carry out projects that are designated "reviewable" must provide information according to requirements approved for each project and apply for an "environmental assessment certificate" before building a project. The EAO oversees and coordinates the process, liaising between the project proponent and regulatory agencies. To a significant extent the EA process responds to information and analysis provided by the proponent, which is in contrast to EA regimes in which the regulatory agency (or agencies) undertakes responsibility for the bulk of the assessment analysis.

Regardless of the EA model, proponents necessarily have a central role in doing the studies and ensuring the findings are incorporated into the deliberations and decisions throughout the planning process. A key issue is how best to ensure the effective involvement of other stakeholders at various stages of the planning and assessment work and not just as reviewers prior to licensing decisions.

The implications of differences between the BC process and other models will become more apparent in the discussion below.

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16 *Environmental Assessment Act*, S.B.C. 2002, c.43, ss.11, 21.

17 West Coast Environmental Law. Bill 38: the New *Environmental Assessment Act*. (November 2004), p.2, online: wcel.org <http://wcel.org/resources/publication/deregulation-backgrounder-bill-38-new-environmental-assessment-act>

18 Environmental Assessment Office. Responding to West Coast Environmental Law's "Deregulation Backgrounder", p.3, (undated).

19 *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII) at para.53.

20 B.C. Reg. 370/2002.

Issue #1: Triggers and Scoping

> Some EIA [environmental impact assessment] systems are relatively narrow in coverage; e.g. limited to projects of a specified type and size. Others have a broader remit, for example encompassing all proposals that have potentially significant adverse environmental impacts. In addition, the environment is defined broadly; for example to include social, health and cumulative effects. The inclusion of these broader aspects of EIA are now accepted as the international standard of good practice and their coverage should be mandatory.
>
> UNITED NATIONS ENVIRONMENT PROGRAMME [21]

1. When is Environmental Assessment Required?

There are many approaches to determining when environmental assessment is required (or "triggered") for a development project. In this section we will focus on assessments of individual projects, and discuss below the issue of strategic-level assessments of the plans, policies and programs of government.

Federally in Canada, the requirement to undertake EA is triggered whenever a federal authority:[22]

- proposes a project as its proponent;
- grants money or other financial assistance to the proponent for the purpose of enabling a project to be carried out;
- sells, leases or otherwise disposes of land or any interest in land to enable a project to be carried out; or
- exercises a regulatory function in relation to a project (such as issuing a permit or licence) in accordance with a provision of a statute or regulation that is listed in the *Law List Regulations*.

In British Columbia environmental assessment is more narrowly applied to certain sizes of certain projects. These are set out in the *Reviewable Projects Regulation*, although there is some latitude for the Minister of Environment to require environmental assessment for additional projects on a discretionary basis and for a proponent to voluntarily "opt in." Projects that are designated as "reviewable" may not be constructed unless and until the proponent has an approved environmental assessment certificate.

The BC *Environmental Assessment Act* has always had a project-threshold approach to determining which must undergo assessment as opposed to the broader, multiple-trigger approach found in the *Canadian Environmental Assessment Act* (CEAA). While governments must always struggle with limited resources, British Columbia has chosen to apply a standard process to a limited number of activities, rather than adjusting the process across a broader range of project types and sizes as CEAA does with its screenings, comprehensive studies and panel reviews.[23] Some provinces classify projects according to size, type, location and impacts, and reserve political approvals to the largest projects with the most significant impacts and complex trade-offs.

The BC approach inevitably raises the issue of whether the EA process is directed towards the right activities. There are two kinds of issues: 1) projects or activities that are not governed by the *Environmental Assessment Act* at all; and 2) those that escape assessment because of the thresholds in the *Reviewable Projects Regulation*.

Activities outside of EA process

Examples of major development activities that do not undergo environmental assessment in British Columbia include the following:

21 United Nations Environment Programme (UNEP), *et al.* Environmental Impact Assessment Course Module. Online: United Nations University <http://eia.unu.edu/course/?page_id=101>.

22 *Canadian Environmental Assessment Act*, S.C.1992, c.37, s.5.

23 *Ibid*. ss.18, 21, 33.

- logging, road building and associated forestry practices;
- seismic lines, roads and exploratory drilling by the oil and gas industry;
- mineral exploration;
- agricultural industries, such as intensive livestock operations and intensively managed crops;
- aquaculture – fish farms and shellfish aquaculture; and
- land conversion not associated with reviewable projects.

No one can reasonably suggest that these types of activities do not have the potential to cause adverse environmental impacts: the main issue is whether the decision-making apparatus for these activities adequately considers environmental impacts and incorporates due public process in a manner that is duplicative or makes the EA process otherwise unnecessary.

The original rationale for the exclusion of logging and related activities likely has to do with the fact that the Province passed its first forest practices legislation on the same day as the 1994 *Environmental Assessment Act*. The initial *Forest Practices Code of British Columbia Act* required several assessments before logging approvals could be granted, addressing watershed hydrology, riparian ecosystems, visual quality, terrain stability, archaeological impacts and forest health.[24] However, these assessments are no longer required under the deregulated regime of the *Forest and Range Practices Act*.[25]

In addition to forest practices legislation, strategic land use planning was carried out throughout much of the province that usually resulted in zoning coupled with Cabinet-approved land use objectives that applied to the forestry activities.[26] To varying degrees, these land use planning exercises addressed the acceptability of certain land uses, at least to the stakeholder groups who were involved in the process. However, there is wide variance among plans when it comes to the level of detail addressed and the types of activities considered. While many stakeholders expected that ongoing plan monitoring teams would address land use issues as they arose over time through periodic plan review, government has abandoned its commitment to land use planning to a significant extent, as discussed below.

The exclusion of oil and gas exploratory drilling projects is more problematic because many wildlife and biodiversity rules that regulate forestry operations do not apply to this industry. Although some "practices-type" regulations are currently under development, they may not address the larger issues of industrial footprint, wildlife habitat fragmentation and cumulative impacts of multiple players on the same landscape. Because government has sold oil and gas exploration rights without an environmental assessment and without environmental practices regulations in place, conservation organizations argue that new rules are being drafted to accommodate the rights already granted rather than in consideration of a full evaluation of environmental impacts. And in drafting such rules, BC does not generally environmentally assess its regulatory rule-making processes.

We will not address all the industries that are exempt from EA. Suffice it to say that there are significant gaps in EA coverage in British Columbia—and past rationales for excluding some sectors no longer apply, because of the combination of deregulation and cumulative effects over the last decade.

Activities subject to thresholds in EA process

The starting point for determining whether a project is "reviewable" is the thresholds set out in the *Reviewable Projects Regulation*.[27] The thresholds have changed over time since the Major Projects Review Process became policy in 1990. Most of the industries that were covered by that policy remain subject to EA (with the exception of the abrasives, refractories and

24 R.S.B.C. 1996, c.159, s.17; *Operational Planning Regulation*, B.C.Reg.107/98, ss.12-17, 37-38.

25 S.B.C. 2002, c.69.

26 Integrated Land Management Bureau. *Land Use Planning*. (Victoria: ILMB), online: ILMB <http://www.ilmb.gov.bc.ca/slrp/index.html>.

27 B.C. Reg. 370/2002.

harbour and port operations industries), but the main change has been that many industries that formerly required assessment regardless of the size of the operation are now subject to threshold triggers. In many cases these thresholds seem very high – as if designed to significantly limit the reach of EA. The most significant changes were made in 2002 when the threshold triggers increased for several types of projects, with the result being that many now fall below the thresholds and are no longer subject to environmental assessment. Examples are found in Table 1:[28]

28 Table 1 is based on West Coast Environmental Law's *Bill 38: the New Environmental Assessment Act*, online: wcel.org <http://wcel.org/resources/publication/deregulation-backgrounder-bill-38-new-environmental-assessment-act>, with additional information extracted from B.C. Reg. 276/95 and B.C. Reg. 370/2002.

Table 1 – Reviewable Projects under the 1994 and 2002 *Acts*

Type of Project	**Must be Assessed under the 1994 *Act* if:**	**May be Assessed under the 2002 *Act* if:**
New Coal Mine	Production capacity is over 100,000 tonnes/year or	Production capacity is over 250,000 tonnes/year
New Mineral Mine	Production capacity is over 25,000 tonnes/year	Production capacity is over 75,000 tonnes/year
Modification of Sawmill	Waste increases by 10%	Waste increases by 30%
Modification of Pulp/paper mill	Waste increases by 10%	Waste increases by 30%
Expansion of Coal or Mineral Mine	Expansion of surface area that can be disturbed by 250 hectares or over 35% of original mine site	Expansion of surface area that can be disturbed by 750 hectares or over 50% of original mine site
Energy Projects: Coal, Natural Gas, Oil Fired Power Plants or Hydro-Electric Dams	Nameplate capacity of >20 megawatts of electricity	Nameplate capacity of > 50 megawatts of electricity
Electric Transmission Lines	All transmission lines of 500 kV or higher voltage	> 40 kilometres of transmission line of 500 kV or higher voltage
Hazardous Waste Treatment Facility	Treatment capacity of over 50,000 kg per day	Treatment capacity of over 100,000 kg per day
Short term hazardous waste storage	Over 5,000 tonnes of hazardous waste stored in piles or 10,000 tonnes stored in containers	Assessment not required
Urban Transit Rail Projects	> 8 contiguous kilometres of developed track	> 20 contiguous kilometres of developed track

It is in the nature of thresholds to be somewhat arbitrary, but there are certainly anomalies created by a system that focuses on the size of elements of a project rather than the location or receiving environment. For example, after years of land use planning to protect caribou winter range and old growth management areas for biodiversity, the proponent of a hydro-electric power project at a designated recreation site with a popular waterfall is not required to undertake environmental assessment because the generating capacity of the power plant is less than 50 megawatts—and the proposed electrical transmission lines through old growth forest and caribou habitat, while exceeding the threshold distance of 40 km of new right of way, would have less voltage than the 500 kV specified in the *Reviewable Projects Regulation*.

Similarly, a proposed gravel mine proposed on prime farm land with Class 1 soils (the highest agricultural capability ranking) in the agricultural land reserve,

which also raised concerns about hydrological impacts to a trans-boundary aquifer shared with Washington State and is habitat of a listed species at risk with a small localized home range, escaped assessment because the proponent indicated that the mine's production rate would be less than the prescribed threshold of 500,000 tonnes per year or 1,000,000 tonnes over four years.[29] Some arbitrariness is potentially at play in determining whether a project falls within the thresholds because a proponent can stipulate the life of a mine project, thereby affecting the production rate allowing it to "duck under the threshold." The EAO advises that it is the responsibility of line agencies to be aware of which projects are reviewable and to refer proponents to the EAO if a project is reviewable. Sometimes a proponent will submit their project to the EAO for a ruling as to reviewability under s.10 of the *Act*, sometimes not.

Construction of the rapid transit project from downtown Vancouver to Richmond and the Vancouver Airport, which crosses the Fraser River, could have avoided provincial environmental assessment because the project fell 500 metres short of the 20 km threshold (the pre-2002 threshold was 8 km). However, the proponent voluntarily applied for the project to be reviewable.[30] This practice is sometimes followed by proponents who must undergo federal assessment in any event and who wish to take advantage of more favourable emphasis on socio-economic factors in the provincial process,[31] the "one window," harmonized process contemplated by the Canada-BC Agreement for Environmental Assessment Cooperation,[32] and the peer-influence on federal authorities of obtaining provincial approval, which is governed by time limits in the *BC Prescribed Time Limits Regulation*.[33]

It should be noted, however, that the Minister of Environment has the authority to designate a project as reviewable if he or she "is satisfied that the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest," provided that the project is not substantially started at the time of designation.[34] However, the Environmental Assessment Office advises that this power has not been exercised to date.

Some projects that do not trigger environmental assessment may nevertheless undergo a form of review for environmental impacts through agency referral processes. The referral may be made to the same agency personnel who would be involved in environmental assessment if one were required, possibly limiting the downside of not being subject to EA. However, there are several limitations to this argument: 1) referral processes are hit and miss, and not all agencies undertake them for the projects that could have negative environmental consequences; 2) there are practical limitations to reviewing agencies' ability to provide meaningful and competent review in non-mandatory processes;[35] 3) there are limits to the statutory authority to consider impacts and require mitigation measures outside of the EA process; and 4) the environmental assessment process can fill an important regulatory niche by providing legally binding environmental protection and mitigation measures that might not otherwise be provided for under other statutes, in the form of terms and conditions placed on project approvals.[36]

Too many activities that have the potential to significantly impair the environment are not assessed proactively for environmental impacts. To achieve its

29 Pynn, Larry. "Mine threatens mole's existence: Proposed gravel pit infringes on habitat of the last 500 of the endangered mammals." *Vancouver Sun* (March 7, 2009), online: canada.com <http://www2.canada.com/vancouversun/news/westcoastnews/story.html?id=2a3037e9-8c59-49b6-ba72-90e71954e7b0>

30 *Heyes v. City of Vancouver,* 2009 BCSC 651 (CanLII), at para.194.

31 *Heyes v. City of Vancouver*, 2009 BCSC 651 (CanLII), at para.195.

32 Canadian Environmental Assessment Agency. *Canada-British Columbia Agreement for Environmental Assessment Cooperation.* (Ottawa: Environmental Assessment Office, 2004), online: CEAA <http://www.ceaa.gc.ca/010/0001/0003/0001/0002/2004agreement_e.htm>

33 B.C.Reg.372/2002.

34 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.6. Some EA practitioners have expressed concerns that designating projects as reviewable is often made too late in the project planning process to influence key issues such as alternatives to the project and design elements. That is, if assessment is not required by law but by ministerial discretion, often that discretion isn't exercised until the undertaking is at an advanced planning stage and has become controversial.

35 For example, the Ministry of Environment in one region decided that due to staff cuts and the large number of projects proposed it did not have the capacity to respond to all the private energy projects being proposed and could only focus on those that triggered EA.

36 *Environmental Assessment Act*, S.B.C. 2002, c.43, ss.8, 17(3).

sustainability goals British Columbia needs to take corrective action and ensure that the projects, activities, programs, regulations and policies with the potential for significant environmental effects are designed and implemented appropriately, in a deliberate and transparent manner. The most efficient and effective mechanisms for delivering this will no doubt vary according to the type of activity – it would not be productive to force all activities into a single process.

Assessments that are focused at the strategic level can be more efficient than multiple assessments trying to address the same matters at the project level. In some cases, it may be better to focus the exercise on the environmental value (e.g. endangered species) than any one project or activity type due to the cumulative effects of multiple activities on the landscape.

Recommendations:

1. **Carry** out a comprehensive review of provincially regulated activities that are likely to impact the environment and determine the best mechanism for assessing and evaluating those impacts, including:

- Project level assessment;
- Strategic environmental assessment;
- Land use planning;
- Regional effects assessment;
- Class assessment;
- Regulatory impact assessment;
- Species recovery planning;
- Other mechanisms.

2. **Triggering** criteria for project level environmental assessments should be redesigned and based on additional factors to project size or production rate: the criteria should also incorporate factors going to impacts such as:

- the location of a project (e.g. environmentally sensitive area, fisheries watersheds, community watershed, critical wildlife habitat, highly fragmented landscapes, trans-boundary waters, etc.); and
- the environmental values at stake (e.g. threatened or endangered species, drinking water aquifer, etc.)

3. **Thresholds** (such as those in the *Reviewable Projects Regulation*) should be reviewed based on the outcome of Recommendations 1 & 2 above: project level thresholds should be revised to capture projects that are likely to have adverse environmental impacts.

2. Strategic Environmental Assessment & Land Use Planning

As mentioned above, environmental assessment is not required of major government proposals, plans or programs in British Columbia but is instead limited to specific projects by mostly private sector proponents. Section 49 of the *Environmental Assessment Act* allows the Minister of Environment to direct the EAO to "undertake an assessment of any policy, enactment, plan, practice or procedure of the government," but this provision has not been used in more than a decade.[37]

Many jurisdictions (including Canada, Ontario, Australia, New Zealand, the U.S. and Europe) are filling gaps in project-level assessment through higher level strategic environmental assessment (SEA).[38] Strategic environmental assessment has been defined as "the proactive assessment of alternatives to proposed or existing policies, plans and programs, in the context of a broader vision, set of goals, or objectives to assess the likely outcomes of various means to select the best alternatives(s) to reach desired ends."[39] Canadian scholars have thoroughly documented the rationale and legal and policy options for applying SEA.[40]

The United Nations Environment Programme (UNEP) has identified SEA as a modern trend in the development of environmental assessment since the early 1990s which is designed to "bring a greater measure of 'sustainability assurance' to development decision making. These trends have brought new perspectives on what constitutes EIA good practice and effective performance." Table 2 represents the evolution of environmental assessment over time:[41]

37 The sole occasion appears to be the 1997 Salmon Aquaculture Review carried out under the 1994 *Act*. Noble argues that this SEA resulted in mixed success because the BC government did not implement many of its recommendations. See Noble, B.F. "Promise and Dismay: The state of strategic environmental assessment systems and practices in Canada," *Environmental Impact Assessment Review* 29 (2009) 66–75.

38 For Canada see Privy Council Office. *Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.* (Ottawa: Privy Council Office), online: CEAA <http://www.ceaa.gc.ca/Content/B/3/1/B3186435-E3D0-4671-8F23-2042A82D3F8F/CEAA-StrategicFinal_e.pdf>. For Ontario, see R.S.O.1990, c.E.18, s.3. For U.S. see 40 CFR 1502.4, 1508.18. For Europe, see the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context. Online: UN <http://untreaty.un.org/English/notpubl/27_4bE.pdf>. For other jurisdictions see UNECE Resource Manual. Online: <http://www.unece.org/env/eia/sea_manual/annexA11.html>.

39 Noble, B.F. "Strategic Environmental Assessment: What is it? And What Makes it Strategic?", 2:2 *Journal of Environmental Assessment Policy and Management* (2000), 206.

40 See Benevides, H. *et al. Law and Policy Options for Strategic Environmental Assessment in Canada.* Canadian Environmental Assessment Agency, 2008. Online: CEN <http://www.cen-rce.org/eng/caucuses/assessment/docs/SEA%20Options%20for%20Canada%20fnl%20copy.pdf>. See also Noble, B.F. "Promise and Dismay: The state of strategic environmental assessment systems and practices in Canada," *Environmental Impact Assessment Review* 29 (2009) 66–75.

41 UNEP *et al. Environmental Impact Assessment Course Module.* Online: United Nations University <http://eia.unu.edu/course/?page_id=100>.

Table 2: Major trends in EIA		
Phase	Time	Key Events
Introduction and early development	1970-1975	Mandate and foundations of EIA [*environmental impact assessment*] established in the U.S.; then adopted by a few other countries (e.g. Australia, Canada (see footnote 42 below), New Zealand); basic concept, procedure and methodology still apply.
Increasing scope and sophistication	mid 70s to early 80s	More advanced techniques (e.g. risk assessment); guidance on process implementation (e.g. screening and scoping); social impacts considered; public inquiries and reviews drive innovations in leading countries; take up of EIA still limited but includes developing countries (e.g. China, Thailand and the Philippines).
Process strengthening and integration	early 80s to early 90s	Review of EIA practice and experience; scientific and institutional frameworks of EIA updated; coordination of EIA with other processes, (e.g. project appraisal, land use planning); ecosystem- level changes and cumulative effects begin to be addressed; attention given to monitoring and other follow-up mechanisms. Many more countries adopt EIA; the European Community and the World Bank respectively establish supra-national and international lending requirements.
Strategic and sustainability orientation	early 90s to date	EIA aspects enshrined in international agreements; marked increase in international training, capacity & building and networking activities; development of strategic environmental assessment (SEA) of policies and plans; inclusion of sustainability concepts and criteria in EIA and SEA practice; EIA applied in all OECD countries and large number of developing and transitional countries.

42 This is presumably a reference to the federal *Environmental Assessment and Review Process Guidelines Order* P.C. 1984-2132 21 June, 1984, under the *Government Organization Act*, 1979. Online: http://www.ceaa.gc.ca/default.asp?lang=en&xml=8E05F242-A500-4AC0-A544-09745305B9BF

Strategic environmental assessment is hardly a new concept, and there are substantial resources available both within Canada and internationally designed to assist jurisdictions wishing to avail themselves of opportunities to avoid environmental harm at this higher-than-project level.[43]

The failure to assess the impacts of government policies, plans and programs in this more strategic way can substantially limit the overall value of project-level environmental assessment. Some consideration of the environmental impacts of plans, policies and regulations might occur outside of the EA process depending on Cabinet's wishes, but it is not likely to be as open, deliberate or comprehensive as formal assessment. Often when government consults outside stakeholders on these initiatives it is for the purposes of determining the positions of various parties rather than to conduct scientific analysis of environmental impacts and consequences. It takes on more of an "issues management" than a strategic environmental assessment flavour. At other times this process amounts to little more than arm-twisting and deal-making between agencies, which doesn't see the light of day unless publicly released through freedom of information requests.

Failure to carry out this level of assessment can also lead to frustration where the public is essentially concerned about strategic and land use planning issues more than the site-specific details of a particular project. These issues are often considered by the EAO to be outside the purview of the environmental assessment process. Proponents who are simply playing by the rules may feel stymied or perplexed by issues being raised by the public that are really addressed to higher level policy issues beyond their control and not particularly relevant to the specifics of a given project. But to the public, these issues are often the essential first questions to be asked, going to issues such as the need for a project and alternatives to the project, both of which are

43 For example, see the United Nations University online SEA course at <http://sea.unu.edu/index.html>.

considered standard EA issues in many jurisdictions. The International Association for Impact Assessment has stated that strategic environmental assessment "enhances the credibility of decisions and leads to most cost- and time-effective EA at the project level."[44]

> EIA [Environmental Impact Assessment] practice is constrained by certain limitations and weaknesses. These include structural weaknesses centred on the relatively late stage at which EIA is usually applied in decision-making. By this point, high-order questions of whether, where and what type of development should take place have been decided, often with little or no environmental analysis. Project-by-project EIA is also an ineffective means of examining these issues. SEA [Strategic Environmental Assessment] or an equivalent approach can be used as a complement to project-level EIA to incorporate environmental considerations and alternatives directly into policy, plan and programme design. Thus, when applied systematically in the "upstream" part of the decision cycle…SEA can be a vector for a sustainability approach to planning and decision-making - as called for by the Brundtland Commission (WCED 1987) and by Agenda 21 (UNCED 1992). This "upstream" approach can also help to focus and streamline project EIAs, making them more consequential and reducing the time and effort involved in their preparation. SEA may yield significant other benefits; for example, by ruling out certain kinds of development at the policy level, reducing the need for many project-level EIAs and thus relieving pressure where institutional and/or skills capacity is limited.
>
> INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT [45]

Benevides *et al.* argue that "project assessments are usually too narrowly mandated and come too late in decision making to be generally effective vehicles for examining strategic concerns and options. Where strategic concerns have emerged in project assessments, it has rarely been possible to address them adequacy or efficiently. Too often the experience has been frustrating to all concerned."[46]

A recent BC example of this issue is found in the enthusiastic response of private sector energy proponents to the government's announcement of the BC Energy Plan, which set new energy development targets and opened production to private interests after years of near monopoly by the Crown Corporation BC Hydro. Hundreds of streams became subject to water licence applications for hydroelectric projects, including salmon and fish-bearing waters. Some projects would require electric transmission lines through protected areas, habitat for species at risk, and old growth management areas. Numerous projects with a generation capacity < 50 MW are not subject to environmental assessment as a result of the 2002 regulatory amendments, leading one filmmaker to title his critical documentary on the topic "49 Megawatts" due to the large number of projects proposed to come just under the EA threshold. One such operation has been issued a stop work order due to unanticipated turbidity impacts to a fish stream.[47]

As of January 2009 there were a reported 145 water power licences issued and an additional 621 applications.[48] Perhaps not all of these will develop into hydropower projects, but it demonstrates the extent of the challenge facing decision-makers. As of March 2010, 25 of the proposed or approved hydroelectric projects were in the provincial EA process.[49]

For those projects that are subject to EA, non-government organizations ranging from salmon enhancement, stream stewardship, outdoor recreation, commercial and non-commercial fishers, to naturalist

44 International Association for Impact Assessment, *Strategic Environmental Assessment Performance Criteria* (January 2002). Online: IAIA <www.iaia.org/publicdocuments/pdf/sp1.pdf>.

45 International Institute for Environment and Development. *Directory of Impact Assessment Guidelines*. Second Edition, 1998, p.34. Online: IIED <http://www.iied.org/pubs/pdfs/7785IIED.pdf>.

46 Benevides, H. *et al. Law and Policy Options for Strategic Environmental Assessment in Canada*. Canadian Environmental Assessment Agency, 2008. Online: CEN <http://www.cen-rce.org/eng/caucuses/assessment/docs/SEA%20Options%20for%20Canada%20fnl%20copy.pdf>.

47 Simpson, Scott. "Pollution Worries Halt Power Project." *Vancouver Sun* (May 17, 2010). Online: <http://www.vancouversun.com/technology/Pollution+worries+halt+power+project/3037259/story.html>.

48 Online: Private Power Watch <http://www.ippwatch.info/w/>

49 Online: Environmental Assessment Office <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_index_report.html>

and conservation groups, etc. have wanted to raise many strategic planning issues in the environmental assessment process. They are told that these concerns are outside the scope of review and comment opportunities that are limited to the proposed terms of reference for an assessment, or the content of an EA certificate application, or are otherwise judged to be beyond the ability of a proponent to address in relation to its specific project. Former BC Environment Minister Rafe Mair has been an outspoken critic of these process limitations,[50] and in many jurisdictions basic issues such as addressing the need for the project, alternatives to the project, and alternative locations for a project are legally required elements of an environmental assessment.[51] As recognized by the federal government long ago, strategic environmental assessment can play an important role in addressing issues that go beyond the project-specific.[52] West Coast Environmental Law has advocated recently for strategic environmental assessments for energy development, and provided numerous examples of where these assessments have been undertaken for energy issues in Canada and abroad.[53]

A closely related issue is land use planning, which incorporates not only environmental considerations but also community and multi-stakeholder acceptability issues through consensus-based processes. As mentioned above, BC made a considerable investment in consensus-based land use planning from the early 1990s to the middle of the current decade. While these typically led to Cabinet-approved land use plans that capture broad stakeholder agreement and intent, they were often developed with forestry, mining, tourism and sometimes other industries in mind, and do not specifically address newer activities such as power projects because private power development was restricted throughout much of this time frame.

The EAO has stated that environmental assessment "is a project-specific review mechanism and has no authority to act as a land use planning mechanism or to re-open previously approved land use plans."[54] Further compounding the issue is the Province's decision in 2006 to pass legislation stripping local governments including regional districts of their land use zoning powers in relation to energy projects.[55] At the time, local governments in the Squamish-Lillooet Regional District area had been convening public meetings to address the large number of proposed energy projects in the area. Facing the loss of democratic channels for strategic planning and land use discussions about energy development and restricted in the issues that may be raised in the project-specific EA process some public participants have concluded that their only option is protest.[56]

Even for those who support the basic thrust of the BC Energy Plan, the narrowness of the project-specific, proponent-driven EA process leaves many of the larger environmental impacts and evaluation of the plethora of options and alternatives entirely unaddressed. In some jurisdictions this gap would be filled by strategic environmental assessment of the plan itself.

Independent power projects in the energy sector provide just one recent example of development that is driven by a higher level provincial policy that should undergo environmental assessment at a higher strategic level. The same logic applies to other sectors, whether

50 Mair, Rafe. The EAO public meetings are a sham. Online: rafeonline.com <http://rafeonline.com/2009/07/the-eao-public-meetings-are-a-sham/>.

51 For example, see International Institute for Environment and Development. *A Directory of Impact Assessment Guidelines*, second edition. (Nottingham: International Institute for Environment and Development, 1998) and the *US National Environmental Policy Act*, Sec. 102 [42 USC § 4332].

52 Privy Council Office. *Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.* (Ottawa: Privy Council Office), online: CEAA < http://www.ceaa.gc.ca/Content/B/3/1/B3186435-E3D0-4671-8F23-2042A82D3F8F/CEAA-StrategicFinal_e.pdf>.

53 West Coast Environmental Law. *Toward a 'More Planned Approach' to IPP Projects in BC: Backgrounder on Strategic Environmental Assessment*, December 2009. Online: WCEL <http://wcel.org/resources/publication/toward-planned-approach-ipp-projects-bc-strategic-environmental-assessment>.

54 Environmental Assessment Office. *Guide to the British Columbia Environmental Assessment Process* (Victoria: Environmental Assessment Office, 2003).

55 *Bill 30 - Miscellaneous Statutes Amendment Act* (No.2), 2006, s.53, online: LABC <http://www.leg.bc.ca/38th2nd/3rd_read/gov30-3.htm>.

56 Pynn, Larry. "'Green' Energy Threatens B.C. Rivers, Report Warns." *Vancouver Sun* (March 23, 2009). Online: Watershed Watch Salmon Society <http://www.watershed-watch.org/IPP-VanSun-March23_2009.pdf>.

currently subject to EA or not. For example, similar issues arise related to the oil and gas industry. A single well may not have a huge impact – but citizens have asked for strategic assessment of the overall impact of a policy that calls for hundreds of wells across the landscape. For some sectors the issue is not as straightforward: for example, mine locations are governed by where the minerals are situated and there are fewer alternative options. However, the acceptability of a mine in a given area may nevertheless be addressed through land use planning that happens in advance of project level assessments.

It is often in proponents' interests to have strategic and land use issues addressed up front in the decision-making process. Properly designed strategic level assessments can be far more efficient than multiple assessments trying to address the same matters at the project level. Proponents stand to benefit from SEAs that promise to clear the larger issues they would otherwise face at the project level. Benevides *et al* claim that: "One of the major motivations for SEA is the frustration of project proponents and project level assessment participants who find significant strategic level issues (e.g. concerning cumulative effects, broad policy implications, needs for new or updated programmes or plans) arising in project assessment processes that are not adequately mandated or otherwise equipped to deal with strategic level concerns."[57]

Project level assessment can be very expensive, costing millions of dollars depending on the project type, location and studies required to determine potential impacts. Does it make sense that proponents are expected to make these expenditures in detailed engineering and technical assessments, only to have the acceptability of the project judged at the end of the day on social and political factors such as community and First Nation acceptance? Does the fact that those expenditures have been made unduly influence the decision outcome? Is there a way of separating the strategic and land use issues from the technical EA issues? We expect that in some cases the issues are more easily separated than others: for example, in some cases the social and political acceptability of a project might require that some technical environmental issues be investigated and determined before an "approval in principle" should be granted.

Strategic environmental assessments that are properly designed to meet best practice standards and are entrenched in law could play an important role in addressing key issues of public concern and making project level assessments more efficient. They must be reliably comprehensive, participatory, rigorous and clearly linked to project level assessment.

Building on Recommendation #1, strategic environmental assessments and land use planning play an important role in addressing key issues of public concern and make project level assessments more efficient by addressing "bigger picture" issues.

57 Benevides, H. *et al. Law and Policy Options for Strategic Environmental Assessment in Canada.* Canadian Environmental Assessment Agency, 2008, p.16. Online: CEN <http://www.cen-rce.org/eng/caucuses/assessment/docs/SEA%20Options%20for%20Canada%20fnl%20copy.pdf>.

Recommendations:

4. **Strategic** environmental assessment of government's policies, enactments, plans, practices and procedures should be utilized in British Columbia. While it is presently enabled in the *Environmental Assessment Act*, this important tool needs to be more robust. We specifically recommend:

- Identifying circumstances in which SEA will be mandatory;
- Incorporating sustainability objectives and international best practice standards for SEA into the *Act*, ensuring that assessments will be reliably comprehensive, participatory and rigorous;
- Clearly linking SEAs to project level assessment;
- Clearly identifying who is responsible for carrying out these assessments.

5. **The** Province should reaffirm the importance of land use planning in addressing regional environmental impacts and restore the mandate of the Integrated Land Management Bureau to develop, oversee and refine land use plans to address strategic level environmental effects. This needs to be done in a manner that is consistent with First Nations rights and the issues addressed under Issue #5 (p. 70).

6. **Consideration** should be given to adopting a "traffic light" approach to strategic and land use issues before a given project proceeds to the detailed technical assessment stage of environmental assessment.[58] Under such a scheme:

- a "green light" could mean "approval in principle, subject to resolution of environmental impacts";
- a "yellow light" could mean "approval to proceed to technical EA subject to strong cautions identified" (e.g. where project acceptability cannot be determined until some significant issues have been addressed);
- a "red light" could mean that the project may not proceed to technical EA due to unacceptability based on social, political or land use factors including First Nations rights.

This process should be transparent and inclusive, and incorporated into the *Environmental Assessment Act.*

58 One similar, recent example of this approach may be found in the Fraser Valley Regional District Aggregate Pilot Project: Recommendations Report, March 31, 2009. Online: <http://www.empr.gov.bc.ca/Mining/Aggregate/Documents/FVRD_AggregatePilotProject_FinalRecommendations.pdf

3. EA Scoping, Procedures and Methods

Once a project has been determined to be reviewable, normally the executive director of the Environmental Assessment Office (or his/her delegate) makes an order concerning the scope, procedures and methods for the assessment.[59] It is broadly accepted that the purpose of scoping is to identify:[60]

- the important issues to be considered in an EIA;
- the appropriate time and space boundaries of the EIA study;
- the information necessary for decision-making; and
- the significant effects and factors to be studied in detail.

In BC, the executive director of the Environmental Assessment Office or his/her delegate (and in some cases the Minister of Environment) has broad discretion to determine the scope of the assessment, and the procedures and methods for carrying it out on an individual project basis, all of which is formalized in a "section 11 order." The intent of the formal order is to provide some certainty to both the proponent and EAO concerning the process, but it may be varied "if necessary…to complete an effective and timely assessment of the reviewable project." [61]

Neither the *Environmental Assessment Act* nor its regulations specify mandatory content for environmental assessment reports.[62] Section 11 orders specify the scope of the project and scope of the assessment, but tend to address EA methodology in a very general way. Rather than specifying how the assessment must be conducted, they address the process by which the proponent will develop application information requirements (formerly known as "terms of reference") for the assessment and submit them for review and ultimately approval. In essence, the elements of each assessment are negotiated between the proponent, agencies and Environmental Assessment Office.

Elements of negotiation are an inevitable part of any EA process to some degree, as assessments should be tailored and relevant to the specifics of each project, but this can also result in discrepancies between similar assessments based on the individuals involved. The lack of content and methodology specifications in the regulations also leads to potential differences in such fundamental matters as:

- standards and protocols the proponent will have to meet in carrying out baseline inventories and studies;
- the extent to which alternatives to the project and alternative methods of carrying out the project will or will not be evaluated; and
- the extent to which cumulative effects will or will not be evaluated.

Negotiable scope provisions have been criticized for narrowing assessments to be more "streamlined and efficient" for proponents and reviewers at the expense of covering all significant environmental and stakeholder concerns, and at the expense of consistency from one case to the next. Less noticed but also important is the tendency of negotiations to delay assessment and to reduce the potential for assessment work to be integrated effectively in the selection and planning of undertakings. Negotiated scoping further entrenches the attitude and practice that treats EA as mere regulatory hoop-jumping.

The 2007 EAO *Guide to Preparing Terms of Reference* states that a number of issues need only be addressed if a project triggers a federal CEAA assessment: these include the assessment of alternative means of carrying out the project; cumulative environmental effects; and the potential for accidents and malfunctions

59 Sections 10 & 14 of the 2002 *Act* allows for the minister to approve the scope, procedures and methods for the assessment where the executive director refers the project to the minister for that purpose, but this is not the normal practice.

60 UNEP *et al. Environmental Impact Assessment Course Module*. Online: United Nations University <http://eia.unu.edu/course/?page_id=140>

61 *Environmental Assessment Act*, S.B.C. 2002, c.43, ss.11,13.

62 This is not typical of BC legislation: for example, for forest stewardship plan content requirements see s.5 of the *Forest and Range Practices Act*, S.B.C.2004, c.69 and ss.12-18 of the *Forest Planning and Practices Regulation*, B.C.Reg.14/2004.

and natural hazards to the project.[63] Yet these issues are considered to be standard best practices in the assessment profession, and are indicative of the weakness of the BC legislation when compared to CEAA. The importance of addressing accidents and malfunctions proactively in the EA process recently has been brought to world attention with the large oil spill off the Louisiana coast in the Gulf of Mexico from BP's Horizon Deepwater deep-sea well.[64]

Standards and Protocols

This discussion is not to suggest that the EAO (and the agencies reviewing draft application information requirements proposed by proponents) does not bring its own standard expectations to the table based on professional knowledge and experience with projects of a similar type. However, some basic elements going to the credibility of assessments are sometimes unnecessarily open to negotiation, such as whether the proponent will carry out biophysical inventories to established provincial standards.

Professionals across disciplines in British Columbia have spent considerable time and effort since 1991 establishing standards for natural and cultural resources inventories, including collection, storage, analysis, interpretation and reporting of inventory data through the Resource Information Standards Committee, and there is no reason that these standards should not be incorporated into every EA.[65] Such standards are essential to the credibility of a proponent's assessment report on matters, for example, such as presence/absence studies on the occurrence of species at risk. The EA process sees many different applicants with widely varied experience and financial backing, some of whom will want to take advantage of lack of firm requirements for assessments.[66] Our review of approved Terms of Reference (TOR, now known as Application Information Requirements) revealed a lack of clarity on these sorts of issues. For example, the EAO has approved TORs that simply commit to "standard methodology," without specifying what the proponent believes that to be—even when it is known that there are significant species-at-risk issues facing a project.[67] A positive recent development is that the 2010 Application Information Requirements Template now addresses this issue and may result in greater consistency in the future.[68]

Another positive recent development is "Common Issues and Commitments Report" that the EAO published in October 2009 as a guidance document for projects involving landfills. The EAO describes this as "a tool to enhance, streamline and standardize EA within categories of projects where common issues arise, common mitigation is applied, and common commitments are frequently developed."[69] There are many other sectors which generate a larger number of environmental assessments in BC (such as energy and mining projects) that would benefit from the development of similar standardized approaches, particularly if incorporated into section 11 orders determining the scope, procedures and method for assessments.

63 Environmental Assessment Office. *A Guide to Preparing Terms of Reference for an Application for an Environmental Assessment Certificate.* (Victoria: Environmental Assessment Office, 2007), pp.21-22. Online: EAO <http://www.eao.gov.bc.ca/guide/tor/Guide%20to%20Preparing%20 Terms%20of%20 Reference%20Sept07.pdf>.

64 For an opinion editorial on deficiencies in the EA process that led to this event see Mark Chernaik, "Regulators and citizens missed chance to prevent oil spill," Register-Guard, May 12, 2010. Online: <http://www.registerguard.com/csp/cms/sites/web/opinion/24780631-47/environmental-oil-spill-deis-impact.csp>.

65 Resource Information Standards Committee, online: ILMB <http://www.ilmb.gov.bc.ca/risc/index.html>

66 For example, in the course of our research we became aware of one assessment in which the proponent vigorously resisted having to follow provincial RISC standards, preferring to determine the presence/absence of a species at risk by helicopter over-flight. At the same time, we were informed by Ministry of Environment staff that in some parts of the Province, proponents' consultants readily accept the provincial RISC standards, particularly proponents with multi-jurisdictional experience using established consulting firms.

67 See Hackney Hills Wind Project Approved Terms of Reference, Oct. 31, 2008. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_304_26603.html>

68 Environmental Assessment Office, *Application Information Requirements Template*, March 29, 2010, p.11. The text states that "Baseline studies and assessment analyses must follow relevant provincial and federal standards," however, it is italicized text which means it is "guidance" rather than "direction."

69 Environmental Assessment Office. *Secure Landfills: Common Issues and Commitments Report.* October 19, 2009. Online: EAO <http://www.eao.gov.bc.ca/pdf/COMMON%20ISSUES%20AND%20 COMMITMENTS%20 REPORT%20SECURE%20LANDFILLS-FINAL.pdf>

Need for Project and Evaluation of Alternatives

The failure of the BC *Environmental Assessment Act* and its regulations to specify EA requirements allows the process to depart from and avoid what is commonly understood to be standard EA practice internationally and within Canada. This is particularly apparent when it comes to evaluating the need for specific projects and alternatives to those projects.

> The consideration of alternatives to a proposal is a requirement of many EIA systems. It lies at the heart of the EIA process and methodology…Consideration of alternatives is mandatory in some EIA systems but discretionary in others. Varied provision is made for including a range of alternatives to a proposal, and there are different requirements for the evaluation and comparison of alternatives as part of the EIA process. … At a minimum, explicit provision should be made for the consideration of the main or "reasonable" alternatives to a proposal (including no action). This component is a critical determinant of effective EIA.
>
> UNITED NATIONS ENVIRONMENT PROGRAMME [70]

> A robust EA planning and decision-making process generally requires three types of alternatives to be examined by proponents: (a) "alternatives to"; (b) "alternative methods"; and (c) the "null" (or "no go") alternative. "Alternatives to" are generally regarded as functionally different ways of dealing with a particular problem or opportunity (i.e. waste diversion is an "alternative to" waste disposal). "Alternative methods" refer to different operational options or ways of carrying out the same activity (i.e. establishing a new landfill or expanding an existing landfill, or utilizing engineered facilities or "natural attenuation" designs, are "alternative methods" of carrying out waste disposal). The "null" (or "no go") alternative refers to the assessment of the environmental risks and benefits if the proponent simply does nothing to address the identified problem or opportunity.
>
> MINISTER'S ENVIRONMENTAL ASSESSMENT ADVISORY PANEL (ONTARIO) [71]

The *Canadian Environmental Assessment Act* adopts what has become the international norm by requiring consideration of "the need for the project and alternatives to the project." CEAA also requires decision-makers to consider "alternative means of carrying out the project that are technically and economically feasible." [72] The Canadian Environmental Assessment Agency developed an operational policy statement as early as 1998 addressing why each of these distinct considerations is important for making EA an important decision-making and planning tool.[73]

Evaluation of need and alternatives to the project is also required in Alberta[74] and Ontario. The *Code of Practice – Preparing and Reviewing Environmental Assessment in Ontario* stipulates that:[75]

> ***During the environmental assessment process, proponents should consider a reasonable range of alternatives. This should include examining "alternatives to" the undertaking which are functionally different ways of approaching and dealing with the defined problem or opportunity, and "alternative methods" of carrying out the proposed undertaking which are different ways of doing the same activity. Depending on the problem or opportunity identified, there may be a limited number of appropriate alternatives to consider. If that is the case then there should be clear rationale for limiting the examination of alternatives. Proponents must also consider the "do nothing" alternative.***

70 UNEP *et al. Environmental Impact Assessment Course Module.* Online: United Nations University <http://eia.unu.edu/course/?page_id=101> and <http://eia.unu.edu/course/?page_id=143>.

71 Minister's Environmental Assessment Advisory Panel – Executive Group. *Improving Environmental Assessment in Ontario: A Framework for Reform,* Vol.1. March 2005, p.51.

72 *Canadian Environmental Assessment Act*, S.C.1992, c.37, ss.16(1)(e), 16(2)(b).

73 Canadian Environmental Assessment Agency. "Operational Policy Statement Addressing "Need for", "Purpose of", "Alternatives to" and "Alternative Means" under the *Canadian Environmental Assessment Act*," November 2007. Online: CEAA <http://www.ceaa.gc.ca/default.asp?lang=En&n=5C072E13-1>.

74 *Environmental Protection and Enhancement Act*, R.S.A.2000, c.E-12, s.49(h).

75 See pp.8, 17-20. Online: Ontario Ministry of Environment <http://www.ene.gov.on.ca/publications/ 7258e.pdf>.

Policy guidance in British Columbia does not seem to fill this regulatory gap. The closest that EAO guidance documents come to suggesting that alternatives should be considered is a statement in the Terms of Reference guide that EA certificate application reports should include a "Summary of any consideration of alternative locations for the project or project components."[76] This may address some of the factors that arise in evaluation of alternative means of carrying out a project, but falls short of a full examination of that issue, and avoids needs assessment and alternatives to the project.

Although the *Act* is silent on this issue, it does provide authority to the executive director or his/her delegate to require these factors in section 11 orders determining assessment scope, procedures and methods (and to the minister when exercising s.14 powers). However, it does not appear that these orders are in fact incorporating needs and alternatives assessments in this way unless a project triggers CEAA assessment.

The extent to which the BC environmental assessment process is proponent-driven is a factor here: can a proponent be expected to carry out an objective evaluation of whether or why its project is needed, or whether alternatives to the project (perhaps proposed by its competitors) might be preferable? Our review of proponent assessments that have included these factors found that they often seem simplistic and self-serving when addressing these issues. In many cases they merely reiterated higher level political decisions, such as the BC Energy Plan, that in themselves do not undergo environmental assessment. In many of the jurisdictions that include these requirements the assessments are carried out by the primary agency responsible for permitting, or by an independent assessment body.

Cumulative Effects

Cumulative effects assessment (CEA) is evaluating the impacts of a project in combination with other projects or activities that have been or will be carried out. The importance of considering cumulative effects of multiple projects and activities on ecosystems at multiple scales (local, regional, national, etc.) has been accepted for decades. Impact assessment professionals recognized early on that the project by project assessments were inadequate if they did not consider the larger context.[77] As early as 1985 a conference of Canadian and U.S. experts concluded that the "failure to take cumulative effects into account 'is resulting in damage to the environment' on a range of scales from local through regional/national to global and that if environmental assessment cannot properly take them into account 'the usefulness and credibility of the whole process must be in doubt.'"[78]

> [I]f our current understanding of ecosystems behavior and economic rationality is valid, the ecosphere and the global economy are on an unplottable collision course propelled by the unaccounted cumulative effects of unrestrained development.
>
> …cumulative affects assessment has little practical value unless it is in relation to allowable limits within regional carrying capacity.
>
> Cumulative environmental assessment should, therefore, become a more proactive planning tool used to ensure no net loss of natural capital as a routine development objective.
>
> WILLIAM E. REES, [79]

The *Canadian Environmental Assessment Act* has required the evaluation of cumulative effects since

76 Environmental Assessment Office. *A Guide to Preparing Terms of Reference for an Application for an Environmental Assessment Certificate*, p.13. (Victoria: Environmental Assessment Office, 2007), online: EAO <http://www.eao.gov.bc.ca/guide/tor/Guide%20to%20Preparing%20Terms%20of%20Reference%20 Sept07.pdf>.

77 Rees, William E. "Cumulative Environmental Assessment and Global Change." *Environ Impact Assess Rev*, 1995;15:295-309.

78 *Ibid*., p.296.

79 Rees, William E. "Cumulative Environmental Assessment and Global Change." *Environ Impact Assess Rev*, 1995;15:295-309.

its passage in 1992.[80] Extensive guidance has been developed for federal agencies and EA practitioners, giving practical advice about how to carry out effective cumulative effects assessments.[81]

In the Yukon, cumulative effects assessment is mandatory under the *Yukon Environmental and Socio-economic Assessment Act*.[82] Likewise, Alberta's *Environmental Protection and Enhancement Act* includes cumulative effects among the mandatory content requirements for environmental impact assessment reports.[83] In Ontario, cumulative effects are not expressly mentioned in the *Environmental Assessment Act,* but are incorporated into the Ministry of Environment's Statement of Environmental Values (required by the *Environmental Bill of Rights*) and must be considered in all decision-making.[84]

The International Association for Impact Assessment advocates that EA processes should assess cumulative effects "consistent with the concept and principles of sustainable development."[85]

In British Columbia, evaluation of cumulative effects has a checkered history. The 1994 *Act* made it mandatory for project reports to include the "data necessary or useful to enable the assessment of the probable cumulative effects of the project." However, this provision was repealed in 2002. The *Clean Energy Act,* passed in June 2010, amended the *Environmental Assessment Act* to enable the executive director to require evaluation of the potential cumulative environmental effects when determining the scope, procedures and methods for an assessment on a discretionary basis.[86] There is no mandatory requirement, definition or detail specified for cumulative effects assessment in the *Clean Energy Act* amendments, and EAO policy is not certain to us at the time of writing. The provincial government is campaigning to have the federal government accept its assessments as equivalent to federal CEAA assessments, and some practitioners speculate that this provision will simply be used to argue that provincial assessments meet federal standards.

Those projects that trigger federal assessment must evaluate cumulative effects to comply with CEAA, and time will tell whether the EAO requires cumulative effects assessment in a consistent and robust way, or whether it will only be required for projects that trigger CEAA. One practitioner involved in a recent assessment commented that the provincial cumulative effects requirements were quite well-developed for a project, even more so than the federal. However, there remain a significant number of large projects that do not require federal assessment.

Two main challenges arise in cumulative effects assessment: one is the scale and geographic scope of the assessment, raising a question as to whether it is more effective at the strategic environmental assessment level. The second challenge is predicting the future and determining which other possible projects or activities to include. In the CEAA context, the latter is answered by the inclusion of "certain" and "reasonably foreseeable" future projects.[87]

The International Institute for Environment and Development considers that strategic environmental

80 *Canadian Environmental Assessment Act*, S.C.1992, c.37, s.16.

81 *Cumulative Effects Assessment Practitioners Guide.* The Cumulative Effects Assessment Working Group and AXYS Environmental Consulting Ltd., Canadian Environmental Assessment Agency: 1999. Online: CEAA <http://www.ceaa.gc.ca/013/0002/cea_ops_e.htm>. See also *The Responsible Authority's Guide: Addressing Cumulative Environmental Effects.* Canadian Environmental Assessment Agency. Online: <http://www.ceaa.gc.ca/default.asp?lang=En&n=3939C665-1&offset=28&toc=hide >

82 S.C.2003, c.7, s.42. Online: <http://www.canlii.org/en/ca/laws/stat/sc-2003-c-7/latest/sc-2003-c-7.html>

83 R.S.A.2000, c.E-12, s.49. Online: <http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-e-12/latest/rsa-2000-c-e-12.html>

84 See *Dawber v. Ontario* (2007), 28 C.E.L.R. (3d) 281(ERT). Online: < http://www.ert.gov.on.ca/files/DEC/06160d2.pdf> affd. (2008), 36 C.E.L.R. (3d) 191 (Ont.Div.Ct.); leave to appeal refused (Ont. C.A File No. M36552, November 26, 2008).

85 Senécal, P. *et al. Principles of Environmental Impact Assessment Best Practice.* International Association for Impact Assessment & Institute of Environmental Assessment, UK, 1999, p.4. Online: IAIA <http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf>

86 *Clean Energy Act*, SBC 2010, c.22, s.44. Online: <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_10022_01>.

87 Canadian Environmental Assessment Agency. *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (original 1999, updated 2007). Online: CEAA <http://www.ceaa.gc.ca/013/0002/cea_ops_e.htm>.

assessment "offers a better opportunity than project-level impact assessment to address cumulative effects," but also acknowledges that project-based assessments have developed to the point that they "deal reasonably well with the ancillary impacts of large scale projects… and the incremental effects of numerous, small-scale actions of a similar type.[88] Cumulative effects are likely to be addressed more effectively in project level assessments that require a comparative evaluation of reasonable alternatives.

Some EA participants report that they have requested that the EAO require cumulative effects assessment when providing input on draft terms of reference (application information requirements) but the EAO has declined to do so, stating that the BC legislation does not require it and that it is unfair to expect proponents to speculate about future projects and activities and evaluate those impacts as well. First Nations in particular have been outspoken critics of the failure of the BC environmental assessment process to consider cumulative effects.[89]

As noted above, the EAO's 2007 *Guide to Preparing Terms of Reference* for proponents of reviewable projects states that cumulative effects assessments is only required if the project invokes federal assessment under CEAA.[90] However, the 2009 User Guide states that the EAO does consider cumulative effects when evaluating projects,[91] but provides no policy or methodology outlining its process for cumulative effects assessment. On its "Frequently Asked Questions" web page, the EAO states that it does consider cumulative effects and cites examples of projects that did so. However, most of the examples are projects that also required federal CEAA assessment, although one did not (Hermann Mine).

In our own review of recently certified assessments for non-CEAA projects, the results were mixed. Five projects[92] did consider cumulative effects, while seven did not.[93] All we can conclude from this is that the EAO is well aware of its vulnerability to criticism in not requiring cumulative effects assessment to date. Some proponents will voluntarily do cumulative effects assessment because it is a standard and well-accepted practice. However, some proponents do not consider cumulative effects, and the EAO has not required them to do so. Hopefully this will change in the future.

The actual scope and quality of CEA in the proponent applications and EAO assessment reports is a separate issue, and there is considerable discussion in the assessment profession and academia of successful and unsuccessful evaluation of cumulative effects.

Quality of Assessments

It is beyond the scope of this paper to review the quality of environmental assessment certificate applications and supporting documentation prepared by proponents. This would be a worthwhile undertaking, of course, but is one that requires multiple experts across disciplines to be credible. However, based on our review of comments provided by experts within government agencies (and occasionally experts outside

88 International Institute for Environment and Development. *Directory of Impact Assessment Guidelines.* Second Edition, 1998, p.35. Online: IIED <http://www.iied.org/pubs/pdfs/7785IIED.pdf>.

89 See Critique of the BC Environmental Assessment Process from a First Nations Perspective, Carrier-Sekani Tribal Council, 2007. Online: <http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf>; and Plate, Elmar *et al. Best Practices for First Nation Involvement in Environmental Assessment Reviews of Development Projects in British Columbia.* (West Vancouver: New Relationship Trust, 2009), online: NRT <http://www.newrelationshiptrust.ca/downloads/environmental-assessments-report.pdf>; and Chief Roland Wilson comments in CBC interview at <http://dogwoodinitiative.org/media-centre/news-stories/environmental-assessment-projects-and-aboriginal-claims-in-northeastern-b.c>. See also Booth, Annie. *Effective Engagement of Aboriginal Peoples in Environmental Assessment: A Case Study of Treaty 8 Nations*. University of Northern British Columbia, March 2010. Unpublished.

90 Environmental Assessment Office. *A Guide to Preparing Terms of Reference for an Application for an Environmental Assessment Certificate.* (Victoria: Environmental Assessment Office, 2007), pp.21-22. Online: EAO <http://www.eao.gov.bc.ca/guide/tor/Guide%20to%20Preparing%20Terms%20of%20 Reference%20Sept07.pdf>.

91 Environmental Assessment Office 2009 User Guide, pp.26-27. Online: <http://www.eao.gov.bc.ca/pdf/EAO_User_Guide_2009.pdf>. The 2003 version of the Guide does not make any reference to cumulative effects.

92 The projects that evaluated CEA include: Cabin Gas, Heritage Secure Landfill, Lower Mainland Transmission, Mackenzie Green Energy, and Mica Generating Station.

93 The projects that did not evaluate CEA include: Cache Creek Landfill Extension, Quality Wind, Babkirk Secure Landfill & Babkirk Special Waste, Highland Valley Copper, Northern Rockies Secure Landfill and Peejay Secure Landfill.

government), it is apparent that the quality (or lack) of baseline ecological information, the rigour of analysis, and the justification for conclusions drawn on the significance of project impacts is frequently raised as an issue. This is to be expected to some degree, as some proponents will be motivated by costs and time factors, whereas some regulators generally will want greater certainty about environmental impacts. The key issues here are: 1) whether greater clarity as to EA certificate application requirements (either in the legislation, regulations, and/or s.11 orders) could reduce the number of disputes about the adequacy of applications; and 2) how the EAO handles these disputes (which will be addressed below under decision-making).

One independent expert review of proponent assessments for mining projects in 2005 observed the following: [94]

> ***While the scope and completeness of the EIS [environmental impact statements] in Alberta and British Columbia is determined through a regulatory/proponent consultative process, considerable variation in the quality of information is possible.***
>
> …
>
> ***The results of the review indicated the lack of an ecosystem approach to baseline data collection… The underlying objectives of these impact-oriented baseline studies appeared to be ecosystem characterization; however, important functional aspects of the described ecosystems were omitted.***
>
> …
>
> ***Within the EISs reviewed, information content and quality was variable and often questionable in terms of reliability… All of the EISs contained vague narrative generalizations based, for the most part, on poorly described methods. Important information on diversity, rare and endangered species, succession, and spatial relationships of wildlife habitat were often lacking. The approaches taken reflected a static perspective of ecosystems, and the information collected appeared to be a part of a ritualized 'fill-in-the-blanks' process. Although variable, most EISs did not contain sufficient information (content and quality) upon which to base project approval with respect to reclamation.***

While these findings raise quality control issues with respect to proponent studies, they are arguably exacerbated by the lack of specifications for scoping, procedures and methods in the regulatory regime itself. The development of additional sector-specific EAO guidance documents such as the "Common Issues and Commitments" report for landfills mentioned above could improve consistency among assessments.

94 Smyth, C.R. "A Review of Environmental Impact Statements and their Utility for Coal Surface Mine Reclamation Planning in Alberta and British Columbia," (Vancouver: Proceedings of the 29th Annual British Columbia Mine Reclamation Symposium, 2005), online: UBC <https://circle.ubc.ca/bitstream/handle/2429/8857/17+Clynt+Smyth.pdf;jsessionid=B2B1C9C0E8D7098C50732A48F29216E9?sequence=1>.

Recommendations:

7. **The** *Environmental Assessment Act* should specify the key mandatory "scope" requirements for an assessment, while leaving room for discretion and project-specific and location-specific details. The range of what is currently open for negotiation needs to be narrowed. For example, the *Act* should require:

- Evaluation of the need for a project, reasonable alternatives to a project, and alternative methods of carrying out a project;
- That established standards and protocols be used in the assessment;
- Cumulative effects assessment;
- Worst case scenario evaluation;
- Other key matters currently set out in the Application Information Requirements Template.

These amendments will require careful attention to concept and definition, and should be developed in an open and transparent manner.

8. **Section** 11 orders should incorporate more substantive details on the scope, procedure and methods for an assessment, rather than addressing mostly procedural issues and methodology.

9. **The** Environmental Assessment Office should continue to develop detailed guidance on standard issues that arise in similar projects, as it has done in its helpful "Common Issues and Commitments" for landfills.

Issue #2: Public Participation and Engagement

> [C]onsultation is not simply telling people what you intend to do and, then, listening to their comments. Consultation begins with engaging all the parties that have an interest in the proposed project and determining to what degree they understand what the project is, the full range of its potential impacts and how it may be important to them…The parties have to get to a position where they all know the full implications of a proposal before a meaningful dialogue can occur.
>
> The second crucial aspect of public consultation relates to the perceived sincerity of that dialogue. There have been many occasions where affected people have dedicated tremendous time and effort to the consultation process, in the sincere belief that their rational arguments could change or stop the proposed undertaking, only to have their expectations dashed when the project was approved unchanged. Despite all their work – participating in a process that will hear, but still ignore, their arguments – they discover that it can be impossible to get to a "No" outcome. This is very damaging to the credibility of environmental approval processes. It alienates the people in society who can speak for the integrity of our decision making systems. It encourages those who reject participatory processes and endorse less constructive and more costly strategies, such as litigation or civil disobedience, as a mechanism of public decision making.
>
> ENVIRONMENTAL COMMISSIONER OF ONTARIO[95]

The adequacy of the public involvement process is a key concern of EA participants and stakeholders. Often members of the public have equal or better first-hand knowledge of the area of a proposed project than the EAO, agencies or proponent and can add value to the knowledge base for the assessment. From our review of project files and interviews with EA participants it is apparent that members of the public wishing to engage in EA processes are not just lay people who are resistant to any change (the "not-in-my-back-yard" profile) but very often include individuals who are experts in their own right – in fisheries, wildlife, hydrology, mining, forestry, energy, economics to name just a few.

As mentioned earlier, the 2002 *Act* made significant changes to public involvement in environmental assessment by eliminating project committees and public advisory committees. While a semblance of the former project review committees continues to a limited degree by the inclusion of agency, local government and First Nations officials on a "working group" for assessments, their role is diminished.

The 1994 *Act* gave project committees a distinct and legally relevant role in providing expertise, advice, analysis and recommendations to the ministers regarding the potential effects of the project. In addition, they provided information regarding the prevention or mitigation of adverse effects, and received input from the public advisory committee and general public. The executive director's ability to refer a certification application to the ministers was subject to the recommendation of the project committee.[96]

Similarly, interested stakeholders had a more defined role under 1994 *Act* through public advisory committees established to advise and make recommendations to project committees. The *Act* identified nine points in the process wherein the executive director was required to give notice inviting the public to provide comments.[97]

By contrast the current *Public Consultation Regulation* largely places responsibility for public consultation on

95 Environmental Commissioner of Ontario. 2008. "Environmental Assessment: a vision lost." Getting to K(No)w, ECO Annual Report, 2007-08. Toronto: The Queen's Printer for Ontario. Online: <http://www.eco.on.ca/eng/index.php/pubs/eco-publications/2007-08-AR.php>

96 Environmental Assessment Act, S.B.C.1994, c.35, ss.9,10,29.

97 *Ibid*, s.16.

proponents, and provides that it is a "general policy requirement" to have "at least one formal comment period." A second comment period is recommended unless it is "impracticable because of insufficient time, or…unnecessary because the public has not demonstrated sufficient interest in the assessment."[98] Typically, however, the EAO will require a proponent to provide two comment periods: one on the draft Application Information Requirements and another at the time the proponent submits its certificate application to the EAO for review. This is more limited engagement than is provided elsewhere. For example, even class assessments in Ontario have three required public consultation stages, and two optional opportunities.[99] The mandatory consultation periods are:

- at the initiation of assessment work with identification of the basic purposes of the anticipated undertaking and the range of alternatives to be considered (notice of commencement);
- when the preferred alternative has been selected and alternative design options are identified; and
- when the assessment document (the environmental study report) is ready for review.

Similar requirements should be minimal expectations for major undertakings subject to full assessment requirements.

Bauman, J. of the BC Supreme Court characterized this process as "an ad hoc régime for public notice, access to information and consultation, tailored for each assessment by a person with broad discretionary authority which, in turn, is loosely guided by the Regulation." He went on to find that "the common law rules of procedural fairness have been supplanted here by the consultation scheme envisaged by the legislature under the *Act* and the *Regulation* and that scheme is very much left up to the discretion of the executive director (or his/her delegate) to be designed on a project by project basis."[100] The question of whether the regulation supplants the common law rules of procedural fairness was appealed to the BC Court of Appeal, but the court decided the matter on other grounds and did not rule on this issue.[101]

A sense of disenfranchisement from the environmental assessment process is apparent from interviews of EA participants conducted by the Environmental Law Centre, expressed as follows:

- a lack of meaningful two-way dialogue with the EAO on matters of public concern, including a lack of response to correspondence from the public raising specific questions, concerns and comments;
- EAO reluctance (in some cases) to extend review and comment periods on technically complex projects with voluminous documents;[102]
- EAO refusal to allow concerned citizens group representatives (some of whom have reputations for professionalism and constructive dialogue in other government or proponent-led processes) to attend working group meetings, even as silent observers;
- EAO refusal to hold public meetings in the main population centres affected by and/or concerned about some controversial projects, either because the proponents did not want meetings held in those locations or because the EAO felt that the smaller communities were closer to the project;[103]
- Frustration with narrow terms of reference for public meetings, such as attempts to limit comment to draft terms of reference or technical issues within EA certificate applications, rather than the issues of concern to participants;[104]

98 B.C.Reg.373/2002, s.7.

99 For example, see the Ontario class assessment requirements for municipal road and water projects. Online: http://www.municipalengineers.on.ca/classea/manual/manualSimple.asp?section={A403E9A1-726C-4C1F-8214-5B4FEB9E0A1E}&heading={8718B2F7-AF3F-4D2C-B21A-992DAC6034B3}

100 *Do Rav Right Coalition v. Hagen*, 2005 BCSC 991, at paras.33, 123.

101 *Do Rav Right Coalition v. Hagen*, 2006 BCCA 571, at paras.5, 47.

102 However, the EAO has sometimes agreed to time extensions, so it would not be fair to suggest that this is a standard response.

103 In the recent past the EAO has considered public consultation to be the proponent's responsibility, but usually attends the sessions and approves the proponent's public consultation plan. However, we are advised that the EAO assumes 'ownership' and conduct of the meetings. The EAO reports that about 95% of the time meeting location is not an issue.

104 *Supra*, note 49. As noted earlier, some of this frustration goes to what the public considers to be unaddressed strategic assessment and land use planning issues: but if these issues cannot be raised at public meetings,

- EAO failure to ensure that some relevant documentation is made publicly available on its website (such as government agency comments on the draft terms of reference or application package) in a timely manner relevant to review and comment periods;[105]
- The lack of a track record of accommodating or being responsive to public comments when it comes to decision-making, recommendations to ministers, and terms and conditions placed (or not placed) on EA certificates; and
- The lack of participant funding resources to "level the playing field" when it come to accessing independent expert review [which is available in some federal and provincial (e.g. Alberta, Manitoba, Ontario) EA processes];
- A perception that the EAO is biased in favour of accommodating proponents based on:
    - the fact that the EAO has on three occasions commissioned "Client Satisfaction Surveys" that seek the views of proponents but not other EA participants;[106]
    - the EAO's highlighting of proponent information on the capital investment and jobs associated with projects still in the EA process, including those in the pre-application phase, which seems to indicate a pro-development bias; and
    - a lengthy record of process and substantive decisions that reflect proponent preferences.

This is not to suggest that all members of the public engaged in the EA process are dissatisfied to the extent suggested above. However, as discouraging as this may be for the EAO and proponents to hear, based on our consultations the discontent appears to be very widespread, to the point that the credibility of the process is being questioned by the majority of citizen participants. BC has considerable experience with public participation in resource decision-making processes. Similar levels of discontent were being expressed about forestry and land use issues throughout the 1980s and 90s. The protests of that period led to province-wide strategic land use planning exercises that were highly participatory from the mid-90s to about 2006. There may be lessons from that history that could benefit the EA process now. It also might be that this period heightened the level of expectation around consultation processes.

The EAO's Public Comment Policy confirms that the posting of comments on its e-PIC [Project Information Centre] website, "constitutes acknowledgment of receipt of the submission and no further communication back to the author will necessarily be made by the EAO."[107] This lack of constructive engagement with participants on matters which they consider to be important (such as technical issues or perceived shortcomings of a proponent's proposed terms of reference or EA certificate application) leaves the participants uncertain as to whether their input matters at all.

> The design of projects in isolation from the public happens again and again in project EAs under current legislation, in spite of the fact that in the process valuable time and opportunities are lost in understanding public concerns and incorporating their concerns and ideas into project design and implementation. Members of the public are generally not encouraged to participate, and if they do participate, are often seen as a problem to be managed rather than a valuable resource and an interest to be incorporated in project design and implementation.
>
> M.DOELLE & A.J.SINCLAIR [108]

then where?

105 Some EA participants are quite familiar with local government hearing processes in which the law requires full disclosure of all relevant documents to be considered by decision-makers, and bring this expectation to the environmental assessment process as an issue of administrative fairness. From the EAO's perspective dissemination of all agency comments can lead to confusion because there are often several draft versions of application information requirements and the issues identified in correspondence may have been resolved by the time of the public comment draft.

106 These surveys were carried out in 2004, 2006 and 2008 and were administered by BC Stats on behalf of the EAO. Only proponents of active projects were surveyed. The surveys show very high levels of proponent satisfaction, although it varies between survey periods.

107 Environmental Assessment Office. *Environmental Assessment Office Policy: Public Comments.* (Victoria: Environmental Assessment Office, 2008), online: EAO <http://www.eao.gov.bc.ca/pub/pdf/public_comment_policy2008.pdf>.

108 M. Doelle and A.J. Sinclair. "Time for a new approach to public participation in EA: Promoting cooperation and consensus for sustainability." *Environmental Impact Assessment Review* 26 (2006). 185–205.

Another concern expressed by participants is the inability to reply to the proponent's response to comments following the close of the comment period. While the EAO states that it assesses the adequacy of proponent responses to public comments, much of the post-comment period evaluation by the proponent and EAO (e.g. its Assessment Report and the executive director's recommendation to ministers) is not publicly available until a certificate decision has been made by the ministers. The EAO Guide states that "[o]nce the responsible ministers issue a decision, the EAO posts it on e-PIC, along with the assessment report, the Executive Director's reasons and recommendations, and the environmental assessment certificate, if issued."[109] Consequently, the public often does not know until after a decision is made how its concerns were portrayed by the EAO and evaluated by the ministers.

All of these issues affect public perception of the fairness and integrity of the EA process. While for some participants the process might be a zero-sum game in which the only measure of success is whether project approval is declined, this would be an unduly skeptical characterization of all concerned citizens. In the end, as Ontario's Environmental Commissioner noted, the public judges the adequacy of the consultation process by the extent to which their input influenced the EA process, the approval decision and the terms and conditions placed on EA certificates.

The problems BC faces in effective public participation are not unique: other provinces and the federal CEAA process raise similar issues. Some EA scholars have called for a new approach to public participation that is outcomes-based rather than prescriptive, which would entrench in legislation access to information, independent facilitation and access to alternative dispute resolution to help resolve intractable problems.[110]

While much of the discussion on public participation is on the pre-approval period, some studies have noted the importance of citizen involvement in post-approval project monitoring. It is often those living closest to a project that have valuable insights on actual impacts as the project is developed and ideas for suitable corrective responses for any problems that develop. The case can be made that the most effective and efficient monitoring strategies centre on engagement of public organizations and local citizens.[111]

Our focus group engaged in considerable discussion on this issue. Proponents recognized the importance of community acceptance and support for a project, and spoke of the need for "social licence," but some had experience of public meeting "campaign" theatrics that they felt turned consultation meetings into political events rather than respectful meaningful opportunities to receive input. Environmental organization representatives noted that there is more dissatisfaction in recent years since members of the public have not been able to participate on public advisory committees, which has created an atmosphere of distrust, and suggested that the former provisions should be reinstated. Some of the EA practitioners we consulted saw value in this means of public engagement, but felt that it should not be a requirement that is imposed on every project assessment. Some practitioners felt there should be more numerous entry points for public involvement in the assessment process, as happens in Ontario and formerly in BC under the 1994 *Act*. They noted that engagement of public participants is typically frustrated if it happens after key project selection and design decisions have been made and are being defended.

We acknowledge that meaningful public engagement cannot be legislated. However, the Legislature can send strong signals of its importance and set some guarantees and parameters for it.

109 Environmental Assessment Office. Environmental Assessment Office 2009 User Guide (Victoria: Environmental Assessment Office, 2009), pp.33-34, online: EAO <http://www.eao.gov.bc.ca/pub/pdf/EAO_User_Guide_2009.pdf>.
110 *Supra*, note 103.

111 Carol Hunsberger, Robert B. Gibson and Susan K. Wismer, *Increasing citizen participation in sustainability-centred environmental assessment follow-up: lessons from citizen monitoring, traditional ecological knowledge, and sustainable livelihood initiatives*, monograph prepared for the Canadian Environmental Assessment Agency Research and Development Program, April 2004 . Online: http://www.ceaa.gc.ca/default.asp?lang=En&n=C7B298F5-1&offset=1&toc=show.

Recommendations:

10. **The** *Environmental Assessment Act* should allow for public engagement in project assessment, planning and design that is more meaningful than the rudimentary "review and comment" opportunities now provided. The discretion to establish public advisory committees does not need to be exercised for every project, but may go a long way to re-establishing public trust and confidence in the EA system. The *Public Consultation Regulation* should address when public advisory committees are appropriate, and their mandate and membership.

11. **The** *Environmental Assessment Act* should specify mandatory entry points for public engagement opportunities.

12. **Rules** should be developed and consistently applied concerning the timely posting of information, documents and correspondence relating to a project. Government records that would be routinely releasable under the *Freedom of Information and Protection of Privacy Act* should be posted on the e-PIC website routinely and shortly after receipt (notices or caveats can accompany the records if there are legitimate concerns about references being out of date or misunderstood).

Issue #3: Oversight and Decision-making

The effectiveness of the BC environmental assessment process is dependent to a significant degree on the quality of the studies and reports carried out by proponents. This is because, as the EAO states, "[t]he proponent is responsible for collecting the majority of the information that will be included in the application for an environmental assessment certificate."[112] Proponents usually retain consultants with experience in the relevant fields, although some will use in-house staff or a combination of both. There is ongoing discussion between the proponent, EAO and the working group concerning what will be required to address the issues raised by the project, throughout what is referred to as the "pre-application stage."

Eventually this process culminates in the proponent's submission of a formal "application" for an EA certificate. The executive director has 30 days[113] to determine whether to accept the application for review, and must not do so unless it contains the required information.[114] Once accepted, the application undergoes a 180-day review process that culminates in an assessment report prepared by the executive director (or delegate), along with its recommendations to the ministers responsible. This is known as the "review stage." After receiving the EAO reports the ministers have 45 days to decide whether to issue an EA certificate, refuse to issue one, or order that further assessment be carried out.[115]

For discussion purposes we will refer to "oversight" issues as those that involve the guiding and reviewing roles of the EAO and working group in the pre-application period and review period. We will address separately issues that arise in the various "decision-making" points prescribed in the legislation for the executive director and the ministers.

Oversight Issues

The heart of the EA process is the oversight and review of proponent applications by the EAO and agencies with a mandate for environmental protection or resource management. It is not well-defined by the legislation and there are few rules. This may be due in part to the fact that it is difficult to write rules for matters that are highly dependent on professional judgment and project-specific knowledge of EAO staff and agency experts. However, the absence of rules can also lead to a laissez-faire system in which "anything goes." EA can then become a mere paper-based exercise of checking off boxes rather than a comprehensive and diligent assessment of environmental impacts. Several jurisdictions have enshrined the key principles and objectives of EA in law so that the purpose of the exercise — guiding the Province towards environmental sustainability — is the likely outcome.

Role of Proponents/Consultants

The BC approach to the EA process depends for its integrity on the provision of accurate, objective, thorough, unbiased and honest provision of information by proponents. Agencies such as the Ministry of Environment often do not have sufficient personnel or budget to collect or verify field data supporting environmental assessments, so the professionalism of proponent staff and consultants is an important factor.[116]

112 Environmental Assessment Office 2009 User Guide, p.22. Online: <http://www.eao.gov.bc.ca/pdf/EAO_User_Guide_2009.pdf>.

113 All time limits referred to in this paragraph are set out in the *Prescribed Time Limits Regulation*, B.C. Reg. 372/2002.

114 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.16.

115 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.17.

116 One example provided to us was a proponent's incorrect identification of a barrier to fish passage in a remote area with difficult access. The MOE Fish and Wildlife Branch did not have the resources to verify the information, but a member of the public documented fish presence well above the identified barrier, which was an important issue in a creek diversion (hydroelectric power) project. Another example was a proponent reporting that mountain goats were not present in an area when visited

In the course of our consultations and research several issues were identified concerning oversight of proponent-led assessments:

1. Use of Professionals: While the use of professionals is common, there is no requirement that the expert information in proponent reports be prepared by or under the direction of members of a profession. Proponents may use non-professionals in carrying out assessments (e.g. biologists or technicians who are not members of the College of Applied Biology and not subject to a code of ethics or disciplinary procedures). Elsewhere BC has developed rules concerning who is qualified to prepare assessments (e.g. for contaminated sites, landslide hazards, riparian assessments), but there are none for EA and the issue does not appear to be addressed in section 11 orders. Of course, proponent reports include much more than information that falls within any one professional discipline, and we are not suggesting that the proponent's entire application needs to be prepared or signed by professionals. However, where expertise is required, professional standards, guidance and codes of ethics backed by the possibility of disciplinary measures add a degree of assurance to the expert opinions provided in EA certificate applications. This issue has especial relevance to biological assessments, as professional biologists do not have an exclusive right to practice.

2. Clarity and Accountability for Professional Content: Often proponent reports seem to be a blend of proponent and expert consultant information, and it is not always clear who prepared what content. This raises the question of whether the professionals assume responsibility for the statements made and the quality of information in the report. [117] The lack of rules around authorship and professional sign-off leads to the possibility of "massaging" or editing report content behind closed doors, possibly presenting government and the public with an incomplete or potentially misleading picture of environmental impacts or caveats expressed by the professionals involved. It can put professionals in a difficult position, as the proponent is the one paying its fees. Draft versions of expert reports prepared for proponents are not normally made available, and there is no equivalent of court-like disclosure rules for expert evidence, even though the impacts or risks to the environment can be quite significant and the Province's reliance on outside expert opinion is substantial. Relatively simple reforms such as providing clarity around authorship, requiring professional endorsement for expert content and standard declarations or assurance statements, could deter against undue pressure from a proponent on a professional and increase overall confidence in expert reports.[118]

3. Conflict of Interest: There are no clear provisions concerning conflict of interest in the EA process. For example, should a professional be obliged to disclose whether he or she stands to profit from the outcome of the EA certificate application or final project permitting, either by way of payment or shares in the proponent company? Would this amount to a conflict of interest that could affect the expert opinion presented or how it is expressed? The conflict of interest rules for the professions that are most involved in EA seem to focus on the consultant/client relationship: that is, the conflict between the professional's personal interests and those of the client. However, is there not also a duty to the Province and public to provide objective, neutral, complete and accurate expert opinions concerning environmental risks and harm that may be associated with a project? The Code of Ethics for professional biologists acknowledges this issue to a degree by requiring members involved in the preparation or presentation of environmental assessments to receive payment "independent of the success of the project."[119]

by its consultant and therefore likely not an issue: however, in this case the Fish and Wildlife Branch happened to have observed and documented numerous goats in the same area the week previous. This is why level of effort and standardized protocols can be important at the terms of reference (application information requirements) stage, but it also raises oversight and reliance issues.

117 However, some (seemingly a minority) consultant reports voluntarily do identify authorship: the best example we found was the "List of Authors" for the Mackenzie Green Energy Centre certificate application.

118 For example, see the Landslide Assessment Assurance Statements in Schedule D of the Association of Professional Engineers and Geoscientists' *Guidelines for Legislated Landslide Assessments for Proposed Residential Developments in BC*. Online: APEG <http://www.apeg.bc.ca/ppractice/documents/ppguidelines/guidelineslegislatedlandslide1.pdf>

119 College of Applied Biology – British Columbia. Code of Ethics, s.2(x).

Professional associations could perhaps add value to the EA regime by developing more fulsome guidance to their members on these issues. However, since non-professionals are also engaged in the EA process, the issue might be better resolved in a comprehensive rather than piecemeal way by the EA regime itself.

4. Disclosure of Conflicting Opinions: There are no disclosure rules in place that alert decision-makers to "expert shopping" by proponents. Under the current regime, a proponent may "shop around" until it gets the opinion it wants to advance the case for project approval.[120] There is nothing wrong with seeking a second opinion, but should there be an obligation to inform the EAO of contrary professional opinions received by the proponent, particularly given government's limited resources to carry out its own assessments?

5. Practice Direction and Guidance: The professional associations governing engineers, geoscientists, biologists and foresters have codes of ethics that include a general duty to the public and environmental stewardship. However, there does not appear to be much specific practice direction or guidance on these particular issues. One useful but limited example is a guidance document on species at risk that assists professional foresters and biologists when these issues arise.[121] Given the extent of provincial reliance on independent professionals, and budgetary cutbacks to review agencies, it may be worthwhile for the EAO, agencies and professional associations to explore additional practice direction and guidance that arise specifically in the EA setting.

Addressing these issues would be an important contribution to the integrity of the EA process, however, it should not be seen as a substitute for strengthening the legislative regime and effectively engaging the public in project planning, critical review and post-approval monitoring mentioned above.

Online: CAB-BC <http://www.cab-bc.org/files/Code%20of%20Ethics%20colour%202008%20one%20page.pdf>

120 Although not a disclosure issue, it was alleged that the EAO itself engaged in something like this when it obtained a second opinion on the impact of the Jumbo Glacier Resort development on the heli-ski business of an existing land tenure holder. The second opinion was prepared in a short time frame and without the degree of consultation of the original opinion that had concluded the business would be "reduced to the point where the viability of [R.K.'s] enterprise will fail." See *R.K. Heli-Ski Panorama v Glassman et al.*, 2005 BCSC 1622 (CanLII), at paras. 41–57. However, the legal issue in that case was whether the EAO's handling of the second report breached a legal duty of procedural fairness owed to *R.K. Heli-Ski*: it was held that it did not, as the company had an opportunity to voice its objections to the second report. This was affirmed by the BC Court of Appeal: 2007 BCCA 9 (CanLII).

121 College of Applied Biology – BC & Association of BC Forest Professionals, *Managing Species at Risk in British Columbia Guidance for Resource Professionals*, November 2009, p. Online: CAB-BC <http://www.cab-bc.org/files/SAR%20Paper.pdf>. For example, pp.14-15 states that "[o]n occasion, resource professionals will encounter situations where satisfying legislation and established objectives will not result in what they judge to be sound stewardship. They must inform their *employer/client* of a conflict and suggest alternatives, but must not unilaterally add to a *client's or employer's* legal obligations, and must seek the consent of a *client or employer* before undertaking or committing to additional activities" (italics added).

Recommendations:

13. **Rules** should be developed concerning the use of qualified professionals in the assessment process, and requirements for their signature and/or seal on reports and related documents.

14. **Professional** associations should be encouraged to develop practice directives concerning conflict of interest, practice standards and other matters that arise when members are retained to prepare environmental assessments.

15. **Government** needs to support environmental assessment by ensuring that line agencies have the resources necessary to diligently participate in the EA process, including attending project locations in the field and not just "paper reviews."

16. **There** needs to be greater clarity of roles and transparency in fact-finding between agencies and the EAO on matters involving expert opinion. If the EAO is to maintain its decision-making role in the process (a First Nations' proposal suggests not), it should be required to justify in detail its rationale for rejecting the opinion evidence of agency experts. In the event of strong professional disagreement between agency experts and proponents, the EAO should invoke more rigorous dispute resolution procedures and fact-finding exercises.

Role of EAO and Reviewing Agencies

The key oversight issues involve the roles and responsibilities of the EAO and working group (our interest is primarily in the provincial agencies that have a legal mandate over resources and/or environmental stewardship). Projects in the EA process are highly complex and considerable expertise is required to competently assess the environmental impacts and risks. Often this expertise often does not reside in the EAO itself, nor could it be expected to, as its staff come from diverse backgrounds across government.[122] Both the EAO and agency representatives on the working group in effect play the role of facilitators and coordinators who identify issues and gather input from the experts within government. The following types of questions and issues arise:

1. When is the EAO acting as a facilitator of the EA process, and when is it acting as an expert assessment body? Our review of the project information centre records suggests that most often the EAO plays a facilitation role, seeking input from line agencies with responsibility for a given issue. However, the EAO also asserts that it is an expert assessment body, and occasionally will overrule concerns and positions taken by line agencies.

2. Who is best qualified to make findings of fact and whose expert evaluation carries more weight? How can the public be assured that the Province's most qualified experts are guiding decision-making? The competent experts are frequently those in the line agencies, although expertise also resides in the EAO on some issues.

3. Under what circumstances does (and should) the EAO disagree with and override the experts of other agencies? What dispute resolution methods are followed? How should disagreements within government be addressed? There does not appear to be a set of rules or agreements between the EAO and line agencies addressing these issues.

4. The limited ability of line agencies experts to carry out their own field-level review due to resourcing (lack of staff and budget) issues;

5. The ability of the agencies to carry out effective review of the often substantial volume of assessment material within the time limits imposed by the *Prescribed Time Limits Regulation*.

The EA process is an iterative one in which there is much to and fro between proponents and government representatives. Some proponents may find this a frustrating process that seems uncertain, perhaps a never-ending entanglement of "red tape." Experienced proponents recognize that some of this is the nature of the beast because many issues are necessarily site-specific and project-specific, requiring agencies to respond to the issues through ongoing research as they arise. While the process may be proceed fairly smoothly for many projects, the questions posed above become particularly important for controversial projects where the environmental values and risks are high. They arise most starkly when it comes to decision-making, to which we will now turn.

Decision-Making Issues:

The *Environmental Assessment Act* places the ultimate decision-making authority in the two or more Cabinet ministers who must decide whether to issue an environmental assessment certificate for a project. However, there are numerous decision-making points that precede certificate approval which are usually made by the EAO executive director or his/her delegate.[123]

122 However, some experienced EA participants we interviewed felt that the EAO staff should be comprised predominantly of assessment professionals – that nationally and internationally there has been a well-defined group of professionals skilled in effective assessments following established EA norms.

123 The *Act* provides for some of these decisions to be made by the minister, a hearing panel, or commission, but these provisions seldom apply.

> The ongoing absence of overarching EA principles promotes uncertainty, undermines accountability, unduly politicizes the process, and subverts the potential effectiveness of the EA Act in securing societal benefits and environmental protection.
>
> MINISTER'S ENVIRONMENTAL ASSESSMENT ADVISORY PANEL (ONTARIO) [124]

> If environmental assessments are to lead to approval decisions that foster sustainability, the rules governing those decisions must be designed to respect the sustainability principles in a way that is firm but also realistic.
>
> ROBERT GIBSON, UNIVERSITY OF WATERLOO [125]

Pre-Certificate Decisions by the Environmental Assessment Office:

The key pre-certificate decisions by the EAO for the purposes of this discussion include:

1. Deciding on the adequacy of the proponent's proposed application information requirements or terms of reference (s.11).

2. Deciding on the adequacy of the information provided by the proponent in an EA certification application (s.16);

3. Deciding whether to suspend the prescribed time limits in order to require more information from the proponent (s.24); and

4. Deciding on the content of its assessment report and recommendations to the ministers (s.17).

The 2002 *Act* reconfigured decision-making in the pre-certificate stages by eliminating the role of project committees. Prior to 2002, the EAO executive director's recommendation to ministers had to be "on the recommendation of the project committee." The project committee was mandated to "analyze and advise" decision-makers on the comments received in relation to a project, the advice and recommendations of the public advisory committee (if one was appointed), the potential effects of the project and the prevention or mitigation of adverse effects.[126] Having removed these committees, the 2002 *Act* placed all of the decision-making authority in the hands of the EAO, arguably making it easier to disagree with the experts in other agencies, local government and First Nations.

Agencies with licensing authority over an aspect of the project retain some decision-making clout, but those playing a mostly advisory role (like the Ministry of Environment when it comes to most fish and wildlife matters) must now persuade the EAO of the merit of its position. We are not suggesting that EAO disagreement with line agencies is the norm – in fact, it seems for the most part that efforts are made to come to agreement across government. However, the records do indicate that the EAO does veto Ministry of Environment concerns from time to time. Some EA participants we interviewed questioned why the opinion of agency experts seemed to be ignored or did not influence the outcome and felt this undermined the credibility of the EA process in the absence of a persuasive rationale.

By contrast, the legal system has developed a set of rules to assist judges in making factual findings when a matter requires the assistance of expert opinion evidence. The rules include close examination of the qualifications of the person providing expert evidence and a legal duty of fairness, objectivity and non-partisanship to the court that overrides any obligation to the person from whom experts have received instructions or by whom they are paid. The system provides checks and balances by allowing cross-examination by opposing parties. Courts will closely examine expert opinion evidence and even disallow or strike out portions of reports or affidavits that are

124 Minister's Environmental Assessment Advisory Panel – Executive Group. *Improving Environmental Assessment in Ontario: A Framework for Reform*, Vol.1. March 2005, p.29.

125 Gibson, Robert B. Specification of sustainability-based environmental assessment decision criteria and implications for determining "significance" in environmental assessment. Ottawa, Ontario: Canadian Environmental Assessment Agency; 2002. S.3.2.2. Online: <http://www.acee-ceaa.gc.ca/default.asp?lang =En&n=086E7767-1&toc=show&offset=1>

126 *Environmental Assessment Act*, S.B.C.1994, c.35, ss.10, 19.

unduly influenced by litigants or lawyers. Ontario requires experts to sign an acknowledgement of these duties to the court.[127]

Similar measures are also found in the EA context, for example, when experts provide opinion evidence in a hearing and there are opportunities for questions from other participants. This occurs more frequently in federal government processes involving independent review panels. The BC *Environmental Assessment Act* authorizes the Minister of Environment to refer projects to a commission or hearing panel and to endow them with inquiry powers;[128] however, this is an infrequent practice.

Even outside of such referrals there is no apparent reason that the EAO could not develop a more rigorous in-house process to deal with expert evidence. Another option might be to refer only the contested expert issues to an independent commission or panel, rather than the "all or nothing" approach to panels in the current *Act*. On its face, the EAO's decision record suggests that the current process for determining findings of fact on contentious matters requiring expert opinion evidence is somewhat casual, yet what is at stake is often no less significant than the outcome of legal proceedings.

127 Form 53, Acknowledgment of Expert's Duty. Online: <http://www.ontariocourtforms.on.ca/forms/civil/53/RCP-E-53-1108.pdf>

128 *Environmental Assessment Act*, S.B.C.2002, c.43, s.14.

Fish Lake Case Study

One recent example of disagreements between agencies and the EAO concerns the Prosperity Gold-Copper Project in the Chilcotin region. The Ministry of Environment (MOE) strongly expressed its concerns about two issues: wildlife impacts and potential seepage of mine tailings into ground water across watersheds (two productive fish-bearing lakes – called Fish Lake and Little Fish Lake – are proposed to be used as tailing ponds and replaced with an artificial "Prosperity Lake").

In a 34-page document, the regional hydrologist, who is a professional engineer with a Ph.D., set out his concerns about the "lack of sufficient baseline data" and "inadequate modeling of the potential subsurface flow system" that could result in contaminants reaching other watersheds and harming fish. He concluded that these deficiencies resulted in "a high degree of uncertainty in the assessment of environmental risks against baseline conditions, assessing functionality of fish compensation measures, and in assessment effectiveness of mitigation measures."[129] The Ministry of Energy, Mines and Petroleum Resources (MEMPR), which is responsible for mine approval, stated that "[t]o resolve this issue…for the purposes of EA, the proponent should clearly commit to collecting additional information to further assess seepage issues and that this information will be available and incorporated into the detailed designs for seepage control and interception measures" at the *Mines Act* permitting stage.[130]

129 Correspondence dated October 6, 2009, M. Sabur, MOE to G. Alexander, EAO. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/1255019183859_4b6d450441606db4b0c095b27a416604083b6af598d4e34322c106793d204510.pdf>

130 Correspondence dated November 9, 2009, K. Bellefontaine, MEMPR to G.Alexander, EAO. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/d31881/1263326367571_b63aad90281e3d8e64be45910d018179d115a3375a24c4d0e843cbf7ab338d20.pdf>

In his reasons for recommending that the EA certificate be approved, the EAO executive director seemed to go even further than MEMPR by stating that "the EAO believes that sufficient information has been provided to assess the potential for significant adverse effects" and advising the ministers that there would be "no significant adverse effects." [131]

When it came to wildlife impacts, MOE's senior ecosystem biologist objected to what he considered to be the proponent's failure to justify its conclusion that there would be "no significant effects" to wildlife or vegetation, and expressed considerable frustration and "substantive difficulty in procuring an explanation for the conclusions respecting impact to wildlife resources and ecosystem values." MOE further stated that the "proponent's proposal to only address 'a limited number of compatible wildlife resources' and 'not until regulatory approvals have been issued, and the project is operating' falls short of being a forthright response to expectations for a fulsome compensation plan for residual losses of recreation, wildlife, wildlife habitat, and the habitat of species at risk." The letter identifies "numerous outstanding issues" and expresses dismay that the proponent was refusing to make a commitment to "additional field surveys to confirm the presence or absence of wildlife habitat features prior to construction."[132]

Despite this failure to satisfy the Ministry of Environment, the EAO executive director recommended certificate approval, stating that the "EAO believes sufficient information has been provided to assess the potential for significant adverse effects and the proposed measures will ensure no significant adverse effects."[133] The EAO's assessment report acknowledges that these concerns were also expressed by the Canadian Wildlife Service, yet states that "EAO is satisfied that the proposed Project is not likely to have significant adverse effects on wildlife," without any explanation as to how it reached this conclusion.[134] The ministers approved the EA certificate shortly after these receiving these recommendations.

As will be discussed below, the federal review panel reached a different conclusion on impacts to grizzly bears.

131 R.Junger. Reasons of the Executive Director, December 17, 2009, p.8. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/12635 03166531_111bf55585d2ae6168f90be26d049256ece101a1db1b1077333 129c863464809.pdf>

132 Correspondence dated Sept.23, 2009 from R.Packham, MOE to Canadian Environmental Assessment Agency. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/1255474589770_b585cc39b c2105c8fc8cc8180592f6dafecbbe277c361f082d92c9e7576eba28.pdf>

133 R.Junger. Reasons of the Executive Director, December 17, 2009, p.9. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/12635 03166531_111bf55585d2ae6168f90be26d049256ece101a1db1b1077333 129c863464809.pdf>

134 Environmental Assessment Office. Prosperity Gold-Copper Project Assessment Report, p.84. December 17, 2009. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p6/d31889/12635 03323535_111b

The Fish Lake example is not an isolated one: there are several EAs in which similar issues arise, particularly for wildlife-related impacts. Some agencies can rely on their permitting authority to resolve outstanding issues at a later time, making the timing of the EA approval somewhat less of a concern (theoretically at least) for issues that can be addressed by withholding a permit or specifying terms and conditions that will properly address the issue. However, some agencies do not have that option. For example, in the Fish Lake situation, the *Water Act* does not currently require a permit for impacts to ground water, and the *Wildlife Act* does not require a permit for impacts to wildlife habitat – not even for threatened and endangered species. Although the Ministry of Environment is the agency with the primary legal mandate for environmental protection,[135] it does not have as many law or policy levers as agencies granting rights to extract natural resources. So while a key benefit of the EA process is its ability to introduce environmental protection requirements that are not addressed in legislation (through the terms and conditions placed on EA certificates), this benefit is lost where the EAO declines to exercise it.

Our research indicates that the following types of issues frequently arise in the review of proponent studies supporting EA certificate applications:

1. Determining Adequacy of Studies: the executive director "must not accept the application for review unless he or she has determined that it contains the required information,"[136] however, it is appears that this is interpreted very loosely. Although the decision to

f55585d2ae6168f90be26d049256ece101a1db1b1077333129c863464809.pdf>

135 *Ministry of Environment Act*, R.S.B.C. 1996, c.299, s.4.

136 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.16.

accept an application for review triggers the 180-day approval timeline under the *Prescribed Time Limits Regulation*, the executive director (or his designate) will do so even where it is clear that the information is not yet available.[137] This lack of information may prejudice the public's ability to adequately respond to a proposed project.

Also, while it generally seeks inter-agency agreement, the EAO sometimes decides that studies are acceptable despite the contrary expert opinion of those in government agencies who may be better qualified. The record shows that the EAO will sometimes reject agency and working group recommendations for further study (or even requests for further justification of conclusions reached by proponents) without presenting a contrary expert opinion or rationale other than the proponent's own reports. On occasion this leads to conflicts with local government as well.[138]

2. Deferral of Issues: Related to the above, the record shows a tendency to recommend certificate approval while deferring outstanding issues on which there may be considerable disagreement within government to "the permitting stage." To a certain degree this can be inevitable and appropriate, but it requires judgment as to the significance of the issues and ability of permitting authorities to address them. It is not always clear that statutory decision-makers in fact have the jurisdiction to address some of these deferred issues, or that they are inclined to exercise it in a manner that will resolve the issue in a satisfactory manner (e.g. if the decision-maker is inclined to grant resource rights without heeding the advice of the Ministry of Environment). There is a danger that deferral of critical issues to future decision-making can become a shell game, as some proponents later object to terms and conditions at the permitting stage that are not explicitly addressed in the EA certificate.[139]

Also, some certificate applications do not provide certainty of location, with specific location deferred until after the EA process. For example, some energy projects identify a wide swath (e.g. up to 2 km) of public land as potential routing for transmission lines. MOE wildlife biologists need to know the route location because the ultimately chosen site might significantly affect habitat for threatened or endangered species, raising issues of acceptability, mitigation options, and the terms of EA certificate approval. When these issues were raised by MOE and the Canadian Wildlife Service for one project the proponent simply stated that "[t]he need for detailed rare plant surveys and mapping of wetland/bog habitat affected by the final Project footprint is expected to be a condition of the environmental assessment certificate."[140] The significance of these issues no doubt varies according to the specific location, values and project type. The key issues are whether the issues are significant enough to affect the certificate decision, and whether final location and research outcomes can adequately be addressed in the post-certificate legal realm.

3. Significance Determinations and Justification: Some EAO assessment reports and executive director recommendations seem to lack convincing rationales for key findings such as a determination that a project has "no significant effect" when there is clear professional disagreement. These reports tend to merely state both sides of an issue – the proponent's and the agency's (usually MOE) – and then simply assert that there

137 For example, see the June 2007 decision to "start the clock" on review of the Garibaldi at Squamish resort project even though there were "outstanding information requirements." The deadline specified for completing the requirements was half-way through the review period, and after the public review period was closed. The public was granted further opportunities to comment on new information for some but not all aspects of the project assessment. Correspondence dated June 6, 2007, G. McLaren to B. Gaglardi. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p286/1181170761111_1a8857dec0d74066a295a7902e792f79.pdf>.

138 For example, see the District of Squamish opposition to EA certificate approval on the grounds that "crucial information on fundamental issues such as water supply is missing," as reported in: <http://thetyee.ca/Blogs/TheHook/Environment/2010/04/23/SquamishResort/?utm_source=mondayheadlines&utm_medium=email&utm_campaign=260410>. The District of Squamish has posted its Council resolution and letter to the EAO on its website at <http://www.squamish.ca/news/council-takes-position-garibaldi-squamish>.

139 Other variations of this also apply, such as post-certificate debates over what constitutes compliance with the certification conditions, and requests for exemptions from wildlife rules as discussed below.

140 Bear Mountain Wind Park Project Assessment Report. Online: EAO <http://a100.gov.bc.ca/appsdata/ epic/documents/p268/1187627857988_801918e106944f6daa0ab4c86384164e.pdf>.

is no adverse effect, even when it is clear that further studies are required before that factual question can be answered. This appears to be a subjective judgment that lacks the application of clear and transparent criteria.

There does not seem to be a clear definition or policy for what constitutes a significant adverse effect, and it is only mentioned in the *Environmental Assessment Act* provisions dealing with whether an assessment is required, not within the EA process. There is no policy guidance to fill this regulatory gap. Nevertheless, the practice of the EAO presumes that significant adverse effects should be avoided or mitigated (perhaps because this is the very essence of EA in most jurisdictions). Sometimes the EAO simply states that adverse effects are "manageable to an acceptable level" without offering any criteria for what constitutes acceptability. In the absence of policy or rules, the notion of significant adverse effect seems to be applied very loosely.

One Canadian EA expert has commented that the BC legislation "gives the Minister considerable discretion in determining which projects are to be subject to EA requirements and in deciding how those requirements are to be applied. Such an approach is more flexible but could contribute to inconsistencies in significance interpretations for projects with comparable environmental effects."[141]

Nova Scotia's *Environmental Assessment Regulations* provide a useful definition of significance.[142] Significance has been defined in the U.S. NEPA regulations since 1979. In some jurisdictions the formal finding of "no significant impact" is a much more structured and rigorous process. For example, California and Australia have "very detailed requirements concerning which impacts are significant and how impact significance thresholds and criteria are to be established and applied."[143] While there is always an element of subjectivity and professional judgment involved, much has been written in the EA literature on criteria to guide "significance determinations" in order to better ground decision-making.[144]

4. Mitigation: Similarly, there appears to be a lack of clarity around what constitutes acceptable "mitigation" of adverse effects. Many times it appears that future planning or site investigation is considered to count as mitigation of an adverse effect. While mitigation measures attached to EA certificates are legally binding, they are often expressed in overly general terms, leading to questionable enforceability. It seems that the EAO will accept as mitigation measures the "commitments" as proposed by a proponent, even when the language is clearly non-committal and not outcome or results-oriented. For example, one project approved in 2007 (chosen at random) included the following as mitigation measures:[145]

- "consideration" of forestry values;
- "minimizing vegetation clearance" and "implementing buffer zones";
- "minimize the proposed Project footprint (including transmission lines) in bog and wetland habitats" [it was accepted that disturbance to wetlands may "have high effects due to the small size of wetlands and their sensitivity to development activities"];
- "development of a long-term plan to manage access;"
- "encouraging" numerous things, such as "shared access" and "consistent road construction standards between industries;"
- "consulting with" users to restrict motorized access to designated roads and trails in order to sustain other resource values (i.e. fish and wildlife populations, habitat and rare ecosystems).

141 Lawrence, D. Significance in environmental assessment. Ottawa, Ontario: Canadian Environmental Assessment Agency; 2002. S.3.2.2. Online: <http://www.ceaa-acee.gc.ca/015/001/011/index_e.htm>

142 O.I.C. 95-220 (March 21, 1995), N.S. Reg. 26/95, s.2.

143 Lawrence, David. "Impact significance determination—Back to basics." *Environmental Impact Assessment Review* 27 (2007) 755. See also "Thresholds of Significance: Criteria for Defining Environmental Significance." Governor's Office of Planning and Research (California), September, 1994.

144 *Ibid*. See also L.W. Canter and G.A. Canty. "Impact Significance Determination—Basic Considerations and a Sequenced Approach." *Environ Impact Assess Rev* 1993;13:275-297.

145 Bear Mountain Wind Park Project Assessment Report. Online: EAO < http://a100.gov.bc.ca/appsdata/ epic/documents/p268/1187627857988_801918e106944f6daa0ab4c86384164e.pdf >

Context is important when assessing the adequacy of mitigation measures: the greater the significance of an impact or value, the greater the need to identify concrete measures. However, generally speaking, the above types of measures should not be considered acceptable because they are too vague and lacking in specific commitments. CEAA defines mitigation as meaning, "in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means."[146] The UN Environment Programme considers the elements of mitigation to be organized into a hierarchy of actions:[147]

- first, avoid adverse impacts as far as possible by use of preventative measures;
- second, minimize or reduce adverse impacts to "as low as practicable" levels; and
- third, remedy or compensate for adverse residual impacts, which are unavoidable and cannot be reduced further.

The provincial EA regime lacks an equivalent to the requirement in forest practices regulations for "measurable or verifiable outcomes."[148] These shortcomings are magnified by the lack of law and policy in BC addressing impacts to ecosystem values such as wetlands and habitat for species at risk (for example, some jurisdictions have adopted "no net loss" policies or have legislation protecting wetlands and species at risk that serves as a backstop, limiting impacts). While mitigation measures for some projects adequately address these concerns, there seems to be a lack of consistency. This could be corrected by greater precision around what constitutes adequate mitigation.

5. The Adaptive Management Solution: It is common for proponents to propose monitoring and adaptive management programs to address outstanding issues that are not resolved at the time they make a certificate application. There will always be some uncertainty when it comes to determining future environmental impacts – not everything can be known and resolved up front – hence the concept of adapting future management decisions to ongoing monitoring and research has common sense merit. However, it can also become the lazy way out of addressing significant issues identified in the EA process.

Some scholars have noted that while potentially an important approach to environmental decision-making, promotion of adaptive management has "descended into a vague promise of future adjustments without clear standards."[149] In our view its success and justification lie in several factors:

- the likelihood of the adverse effects;
- the significance of those effects (i.e. surely there are some threshold issues that require answers before a project goes ahead);
- whether the project manager has sufficient foresight to plan for unexpected contingencies in project design and is resilient enough to adapt to adverse effects as they arise, and whether those effects are capable of being reversed or adequately mitigated through management action; and
- how well adaptive management is supported by adequate baseline data and concrete monitoring and research requirements that are incorporated into EA certificate (or permit) requirements.

A significant additional problem is that the *Environmental Assessment Act* and most BC legislation authorizing project permitting and licensing do not support adaptive management. For example, EA certificates cannot be amended for adaptive management reasons (see s.37), nor can most permits under other statutes. Yet scholars have noted that "continuing discretion to alter a decision is the essence of adaptive management."[150]

146 S.C. 1992, c.37, s.2.

147 United Nations Environment Programme (UNEP), *et al. Environmental Impact Assessment Course Module*. Online: United Nations University <http://eia.unu.edu/course/?page_id=118>

148 *Forest Planning and Practices Regulation*, BC Reg. 14/2004, s.1. See definitions of "result" and "strategy."

149 Ruhl, J. B. and Fischman, Robert. "Adaptive Management in the Courts (January 26, 2010)." FSU College of Law, Public Law Research Paper No. 411; Indiana Legal Studies Research Paper No. 154. Online: SSRN: <http://ssrn.com/abstract=1542632>

150 See Ruhl, J. B. "Regulation by Adaptive Management - is it Possible?" *Minnesota Journal of Law, Science & Technology*, Vol. 7 at 39.

The problem here is that the legal apparatus provides greater certainty for proponents at the expense of flexibility necessary for adaptive management programs to deliver effective environmental protection. If the law does not allow for certificate or permit amendment without a proponent's consent, how can adaptive management be successful except at the discretion of the proponent?

Jumbo Glacier Resort Case Study

The lack of substantive criteria for EA decision-making can be a challenge not only for the EAO but also for consultants and agencies that are part of the process. The proponent of a large mountain resort village proposed for the Purcell Mountains (that would have over 6,000 beds and 2,000-3,000 visitors) was required to assess the impact on grizzly bears. Its consultant assumed that the objective was to achieve "no net impact" to grizzly populations (based on an earlier commitment from the proponent) and indicated that to mitigate the impact of the resort and its roads and operations, there would have to be extensive motorized access closures to other drainages outside the project area.[151]

Citing the history of extirpation of grizzly bears from large areas over time, and the "critical" importance of these bears to nearby populations that were already considered "threatened" in Canada and "endangered" in the U.S., the Province's large carnivore specialist advised that decision-makers should assume there would be "substantial impact to grizzly bear habitat effectiveness, mortality risk and, most importantly, the fragmentation of grizzly bear distribution in the Purcell Mountains over the long-term as a result of the project." He was of the opinion that the proposed mitigation measures would not be effective.[152]

When it became apparent that such extensive access closures to surrounding valleys were highly controversial with the public, the criteria began to shift. A different employee was assigned to the file and determined that "there is a low risk that the…project would result in a reduction of the grizzly bear population of such significance that the population in the Central Purcells… would become threatened."[153] Thus the evaluation criteria shifted from "no net impact" from the project to no impact large enough to require the larger regional population to become listed as threatened, despite the fact that related populations to south and west already were.

Commander Glacier photo courtesy of Steve Tersmette

The EAO recommended approval of the project without the controversial access management mitigation measures, recommending instead a monitoring program and adaptive management focusing on the project area itself,[154] which the ministers approved.

After the EA certificate was issued, a multi-year grizzly bear population study determined that grizzly populations were much lower than had been previously assumed – that the Purcell grizzly range was only 54% occupied as opposed to the previously assumed 94% upon which the assessment analysis was based. Although one might expect this result to call into question the conclusions of the environmental assessment, or at least require them to be revisited, the *Environmental Assessment Act* does not provide for amendments to EA certificates except in situations of non-compliance or upon the request of the proponent.

151 Apps, Clayton D. "A Cartographic Model-Based Cumulative Effects Assessment of the Proposed Jumbo Glacier Resort Development on Grizzly Bears in the Central Purcell Mountains of British Columbia," December 2003, pp.33-34.

152 Austin, Matt. "A Review of the Project Application for the Proposed Jumbo Glacier Alpine Resort Based on the Potential Impacts to Grizzly Bears," April 2004.

153 Email correspondence from Stewart, R. to Glassman, M. dated July 2, 2004.

154 Jumbo Glacier Resort Project Assessment Report, August 3, 2004, pp.58-59.

Certificate Decision by Ministers:

The *Environmental Assessment Act* grants decision-making authority for EA certificates to the Minister of Environment and other responsible ministers with a mandate relating to the project in question.[155] The ministers must consider the assessment report and any recommendations provided by the EAO, and may consider any other matters that are relevant to the public interest.[156]

While technically the EAO assessment reports and the executive director's recommendations to the Cabinet ministers are advisory only, the practical reality is that the ministers rely extensively on these reports when issuing EA certificates. One certificate was signed the day following the EAO report, leading the BC Supreme Court to conclude that it was "doubtful that the wealth of material represented by the Recommendations Report and the Tlingit Recommendations Report was in fact considered by the Ministers."[157] Given the extent of the Ministers' reliance on the report and advice of the EAO, its analysis of the issues appears to be the *de facto* decision for all intents and purposes.

The discretion to approve an EA certificate application is broad and unstructured. There are no substantive criteria.[158] Because Canadian environmental assessment legislation is largely procedural rather than substantive, this is not uncommon in other provinces also. However, some other jurisdictions have developed substantive criteria to guide decision-making towards achieving the purpose of the exercise. Even within Canada it is common for EA legislation to have objectives or purpose provisions which also guide decision-making. As mentioned earlier, the purposes clause was removed from the BC *Environmental Assessment Act* in 2002.[159]

According to the International Association for Impact Assessment, the standard objectives of EA are:[160]

- To ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process;
- To anticipate and avoid, minimize or offset the adverse significant biophysical, social and other relevant effects of development proposals;
- To protect the productivity and capacity of natural systems and the ecological processes which maintain their functions; and
- To promote development that is sustainable and optimizes resource use and management opportunities.

The lack of decision-making criteria and clear objectives in British Columbia leaves the public asking what evaluation criteria are applied by the Environmental Assessment Office in preparing its recommendations and by the ministers in arriving at a decision. To date, the EAO has never recommended that a project be rejected, and the ministers have never failed to issue an EA certificate recommended by the EAO.[161] Many EA participants feel that approval has become predictable and routine and refer to the process as

155 Cabinet has designated the responsible ministers in Order in Council 519/2009.

156 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.17(3).

157 *Taku River Tlingit et al. v. Ringstad et al.*, 2000 BCSC 1001, at para. 69. However, it should also be noted that the EAO contends that ministers are sometimes well-briefed on the issues facing a given project along the way, prior to its formal referral of the assessment report and recommendations for decision.

158 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.17.

159 Section 2 of the 1994 *Act* provided as follows:

> The purposes of this *Act* are
>
> (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
>
> (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
>
> (c) to prevent or mitigate adverse effects of reviewable projects,
>
> (d) to provide an open, accountable and neutrally administered process for the assessment
>
> (i) of reviewable projects, and
>
> (ii) of activities that pertain to the environment or to land use and that are referred to the board in accordance with the terms of reference mentioned in section 51 (1) (c), and
>
> (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

160 International Association for Impact Assessment. *Principles of Environmental Impact Assessment Best Practice*. 1999. Online: IAIA <http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf>.

161 The only rejection to date was for the Kemess North mine project which followed a different process in that it was a joint federal/provincial review in which an independent review panel strongly recommended against approval, which was accepted by both governments. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p226/1204933585893_ddf008de5c37426c9278f04de3890579.pdf>.

a "rubber stamp."[162] To the public, a 100% approval rate is seen somewhat cynically as symptomatic of a mostly political process that consistently favours development regardless of environmental impacts and community concerns. One exasperated participant in a process judged by many (including government agencies) to have clear information and assessment deficiencies asked "What's the whole point of the process if it's just about politics in the end?"

However, the EAO maintains that the approval rate must be seen in context: that 16 (7%) projects were withdrawn and an additional 40 (or 19% of total) projects are "inactive," meaning that the proponent has temporarily stopped collecting information, holding meetings or preparing documents to advance an environmental assessment, such that no EAO staff time has been required on the file for 26 weeks.[163] Those that are approved are indicative of thorough work that perseveres until adequate mitigation measures are identified for incorporation into the EA certificate. The EAO points out that some projects have not been referred to ministers for decision because the proponent has not been able to resolve problems to the satisfaction of the EAO and government agencies – or for unrelated reasons such as markets and financing.[164] Proponent representatives also indicated that this was the case. A consulting biologist has stated that "[p]rojects can be (and are) rejected at any one of the steps; therefore the ones that do reach the final point of permitting are less likely to be rejected."[165] It seems that the authority to suspend or terminate assessments under s.24(3) of the *Act* is rarely utilized. Regardless of the statistics on this issue, the main question remains as to what criteria are applied to project approval.

What the Courts have said:

Several court cases have commented on decision-making under the *Environmental Assessment Act*. In the 2009 *Kwikwetlem* decision, Huddart, J. of the BC Court of Appeal put it this way:[166]

> ***I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The Act does not specify effects on whom or what.***

Confounding this issue is the breadth of the matters to be assessed. In several places the *Act* refers to assessment of the "environmental, economic, social, heritage or health" effects of a project and these factors are incorporated into the section 11 orders determining the scope of the assessment.[167] The 1994 *Act* included "culture" as well, but this was removed in the 2002 *Act*, to the regret of some First Nations. Some participants we interviewed consider the process to be misnamed: that is, it might be called an environmental assessment process, but is clearly much more than that.

It follows that when all of these factors are being weighed without any parameters upon the discretion exercised, there may be nothing legally incorrect about any conceivable decision – regardless of environmental impacts or economic benefits or risks or financial viability of a project.[168] A project with high environmental risk and speculative mitigation measures might be rationalized simply by giving greater weight to economic factors.

162 For example, see <http://www.theglobeandmail.com/news/ national/british-columbia/bc-hydro-approves-4-power-projects/article1519465/>; <http://dogwoodinitiative.org/media-centre/news-stories/environmental-assessment-projects-and-aboriginal-claims-in-northeastern-b.c; and <http://vancouver.mediacoop.ca/newsrelease/2478>;

163 EAO statistics web page, online: http://www.eao.gov.bc.ca/Statistics.html. Accessed September 28, 2010, based on September 1, 2010 statistics.

164 Environmental Assessment Office. Frequently Asked Questions, online: EAO <http://www.eao.gov.bc.ca/faq/>.

165 Maingon, Loys. ""Site C" and the Gulf Oil Spill, Sustainability, and Risks," in Sustainable Coast. Online: <http://sustainablecoast.ca/index.php?option=com_k2&view=item&id=193:%E2%80%9Csite-c%E2%80%9D-and-the-gulf-oil-spill-sustainability-and-risks&Itemid=118>.

166 *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII), at para.57.

167 *Environmental Assessment Act*, S.B.C. 2002, c.43, ss.6, 10, 20.

168 In *Taku River Tlingit*, Southin J. of the BC Court of Appeal that fraud, bribery or a process that was "so attenuated as to be a sham" might constitute a viable legal attack on a certificate decision. *Infra*, note 167, at paras. 86, 87.

In *Do Rav Right Coalition*, trial judge Bauman J. of the BC Supreme Court described the decision-making as follows:[169]

> ***[34] …at the end of the process, a political, policy-driven decision is made by elected Ministers of the Crown; they are given a very broad discretion to consider the issue: they may consider "any other matters that they consider relevant to the public interest in making their decision on the application".***
>
> ***[35] The environmental assessment process is not, in substance, one engaged in resolving a dispute between a project proponent and affected individuals. It is, on the contrary, one which assesses a project in the context of its broad impacts on society, weighs the efficacy of mitigative measures, and authorizes a project to proceed if it is in the public interest to do so.***

On appeal the Court of Appeal agreed with the submission of the proponent's counsel that "[i]t fell to the Ministers, as the elected representatives of the public interest, to decide whether the proposal as submitted was acceptable and met that overall interest. Their discretion was not limited, or even affected, by the Director's conditional acceptance of the Application for review…"[170] However, strictly speaking, the *Act* does not expressly require even a public interest test to be met.[171]

In *R.K.Heli-Ski*, Mr. Justice Smith of the BC Court of Appeal held that:[172]

> ***At its heart, the decision to allow the ski resort to proceed was a public policy decision that involved the weighing of all public and private interests involved. This context puts the decision at the far end of the administrative-decision spectrum from judicial-like decisions and their attendant procedural safeguards.***

In *Taku River Tlingit First Nation v. Ringstad et al* Madam Justice Southin of the BC Court of Appeal found that "the Legislature has enacted a process that implicitly entrusts to the Ministers an exclusive power to decide whether the purposes of the statute have been met and, if not, what should be the next step. There is no room for a judicial assessment of whether the Ministers are right or wrong." She opined that a different conclusion might result if the statute in fact read:[173]

> *The Ministers may, if*
>
> *a) the project promotes sustainability;*
>
> *b) there has been a thorough, timely and integrated assessment of the environmental, etc., effects of the project;*
>
> *c) the proposal prevents or mitigates adverse effects of the project;*
>
> *d) there has been an open, accountable and neutrally administered process for the assessment of the project;*
>
> *e) all the various persons named in s.2 participated in the project;*[174]
>
> *issue a certificate, etc.*

Southin J. commented further that "Not only does the *Act* not contain any such words as those I have constructed above, but also it contains no obligation on the Ministers to be "fully informed" before deciding what to do…The decision in the end must be "political",

169 *Do Rav Right Coalition v. Hagen*, 2006 BCCA 571.

170 *Do Rav Right Coalition v. Hagen*, 2006 BCCA 571, at paras.42,43.

171 The only references to the "public interest" in the *Act* are in relation to designating projects as reviewable, varying the process in emergencies and the ministers' consideration of "other matters" in addition to the EAO's assessment report when deciding on a certificate application (ss.6, 17, 31). Some BC legislation does require decision-makers to be satisfied that decisions are in the public interest, such as public utility approvals regulated under the *Utilities Commission Act*, RSBC 1996, c.473, s.45 (and 10 additional sections), and disposition of Crown lands under s. 11 of the *Land Act*. S. 85 of the *Land Title Act* gives approving officers the power to refuse subdivision applications that are against the public interest.

172 *R.K.Heli-Ski Panorama Inc. v. Glassman*, 2007 BCCA 9, at para.30.

173 T*aku River Tlingit First Nation v. Ringstad et al*, 2002 BCCA 59, at para.79. Although this is a dissenting judgment, the differences on the court were on constitutional rather than administrative law grounds.

174 This is a reference to the 1994 *Act*, s.2 of which provided that one of its purposes was to provide for participation "by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions."

using the word in its non-pejorative sense."[175]

The perception problem that the EA process faces is that this alternative formulation of the decision-making test is very close to what politicians claim environmental assessment in fact achieves when announcing that projects awarded certificates have been given the "green light."

Sustainability Criteria for EA Decision-making:

The lack of substantive criteria for decision-making has long been identified as a significant challenge for Canadian environmental assessment. Given the breadth of development issues and environments that EA applies to, it would be difficult to develop a comprehensive set of prescriptive rules. Some would argue that this would be undesirable in any event, as it could deprive decision-makers of legitimate policy choices. Under this line of argument, environmental assessment developed as a procedural mechanism to better inform decision-makers of the environmental consequences of development decisions, not to dictate certain environmental outcomes. However, this would be an overly simplistic description of its genesis, as a key purpose of EA has always been to incorporate environmental considerations into the development of proposals. Besides, adaptive management must apply to EA practice itself, and because positive environmental outcomes are essential for sustainability, assessment practices must find a way to consistently deliver environmentally desirable results. Otherwise EA becomes an empty bureaucratic exercise.

There is a wealth of EA literature on incorporating sustainability into the EA process and decision-making. Research commissioned by the Canadian Environmental Assessment Agency in 2000 reviewed international sustainability literature and concluded that the key process design elements of sustainability-focused environmental assessment processes are:[176]

- explicit commitment to sustainability objectives and to application of sustainability based criteria;
- broad definition of environment or other means of ensuring attention to social, economic, cultural and cumulative as well as individual biophysical effects, and all their systemic interrelations;
- mandatory justification of purpose;
- mandatory evaluation of reasonable alternatives;
- attention to positive as well as negative effects and enhancements as well as mitigations;
- provisions for adaptive design and adaptive implementation of approved undertakings;
- links with other sustainability-defining and applying processes; and
- provisions for transparency and effective public involvement throughout the process.

The intentional application of sustainability principles to EA decision-making is limited in British Columbia. The independent joint review panel for the Kemess North mine assessment[177] faced the question of how to evaluate the information before it in the absence of statutory guidance and applied explicit sustainability-based criteria. Its 2007 report states: "[t]he Panel, in considering how best to analyse, synthesize, evaluate and balance all aspects of the Project holistically, concluded that adopting a broad sustainability framework would be an appropriate approach."[178] The panel looked to political commitments found in the BC Mining Plan and sustainability criteria published by mining industry associations and concluded that the assessment framework should address: 1) environmental stewardship, 2) economic benefits and costs, 3) social and cultural benefits and costs, 4) fair distribution of benefits and costs, and 5) present and

175 *Supra*, note 167, at paras.79, 82.

176 Gibson, Robert B. Specification of sustainability-based environmental assessment decision criteria and implications for determining "significance" in environmental assessment. Ottawa, Ontario: Canadian Environmental Assessment Agency; 2002. Online: <http://www.acee-ceaa.gc.ca/default.asp?lang =En&n=086E7767-1&toc=show&offset=1>.

177 This proposed mine required both provincial and federal EA: both governments jointly appointed a 3-person panel of independent experts (a soil scientist, mining engineer and sociologist) to hold public hearings, consider a number of factors and prepare a report for the environment ministers as set out in Terms of Reference for the Panel.

178 *Kemess North Copper-Gold Mine Project: Joint Review Panel Report, September 2007*, at page 233. Online: EAO <http://a100.gov.bc.ca/appsdata/epic/documents/p226/1215560963212_8e248a8d30d9aaba2da1fb7342beb41e98b2a0d24d25.pdf>.

future generations. After detailed examination of these, the panel recommended that "the economic and social benefits provided by the Project, on balance, are outweighed by the risks of significant adverse environmental, social and cultural effects, some of which may not emerge until many years after mining operations cease."[179] The federal and provincial governments accepted the recommendation.

However, it is questionable whether this approach will be carried into future assessments. As the recommendation of an independent review panel, it stands somewhat isolated from the type of assessments and recommendations made by the EAO itself. Shortly after this panel report the EAO declined to enter a similar independent joint review panel process for the Prosperity Mine due to the objection of the proponent, despite previous provincial support for "harmonized" assessment processes to avoid unnecessary duplication, as represented in the Canada-BC Agreement for Environmental Assessment Cooperation mentioned under Issue #1 above. The agreement was renewed in 2008 and states that: "In particular, the Agency and the EAO will explore and encourage the use of tools and mechanisms that are available to better integrate their respective environmental assessment requirements into a single process."[180]

179 *Ibid*., at page 245.

180 See s.3(3) of "Operational Procedures to Assist in the Implementation of the Environmental Assessment of Projects Subject to the Canada-British Columbia Agreement for Environmental Assessment Cooperation," signed December 19, 2008.

Fish Lake Case Study continued:

Just before the Kemess North panel concluded its recommendations, the EAO had been in discussions with the proponent and First Nations about a similar independent joint review panel for the proposed Prosperity mine project at Fish Lake.

Shortly after the Province accepted the Kemess North Panel recommendations, the Prosperity proponent wrote to the EAO stating that it would not accept an independent joint review panel because it would put "the future of a billion dollar mine in the hands of 3 unelected, unaccountable individuals" and "place excessive emphasis on established or asserted Aboriginal rights or title."[181] Four days later the EAO wrote First Nations and proposed two alternate process options: 1) continuing with a joint review panel, but not allowing it to make any recommendations concerning whether the project should proceed; and 2) not having an independent joint review panel process but instead having the EAO lead a separate provincial EA process. The EAO stated that it "does not typically use a panel process" and requested a response by May 27, 2008.[182] Two days later the proponent stated that it wanted the Province to carry out its own assessment,[183] and the Province agreed to do so.[184]

The EA Certificate was recommended and approved provincially prior to the federal review panel holding its public hearings (which were delayed because the panel determined that there was not sufficient information on some key issues to enable meaningful public discussions).[185] The information was found to be sufficient for federal public hearings the month following provincial EA certificate approval.

The Fish Lake assessment is instructive because the federal panel reached a different conclusion than the provincial EAO and ministers. In July 2010 the panel reported its finding that "the success of re-creating a lake with adjacent spawning and rearing channels is questionable as no information was presented regarding the successful replacement of an entire lake and stream system as a self-sustaining ecosystem. It is unlikely that the plan would meet the requirements for the establishment of a self-sustaining

181 May 9, 2008 correspondence from Taseko Mines Limited to EAO and CEAA. Other issues were also raised, such as bias and timeliness.

182 May 14, 2009 correspondence from EAO to First Nation chiefs.

183 May 15, 2009 correspondence from Taseko Mines Limited to EAO.

184 The correspondence documenting this chain of events does not appear to be posted in the EAO's Project Information Centre at the time of writing.

185 Correspondence dated October 6, 2009 from Federal Review Panel to Taseko Mines Limited.

rainbow trout population, or a replacement First Nation food fishery.

The federal panel further stated that "the Province was not able to consider the final comments from federal departments nor was it able to take advantage of information received during the public hearing from First Nations on the current use of lands and resources for traditional purposes and effects on cultural heritage. The Panel notes that the public hearing was instrumental in gathering information from First Nations on these matters."

The panel also identified significant impacts to First Nations, navigation and grizzly bears. However, unlike the Kemess North panel, it declined to issue any recommendations and stated that it had "no mandate to reach conclusions on justifiability" of the project.[186] At the time of writing the federal Cabinet has not yet decided how to respond to the review panel report.

186 Report of the Federal Review Panel, July 2, 2010, CEAA Reference No. 09-05-44811.

Proponent representatives indicated to us that the harmonized EA process has become too difficult to administer because of differences in the federal CEAA process relating to scope and timing for decision-making. Some consider the federal process to be unnecessarily duplicative, and want the federal government to allow the provincial EA process to substitute for the federal, just as the Province occasionally accepts the federal process as a substitute for its own. However, there are major differences between the two processes in structure, design, process and guidance, and the two processes cannot be considered as regulatory equivalents. The contrast between the EAO's assessment of Fish Lake and that of the federal review panel also show significant and stark differences in substantive approaches that led to very different outcomes. Any move in this direction would also have to address the considerable issue of constitutional jurisdiction.

The Fish Lake assessment demonstrates well the challenges of harmonizing EA when two or more jurisdictions are involved. It raises significant questions about the Province's commitment to harmonization and unified EA process to avoid duplication and bureaucracy. The differing outcomes make it clear that provincial EA process is procedurally and substantively very different from the federal, and undermines any argument that the federal government should rely on the provincial EA process as functionally equivalent.

Few would question that economic and social concerns (as well as heritage and health concerns) are relevant factors to sound decision-making. The environmental assessment and sustainability literature clearly endorse the importance of incorporating these into assessment decision-making. And many would accept that the ultimate decision-makers for major trade-offs between environmental and other societal values should be Cabinet ministers who are politically accountable.

But for environmental assessment to be credible there needs to be a clearer separation between the political and scientific aspects of the assessment process and decision-making, clear enunciation of the evaluation criteria, and transparency for the decisions made by way

of written reasons. The 1994 *Act* required ministers to provide written reasons for their decision but this was removed from the 2002 *Act* and replaced with a requirement for the executive director to provide written reasons for his/her recommendation to the ministers.[187]

Even if one holds that Cabinet ministers should be granted the broadest possible discretion to weigh and decide on the trade-offs involved in environmental protection and economic development, it does not follow that the entire EA process should be devoid of substantive criteria. Sound decision-making requires that accurate, peer-reviewed, objective information about environmental impacts, risks and mitigation options be placed before decision-makers – but it is more than this. Assessment properly conceived is not a regulatory licensing process. It is about better planning that accepts complexity and uncertainty, and seeks the best informed understanding possible in a process that is open to scrutiny and continuous critical review by those with various kinds of knowledge and perspectives. It should focus on identifying the best options (i.e. most likely to contribute to sustainability, to avoid significant lasting negative effects, to be adaptable in the face of surprise, etc.), rather than pretending that decision-makers can identify a clear threshold between acceptable and unacceptable in a narrow evaluation of a particular proposal.

Substantive criteria could be designed to apply to professionals preparing reports for proponents and to the EAO in its decision-making and assessment reports to ministers, addressing the following:

- content requirements and standards for proponent reports and EAO assessment reports;
- significant adverse environmental effects;
- mitigation of those effects;
- when an assessment report may be delivered to the ministers and made public (perhaps incorporating a legal test to be met by the executive director or his/her delegate);
- issues needing resolution before referral to the ministers;
- issues needing resolution before a decision is made on an environmental assessment certificate application; and
- standards for the development of conditions to be attached to certificates.

This list is by no means exhaustive, but addressing these issues would provide greater public assurance of the consistency, accuracy and objectivity of information placed before the ministers as the ultimate decision-makers.

Examples from Other Jurisdictions:

Most Canadian provinces lack substantive criteria for EA decision-making in legislation, relying instead on purposes clauses and policies to guide decision-makers. However, the *Yukon Environmental and Socio-economic Assessment Act*[188] and the *Umbrella Final Agreement*[189] provide for an arms length body known as the Yukon Development Assessment Board, which has the express authority to recommend that the project not be allowed to proceed if the board determines that the project "will have significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated."[190]

In the U.S., several states have incorporated substantive provisions into their EA legislation. The *California Environmental Quality Act* "provides that agencies should not approve projects as proposed if there are 'feasible' alternatives. 'Feasible' is defined by the *act* as 'capable of being accomplished in a successful manner in a reasonable period of time, taking into account economic, environmental, social, and technological factors.'"[191]

187 *Environmental Assessment Act*, S.B.C.1994, c.35, s.20(c); and *Environmental Assessment Act*, S.B.C. 2002, c.43, s.17(2).

188 S.C. 2003, c.7.

189 *Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians And The Government Of The Yukon*. Chapter 12. Online: <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/ykn/umb/umb-eng.asp#chp12>

190 S.C.2003, c.7, s.56. Online: <http://www.canlii.org/en/ca/laws/stat/sc-2003-c-7/latest/sc-2003-c-7.html>

191 Cal. Pub. Res. Code, § 21061.1, as cited in Sive, David & Mark Chertok. "Little NEPA's and their Environmental Impact Assessment Procedures." (American Law Institute & American Bar Association, 2005), p.3. Online:

New York's State *Environmental Quality Review Act* provides that "[a]gencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process."[192]

The *Minnesota Environmental Policy Act* has similarly strong provisions:[193]

> ***No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.***

ALI/ABA <http://www.sprlaw.com/pdf/spr_little_nepa_ali_aba_0605.pdf> .

192 N.Y. Envtl. Conserv. Law, § 8-0109. Online: <http://public.leginfo.state.ny.us>

193 Minn. Stat. Ann. § 116D.04, Subd. 6. Online: <https://www.revisor.mn.gov/statutes/?id=116D.04>

Recommendations:

17. **The** purposes of the EA process should be set out in the *Environmental Assessment Act* and serve as the basic and over-arching criteria for decision-making.

18. **Sustainability** criteria should be explicitly incorporated into the *Act*. These should be used as the foundation for developing project-specific evaluation criteria relevant to the local context. This should be an open process that occurs at the outset of the EA process.

19. **The** *Act*, regulations and policies should incorporate definitions and criteria to guide decision-making, including the 7 bullet point issues on page 59.

20. **Independent** review panels should be utilized more frequently, particularly for controversial projects. There should be an open and transparent process for appointing panel members and developing the panel terms of reference. The *Act* should require panel independence, neutrality and objectivity. It should also address panel powers in greater detail, such as *Inquiry Act*-type powers of subpoena, oath-taking, recommendations and public reporting. This doesn't necessarily mean that panels will or should act like quasi-judicial tribunals.

21. **There** should be a more robust and transparent means of dealing with conflicting expert opinion. This could include use of independent review panels, appeals to the Environmental Appeal Board, and mediation or other dispute resolution by qualified practitioners.

EA Certificate Conditions

The rubber hits the road in the EA process when the ministers attach conditions to an EA certificate. Although some project requirements may be specified in permits or licences, it is the certificate that has the authority to address matters that lie outside of the permitting process and regulations. Proponents are encouraged to develop a "Table of Commitments" stating what they will do to address issues that are raised by the working group and others. This table is attached to the EA certificate and becomes binding on development of the project.[194]

To be enforceable it is important that the conditions be written in language that is clear, unambiguous and meets contractual standards. This requires the drafters to address their minds to the 5 W's – who, what, when, where and why – of the conditions in question. However, the drafters of table of commitments are the proponents themselves and this sometimes results in less than ideal set of commitments from an enforcement perspective, as the proponent will sometimes want softer language than regulators. Our review of approved EA certificates identified the following types of issues:

1. Proponent commitments are sometimes softened by qualifying phrases such as "where feasible," "where possible," and even "where economically feasible," etc. These types of phrases can considerably weaken the commitment and give the proponent considerable latitude in determining whether it will be met.

2. Commitments also use vague or unenforceable language: for example, one recent energy project certificate addressed wetlands by committing to "design the route of the transmission line around wetlands and allow for appropriate setbacks." This type of condition avoids verification and measurement, and introduces uncertainty as to who determines what an "appropriate setback" is. The condition then stated that "Where this is not possible, the Proponent will advise the Regional Manager" of the Ministry of Environment. It appears then that merely providing notification that "appropriate setbacks" for wetlands are "not possible" complies with the certificate. It leaves no decision-making role for the environment or other ministry and could result in practices that are inconsistent with the legal requirements for forest companies under the *Forest Planning and Practices Regulation*.[195]

3. Some commitments lack clarity concerning timing: one minor example includes a commitment to make independent environmental monitoring reports available on a website without specifying when. Proponents can be reluctant to make unfavourable monitoring reports available and delay their release. One such report was leaked to an environmental group which in turn took it to the media.[196]

4. Some commitments lack clarity concerning who will be making the decisions on issues left unresolved at the time of EA certificate approval: for example, where detailed geotechnical site investigation was required to inform final project design, a proponent merely committed to submitting the results to the Ministry of Environment "for review and comment," leaving the agency without an approval role. If the issue is minor and that is all the agency seeks this may be fine, but it can also result in a lack of clarity in the event that the agency strongly disagrees with the proponents intended action in the post-certificate setting.

5. Under the current regime, proponents can succeed in having their own consultants or employees making post-certificate decisions rather than agencies, for example, committing to address sensitive wildlife concerns "as advised by a qualified wildlife biologist." This may be appropriate in some circumstances, but inappropriate if it leads to private consultants working for the proponent deciding matters of significance involving the public interest in wildlife. It also raises

194 *Environmental Assessment Act*, S.B.C. 2002, c.43, s.8, and pp.28 & 33 of the 2009 User Guide, online: EAO <http://www.eao.gov.bc.ca/pub/pdf/EAO_User_Guide_2009.pdf>.

195 B.C. Reg. 14/2004, ss.48, 50-52.

196 Pynn, Larry. "Miller Creek project failing: report." *Vancouver Sun* (April 28, 2008). Online: http://www.canada.com/vancouversun/news/story.html?id=a4fba89a-700e-40c4-8b51-69c7a8d8de30. See also http://www.citizensforpublicpower.ca/node/361. For the energy industry's perspective on this issue see http://www.greenenergybc.ca/miller.html. However, this particular example is from a project that did not undergo EA because it was under the 50 MW threshold for reviewable projects.

the issues concerning professional reliance and conflict of interest mentioned earlier.

There are many examples of well-drafted commitments that avoid these problems. Our concern is that there does not appear to be standard criteria or guidance concerning what constitutes an acceptable and legally enforceable commitment, or adequate review of commitment tables to minimize compliance problems after a certificate is issued.

Our consultations with EA participants suggest that this is not merely a theoretical issue, but a real one that needs to be addressed. This is especially so where some major issues are not resolved adequately prior to certificate issuance (which should not be happening in any event). For example, a lack of clarity concerning commitments for ongoing monitoring programs for species at risk has led to significant disputes between proponents and the Ministry of Environment over the adequacy and acceptability of those programs. When the requirements are not addressed in sufficient detail up front, proponents can resist undertaking robust monitoring and follow-up studies, arguing that it is not required by the certificate.

Recommendation:

22. **Guidelines** should be developed for EA certificates to ensure that terms and conditions are measurable and enforceable.

Accountability and Dispute Resolution:

The EA process lacks a conflict resolution process that is independent and impartial. There is no venue for participants to appeal or seek review of any EA decisions. In fact, the 2002 *Act* took away the appeal rights that otherwise exist under other statutes, if the proponent of a reviewable project successfully applies for "concurrent permitting" as part of the EA process.[197] There is no obvious rationale for why a permit decision by the same official is appealable in one context and not the other, as the EAO does not duplicate the role or function of the Environmental Appeal Board.

While the *Act* allows for mediators to be appointed, this provision is not used.[198] The EAO advises that it occasionally retains independent experts agreeable to both the proponent and a government agency to arbitrate disputes. This was done in a dispute concerning the prediction of water quality impacts relating to an acid mine drainage issue. However, mediators are not used to resolve disputes between non-working group EA participants such as the property owners, rights holders or the public.

The EAO considers itself to be in the mediation business to a certain degree, but notes that EA is not a consensus-based process. This is no doubt true in that the EAO informally mediates disputes between government agencies and the proponent, but not disputes involving other EA participants – at least not in any formal or established process that engages members of the public or affected parties. Rather, the EAO tends to play more of a consultative or facilitation role in that it will ask the proponent how it intends to deal with public concerns, and if any measures are required, to document those in its Table of Commitments. Many members of the public who participate in the EA process feel disengaged from and sometimes unaware of decision-making and any dispute resolution that might occur. They certainly do not view the EAO as having the independence and neutrality expected of mediators, or consider that their issues are handled in a manner that is consistent with professional mediation practice.

In contrast, there are many jurisdictions in Canada and internationally that provide for appeal of EA decision-making: appeals may be to an independent tribunal, a court (superior court or specialist environmental court) or to the Minister of Environment or Cabinet.

In Canada, EA-related appeals are available in Alberta, Saskatchewan, Manitoba, Newfoundland and Quebec. In Ontario, the responsible minister may refer certain types of projects to the Environmental Review Tribunal.[199]

Saskatchewan considers the ability to appeal some EA decisions to be a best practice, and has provided for appeals to court on EA screening matters: [200]

> ***From a good practice perspective, the right of appeal by third parties and the developer must be a feature of any fully functioning EA program. In Saskatchewan careful thought was given to this matter in developing The Environmental Assessment Act (1980). Given the variety of projects and the breadth of issues encompassed by EA (bio-physical, socio-cultural and economic matters) it was determined that the Courts would be best suited to arbitrate in matters of conflict – a feature confirmed by Saskatchewan's Court of Appeal which has stated "with respect to whether an EIA is or is not required in the case of a dispute between interested parties, the matter must be resolved, as in all other cases of statutory interpretation, by the Courts."***

197 *Environmental Assessment Act*, S.B.C.2002, c.43, s.23(4) and Concurrent Approval Regulation, B.C.Reg.371/2002. Concurrent permitting simply means that the proponent's permit requirements under other statutes are processed at the same time as the EA certificate. While this process usually requires more information from the proponent up front, it also places decision-makers under the time limits in the *Prescribed Time Limits Regulation.* We were informed by the EAO that about one-quarter to one-third of projects seek concurrent permitting, mostly energy projects.

198 *Environmental Assessment Act*, S.B.C.2002, c.43, s.22.

199 This authority has not been utilized in Ontario for about a decade but is described in the *Environmental Review Tribunals Guide to Hearings for Applications under the Environmental Assessment Act.* Online: ERT <http://www.ert.gov.on.ca/files/Guides/Guide_EAA_EPA_OWRA_Nov_15_07.pdf>.

200 The *Environmental Assessment Act*, S.S.1979-80, c.E.10.1, s.18. See also *A Guide to the Environmental Assessment Process*. Saskatchewan Ministry of Environment. Online: <http://www.environment.gov.sk.ca/Default.aspx?DN=81fd9d6f-05fa-427f-9758-d9499680a645>.

Manitoba distinguishes between three different classes of developments, two of which are decided by a director and one by the Minister of Environment. Assessments may be referred for public hearing to the Manitoba Clean Environment Commission, and reasons must be provided if its recommendations are not followed. Any person who is affected by a director's decision may file an appeal with the Minister of Environment. Ministerial decisions in turn may be appealed to Cabinet (Lieutenant Governor in Council).[201]

Quebec's *Environment Quality Act* provides for any person, group or municipality to apply to the minister for a public hearing and allows that "any order issued by the Minister...may be contested by the municipality or person concerned before the Administrative Tribunal of Quebec."[202]

In Newfoundland and Labrador, any person who is aggrieved of a decision or order made under the *Environmental Protection Act* may appeal to the Minister of Environment. Questions of law or mixed fact and law may be appealed to the Trial Division of the Supreme Court. [203]

Outside of Canada appeals relating to environmental assessment decisions are also available in the U.S.,[204] New Zealand,[205] Australia,[206] India,[207] Kenya,[208] Mauritius,[209] and Guyana.[210] This is not intended as an exhaustive list. Most of these jurisdictions have very liberal standing rules concerning who may appeal.

Judicial review is not an adequate substitute for such rights of appeal. In British Columbia judicial review by the courts is too narrowly limited to address the substantive issues of science and policy that many EA participants want to see a greater level of accountability for. The courts largely see EA decision-making as a non-reviewable political process, particularly given the lack of substantive criteria in the legislation.

The EA participants we interviewed expressed desire for effective means of dispute resolution on the merits of their issues. This could include greater use of mediation in the EA process itself, or opportunities for review of approvals by an independent, objective and neutral body. In Ontario, the Minister's Environmental Assessment Advisory Panel recommended that appeals to the Environmental Review Tribunal only proceed if mediation has first been attempted and proven unsuccessful.[211]

The jurisdictions we surveyed demonstrate various creative approaches to adding this layer of accountability to EA process, but some are not applicable to BC or have been proven ineffective. For example, BC does not have an environmental court, and agencies do not generally have internal appeal mechanisms and are not decision-makers (except for the permitting which follows the EA certificate when the proponent has not opted for concurrent permitting). Also, political-type Cabinet appeals have been tried and much-criticized in British Columbia, and environmental legislation has mostly abandoned this avenue of appeal.

201 *Environment Act*, C.C.S.M. c. E125, ss.27, 28.
202 *Environment Quality Act*, R.S.Q. c. Q-2, ss.31.3, 96.
203 *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss.107, 108.
204 Some federal agencies, such as the Bureau of Land Management and the Forest Service, have an administrative appeals process. See *A Citizen's Guide to the NEPA*, Council on Environmental Quality, 2007, p.30. Online: CEQ <http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf>.
205 The New Zealand *Resource Management Act* 1991 requires assessments for "resource consents," which may be appealed by "affected persons" to the Environment Court. Online: Ministry for the Environment <http://www.mfe.govt.nz/publications/rma/everyday/affected/>.
206 Appeals of assessment-related decisions are available under numerous state statutes. For example, see New South Wales' *Environmental Planning and Assessment Act* 1979, ss.75, 93.
207 See s.11 of India's *National Environmental Appellate Authority Act*, 1997. Online: <http://ercindia.org/files/The%20National%20 Environment%20Appellate%20Authority%20Act,1997.doc>
208 See Kenya Act No.8 of 1999, *Environmental Management and Co-ordination Act*, s.129. Online: <http://www.kenyalaw.org/environment/content/legislation.php>
209 Mauritius Act No.19 of 2002, The *Environmental Protection Act of 2002*, Part VIII. Online: <http://iels.intnet.mu/epa2002.htm>
210 Guyana Act No. 11 of 1996, *Environmental Protection Act 1996*, ss. 18, 28, 29, 51-57. Online: <http://www.epaguyana.org/index2.php?option=com_docman&task=doc_view&gid=27&Itemid=29>
211 Minister's Environmental Assessment Advisory Panel – Executive Group. *Improving Environmental Assessment in Ontario: A Framework for Reform*, Vol.1. March 2005, pp.79-80.

One option might be to allow appeals to a body such as the Environmental Appeal Board (EAB), paying careful attention to the grounds and timing for appeals. To separate the EAO process from the political process and to avoid improper interference with the political role of the responsible ministers, an appeal opportunity might lie to the EAB following publication of the EAO assessment report and executive director's recommendations report. Depending on the outcome of that appeal, the matter could be remitted back to the EAO and/or agencies with directions, or proceed to ministerial decision on the EA certificate.

Recommendations:

23. **Dispute resolution** and appeal mechanisms should be available to parties to provide greater accountability for decision-making. These could include independent arbitrators, review panels, appeals to the Environmental Appeal Board, and alternative dispute resolution by qualified practitioners. Care would have to be taken in determining the timing and circumstances under which these mechanisms would be available.

Issue #4: Post-Certificate Issues

After the ministers have issued an environmental assessment certificate a number of issues can arise relating to licensing, monitoring the actual effects of the project and determining corrective actions, compliance and enforcement, and the ability of regulators to deal with new information. The extent to which these issues arise depends in part on the thoroughness of the initial assessment.

Most projects will require additional authorization such as permits or licenses granted by various government agencies or officials, depending on the project type and location. However, proponents may apply for "concurrent approval" of those applications, which triggers a requirement for the agency to make a decision within 60 days of issuance of the certificate. As noted above, this procedure deprives the public of rights to appeal permits/licences that might otherwise be available.[212]

For projects that require licences or permits a question can arise concerning the discretionary powers of the decision-maker after a certificate has been issued. For example, a hydro-electric power project will require a water licence, and the amount of water authorized to be diverted from a river may have significant consequences for fish and other aquatic species dependent on residual in-stream flow and the financial viability of the project.

A question arises as to whether the statutory decision-maker has complete discretion to refuse to issue that authorization, or to impose limits or restrictions that might make the project less viable. The legal answer, of course, is that absent clear statutory language to the contrary, the decision-maker will retain discretion and cannot allow him or herself to be fettered in the exercise of discretion by the existence of an environmental assessment certificate. The *Concurrent Approval Regulation* provides that a ministry may refuse to issue a post-certificate approval if they provide reasons within a specified time following the certificate decision.[213] This suggests that certificate approval is conceptual approval for a project only, subject to future decision-making at a more detailed operational stage.

While this may be the correct legal analysis, "political reality" can operate at a different level. Depending on government messaging when the certificate is issued, the practical reality may be that few civil servants are likely to withhold or limit subsequent permits once their political bosses have celebrated the project publicly with proponents or issued press releases suggesting the project has been thoroughly evaluated and has received a "green light" to proceed. The civil service knows these to be "career-limiting moves."

This issue became apparent in 2008 when Ministry of Environment officials declared discomfort with their discretionary authority over wildlife habitat protection measures when dealing with projects with an EA certificate. They asked for and received "binding direction" that they do "not have authority to say no to an exemption request" from rules prohibiting timber harvesting and road building, regardless of how or whether those issues were addressed in the EA certificate.[214] In many cases these wildlife protection measures took several years to put in place, and were already hard-won compromises involving broad consultation with agencies and numerous stakeholders. It has been argued that the binding directives undermine the normal statutory discretion to implement environmental statutes.

This issue highlights the importance of ensuring that critical issues are fully addressed in the environmental assessment itself. Yet it is not uncommon for EA certificates to be granted before outstanding issues have been resolved to the satisfaction of all agencies or decision-makers with statutory responsibilities. The

212 *Concurrent Approval Regulation*, B.C.Reg.371/2002.

213 B.C.Reg.371/2002, s.8.

214 Ministry of Environment. Decision Note. February 25, 2008, approved March 18, 2009. File 280-20.

executive director of the EAO holds the authority to decide when to accept an application for an EA certificate, not the affected agencies. And once accepted he must refer the application to the ministers, along with his/her assessment report, within 180 days under the *Prescribed Time Limits Regulation*. The ministers then have 45 days to make a decision on the certificate.[215]

Industry representatives indicated that these timelines are followed fairly strictly and are valued by proponents. Although there are opportunities to "stop the clock" there are established rules for doing so which provide a degree of certainty. First Nations and public participants, however, indicated that the narrower time limits that apply to them impede their opportunity to review and comment on what are often voluminous and technically complex documents.

Under these constraints, the EAO must decide which issues are satisfactorily addressed and, for those that are not, whether conditions placed on a certificate by the ministers can adequately address the outstanding issues. The more significant those issues are, the more the problem is exacerbated.

Properly delivered, the EA process does not end with permits and licensing and project construction. Ongoing monitoring of the actual impacts of a project is a critical aspect of the process. This implies that the proponent and regulators must be equipped and prepared to respond to new information revealed through ongoing monitoring. One problem in BC is that the *Environmental Assessment Act* only allows for certificates to be amended at the request of the certificate holder, except in cases of non-compliance.[216] If subsequent research or monitoring determines that impacts are much greater than anticipated, and that additional mitigation or other measures are necessary (including revocation in extreme circumstances), there is little that the EAO or ministers can do to correct the problem.

In contrast, other BC environmental legislation allows for amendments to approvals when necessary for protection of the environment.[217] In Alberta, the director may amend an approval on his or her own initiative if "an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur."[218] Other jurisdictions also have broader provisions regarding the amendment of EA approvals when necessary to protect the environment.

Finally, enforcement of the conditions placed in EA certificates appears to be an important post-certificate issue. The EAO does not have a field presence, and does not seem to have a viable, proactive compliance and enforcement strategy. Instead the EAO relies on the proponent's own compliance reports and information provided by government agencies or the public. In terms of proactive compliance and enforcement measures, the EAO's 2009 User Guide states only that it "may undertake inspections where appropriate."[219] Government agency staff, however, anecdotally report that they are stretched thin by successive staff and budget cuts and do not consider enforcement of EA certificates to be within their mandate.[220]

The sanctions for non-compliance in Part 5 of the *Act* appear to be varied and adequate. They include powers to inspect; to issue cease or remedy orders; to suspend, cancel or amend certificates; to enter into compliance agreements; to seek court orders; and to prosecute offences. However, the EAO advised that it was not aware of these powers having been utilized.

215 B.C.Reg.372/2002.

216 *Environmental Assessment Act*, S.B.C. 2002, c.43, ss.19, 37.

217 For example, see *Environmental Management Act*, S.B.C.2003, c.53, s.16.

218 *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12, s.70(3).

219 Environmental Assessment Office 2009 User Guide, p.37. Online: EAO <http://www.eao.gov.bc.ca/pdf/EAO_User_Guide_2009.pdf>.

220 West Coast Environmental Law. *Please Hold. Someone Will Be With You: A report on diminished monitoring and enforcement capacity in the Ministry of Water, Land and Air Protection.* (Vancouver: West Coast Environmental Law, 2004), online: WCEL <http://wcel.org/resources/publication/please-hold-someone-will-be-you-report-diminished-monitoring-and-enforcement-c>

Compliance with the terms and conditions of certificates may be falling through the cracks. At present, it appears that the EAO places extensive reliance on environmental monitors hired by the proponent – but only if required by the certificate and usually for a limited term in the construction phase and early operational phase of a project. This degree of reliance warrants closer scrutiny, both in terms of adequacy and transparency.

Recommendations:

24. **The** *Environmental Assessment Act* should provide broader ministerial authority to amend EA certificates in response to unexpected or changing circumstances identified through project monitoring in order to give meaning to adaptive management. Likewise, licensing/permitting legislation should be reviewed to ensure that regulators can respond to new information gained through monitoring.

25. **Rules** should be developed to govern the use of environmental monitors hired by proponents while a project is in the operational phase. The rules should address:

- Qualifications of monitors
- Conflict of interest
- Direct reporting obligations to agencies and the public in a timely manner
- Record keeping and the accessibility of records
- The time frame over which monitors are required.

26. **There** should be greater clarity around agency roles and responsibilities for monitoring, inspection, enforcement of project impacts, compliance with approval conditions, as well as the effectiveness of mitigation measures and adaptive management. The EA process currently focuses on event leading up to approval and suffers from lack of post-certificate follow-up.

Issue #5: First Nations & Aboriginal Rights

There is growing dissatisfaction with the current EA process among First Nations in British Columbia. In April 2010 the First Nations Leadership Council released a detailed report outlining numerous concerns and proposing major structural and procedural reforms to the EA process. This report is highly critical not only of the 2002 *Act* but also how the process is administered by the EAO. A key problem it identifies is that the EA process is attempting to deliver two inherently distinct objectives: one is the technical process of impact prediction and the other is the more "political process of consultation with the intent of reconciling the interests of the Crown with those of Aboriginal people who may be affected."[221] The report argues that the EAO is not mandated and is ill-equipped to meaningfully implement the government-to-government relationship promised by the 2005 New Relationship[222] between the Province and First Nations. It concludes that the current EA process is "broken" and recommends that the EAO be replaced with a new "Sustainability Authority."

In July 2009 a report for the New Relationship Trust outlined 75 recommendations for best practices including structural and legislative reforms that would improve First Nations' engagement and role in the EA process.[223] A 2010 study of Treaty 8 First Nations by the University of Northern British Columbia[224] and a 2007 paper by the Carrier-Sekani Tribal Council[225] are also highly critical of the current process. There are consistent themes in all of these reports, and some provide detailed examples of the sources of frustration that have arisen in specific project assessments.

Much of the EA litigation in BC has been brought by First Nations, and the issues raised include concerns shared by the broader public, such as:

- strategic planning and land use;
- assessment procedures and methodology; and
- decision-making criteria.

However, a key feature of this litigation is issues of Aboriginal rights and government's attendant duty to consult and accommodate First Nations in a manner that upholds the "honour of the Crown" in respect of potential or actual infringements of Aboriginal rights and title.

While First Nations no longer have the project committee role in the EA process provided by the 1994 *Act*, they are typically consulted more extensively than the public at large by inclusion in a working group for a project and by specific provisions in section 11 orders giving consultation directions to proponents.[226] However, that role is not mentioned in the *Act* and is not the same as the more legally significant role played by the former project committees in making recommendations to the ministers.

The 2009 New Relationship Trust report summarized numerous issues of common concern to many First Nations across BC as follows:

- *unsatisfactory aspects of the environmental assessment process, e.g. the way in which Terms of Reference are developed and used;*

221 First Nations Energy and Mining Council, *Environmental Assessment and First Nations in BC: Proposals for Reform*, August 2009 (though publicly released in April 2010).

222 See Ministry of Aboriginal Relations and Reconciliation. Online: MARR <http://www.gov.bc.ca/arr/newrelationship/new_relationship_overview.html>.

223 Plate, Elmar *et al. Best Practices for First Nation Involvement in Environmental Assessment Reviews of Development Projects in British Columbia.* (West Vancouver: New Relationship Trust, 2009), online: NRT <http://www.newrelationshiptrust.ca/downloads/environmental-assessments-report.pdf>.

224 Booth, Annie. *Effective Engagement of Aboriginal Peoples in Environmental Assessment: A Case Study of Treaty 8 Nations.* University of Northern British Columbia, March 2010. Unpublished.

225 *First Nations Perspectives on the BC Environmental Assessment Process: For Discussion Purposes.* Carrier-Sekani Tribal Council, 2007. Online: <http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf>

226 Environmental Assessment Office 2009 User Guide, pp.22-24. Online: EAO <http://www.eao.gov.bc.ca/pdf/EAO_User_Guide_2009.pdf>.

- *legislated time lines for various steps in the environmental assessment process that aren't consistent with First Nation decision making processes;*
- *an inability of the environmental assessment process, or an unwillingness of public governments or Proponents, to meaningfully consider many values of importance to First Nations;*
- *lack of clarity and consistency on how the significance of Project effects is determined;*
- *an unsatisfactory cumulative effects process, that does not properly take into account impacts of all types of development that have occurred in the past;*
- *an unsatisfactory role for First Nations in decision-making;*
- *unsatisfactory funding mechanisms and insufficient levels of funding for meaningful participation in environmental assessment review processes; and*
- *some Project proponents who are unenlightened about First Nation rights and interests, or who merely see First Nation participation as another obstacle to overcome in the pursuit of their Project.*

Some First Nations have additional concerns going to the appropriateness and ability of the EAO to address their issues, as noted by the BC Court of Appeal in the 2009 *Kwikwetlem* decision:[227]

> ***The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.***

In *Haida*[228] and *Taku River Tlingit*,[229] the Supreme Court of Canada (SCC) set out the duty of the Crown to consult and accommodate First Nations prior to proof of Aboriginal title. The *Taku River Tlingit* decision applied the reasoning and principles in *Haida* to the specific circumstances of the EA process for a mining project that the Tlingit opposed, and held that the Crown had met its duty and was not obliged to reach agreement with the First Nation. The SCC held that the duty to consult varies with the circumstances, and based its decision on detailed facts of this particular assessment process. The Tlingit had participated on a project committee over several years and the conditions placed on the EA certificate led the court to expect that "throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate" the First Nation.[230]

Because the SCC held that the Crown's duty was fulfilled in *Taku River Tlingit*, the EAO understandably has tended to view this as a validation of its consultation process. However, there are limits to the application of the decision because strictly speaking it was a validation of the process followed for that particular project as carried out under the 1994 *Act*. The SCC held that the scope of the duty to consult "will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process."[231] The challenges the EAO faces in navigating through its consultation duties when multiple Aboriginal parties with different points of view, and conflicts concerning who has authority to speak for whom, were addressed in detail by Sewell, J. in *Nlaka'pamux Nation Tribal Council v. Griffin*, which held that the EAO did not breach Crown consultation duties by excluding the tribal council from a working group where the aboriginal title claim was weak and other individual bands were represented.[232]

More recently the BC Court of Appeal decision in *Kwikwetlem* examined differences between the former and current legislation and stated that:[233]

> ***Functionally, the environmental assessment process is not the same process considered in Taku***

227 *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII), at para.44.
228 2004 SCC 73.
229 2004 SCC 74.
230 *Ibid*., at para.46 .
231 *Ibid*. at para.29.
232 2009 BCSC 1275.
233 *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII), at paras.51, 53.

> ***River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550.***
>
> …
>
> ***The notion that the interests of First Nations are entitled to special protection does not arise in the current Act. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former Act, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in Taku River, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."***

Most of the environmental assessment litigation and guidance provided by the courts to date addresses procedural matters such as consultation and accommodation duties that go to the honour of the Crown. This is because: 1) as discussed above, the *Environmental Assessment Act* is procedural rather than substantive; 2) the pleadings are often procedural in nature, building upon past precedents that address consultation duties prior to resolution of land claims; and 3) on occasion, the more substantive issues such as infringement of Aboriginal rights including title have been severed from the EA aspects of the case (as occurred at the trial level in *Taku River Tlingit*).[234]

The limitations of judicial review proceedings combined with the deferential standard of review applied by the courts in challenges to decision-makers – particularly when reviewing environmental assessment legislation that lacks substantive decision-making criteria – have led to a body of jurisprudence that fails to address the central substantive issues of impacts to Aboriginal communities and control of resources within a traditional territory. The central issue of control goes to the constitutional authority of the Province to manage natural resources, but also is a key element of Aboriginal title according to the jurisprudence.

Simply put, First Nations feel that their treaty and Aboriginal rights justify shared decision-making, not just consultation.

Aboriginal title litigation is enormously complex and expensive, and ever since the 1973 *Calder* decision[235] the courts have given many strong hints to governments and First Nations to resolve these issues through negotiation. On the one hand, First Nations are bolstered by pronouncements in *Delgamu'kw* that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes."[236] On the other, governments and proponents cling to assurances that they are under "no ultimate duty to reach agreement"[237] with First Nations and that the "process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim."[238]

These admonitions have catalyzed negotiations between the parties and have led to many deals being cut and participation or contribution agreements with proponents,[239] but are less helpful when the First Nations' land use vision is more starkly at odds with that of government and industry. The competing land use visions often raise numerous environmental issues that are linked to Aboriginal rights and traditional practices. However, to the extent that the environmental assessment process considers the issues to be outside of the scope of a proponent-driven, project-specific assessment, there is currently no viable alternative venue in which to resolve them.

Intertwined with competing land use visions is the issue of cumulative effects.[240] First Nations have

234 *Taku River Tlingit et al. v. Ringstad et al.*, 2000 BCSC 1001, at paras.11, 12.

235 *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

236 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para.117.

237 *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 74, at para.2.

238 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 73, at para.48.

239 These agreements go by various names and are made between a First Nation and proponent; they typically address issues such as First Nations' employment and revenue sharing. More recently there is movement toward contribution agreements between First Nations and government through revenue sharing arrangements for mining projects.

240 These issues were identified over a decade ago. See Tollefson, C. and

expressed frustration with the inability or reluctance of the EA process to address cumulative effects across the landbase, including from resource development and other activities that are not subject to environmental assessment. For example, some Treaty 8 First Nations want government to address the larger scale impacts from forestry, oil and gas development, seismic exploration, access management, hunting pressures and proposed energy projects across their treaty territory more than the opportunity to provide individual proponents with comments on their specific projects. They indicate that their historic, cultural and spiritual way of life and relationship with the land is at stake and is left unaddressed by the EA process, and query whether the repeal of "culture" from the notion of environmental effects in the 2002 *Act* is in part responsible.[241] A recent 2010 BC Supreme Court decision was critical of the government's refusal to address these cumulative impacts in relation to the "hunting caribou for food, for cultural reasons, and for the manufacture of practical items." The Court held that "it is not an accommodation to say 'hunt elsewhere.'"[242] Although this did not involve an environmental assessment (because the removal of 50,000 tons of coal and 41 hectares of forest does not trigger EA), it seems that the reasoning would apply equally in the EA context.

Common across most First Nations evaluations of the EA process is the issue of capacity to respond to all of the consultation efforts, particularly given the legislated time constraints. Some EA certificate applications involve as many as 20 large binders of technical material, and when several projects are proposed in their territory at a given time, coupled with a large number of non-EA consultations, First Nations state that they are overwhelmed and under-resourced. Proponents and the EAO provide funding on occasion to assist, but First Nations often find it to be sporadic and inadequate to make the consultation and accommodation process meaningful. It is one thing for courts to require meaningful consultation of the Crown, but quite another to facilitate it in a practical and effective manner when First Nations lack resources to engage in real consultation.

Major Structural Reforms Proposed

The major reforms to the EA process proposed by the First Nations Leadership Council amount to a redesign of the system. The main elements are:

1. Replacing the EAO with a new Sustainability Authority to oversee assessment processes, help resolve disputes, and set EA process standards consistent with best practices. The new authority would:

- be headed by three appointed board members (one nominated by the Province, one by First Nations, and the third by joint agreement);
- report to the Legislature, rather than line agency ministers;
- be administered by an executive director who is a professional environmental assessment practitioner and supported by staff;
- carry out many of the administrative and oversight functions of the current EAO, but not direct the actual assessments themselves. The authority would also be responsible for monitoring, inspection and enforcement of project approval conditions and verification of impacts and mitigation effectiveness in the operational phase of projects.

2. Assessments would be carried out by independent "project assessment teams" established through government to government negotiations; the teams would be required to conduct a neutrally administered, transparent, and technically robust process to ensure that a high quality assessment is conducted;

3. There would be formal consultation, accommodation agreements and joint decision-making by the Province and local First Nations following delivery of the assessment report by the project assessment team.

K. Wipond. "Cumulative Environmental Impacts and Aboriginal Rights." *Environ Impact Asses Rev* 1998;18:371–390.

241 Booth, Annie. *Effective Engagement of Aboriginal Peoples in Environmental Assessment: A Case Study of Treaty 8 Nations.* University of Northern British Columbia, March 2010. Unpublished.

242 *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359.

The proposed new process is set out in Figure 1.

Many of the recommendations in this proposal are consistent with our own, including its provisions for:

- adoption of best practices for environmental assessment designed to provide greater assurance of assessments are technically robust, transparent and accountable;
- the appointment of independent review panels to carry out assessments that are neutrally administered;
- accountability mechanisms such as appeal rights and dispute resolution processes;
- clearer responsibilities for monitoring, inspection, enforcement of project approval conditions and the effectiveness of mitigation measures.

While the reform proposal could be an important step forward in the evolution of EA in British Columbia, further details would need to be worked out concerning the role of the public and accountability of the parties negotiating accommodation agreements and making final project approval decisions to the public.

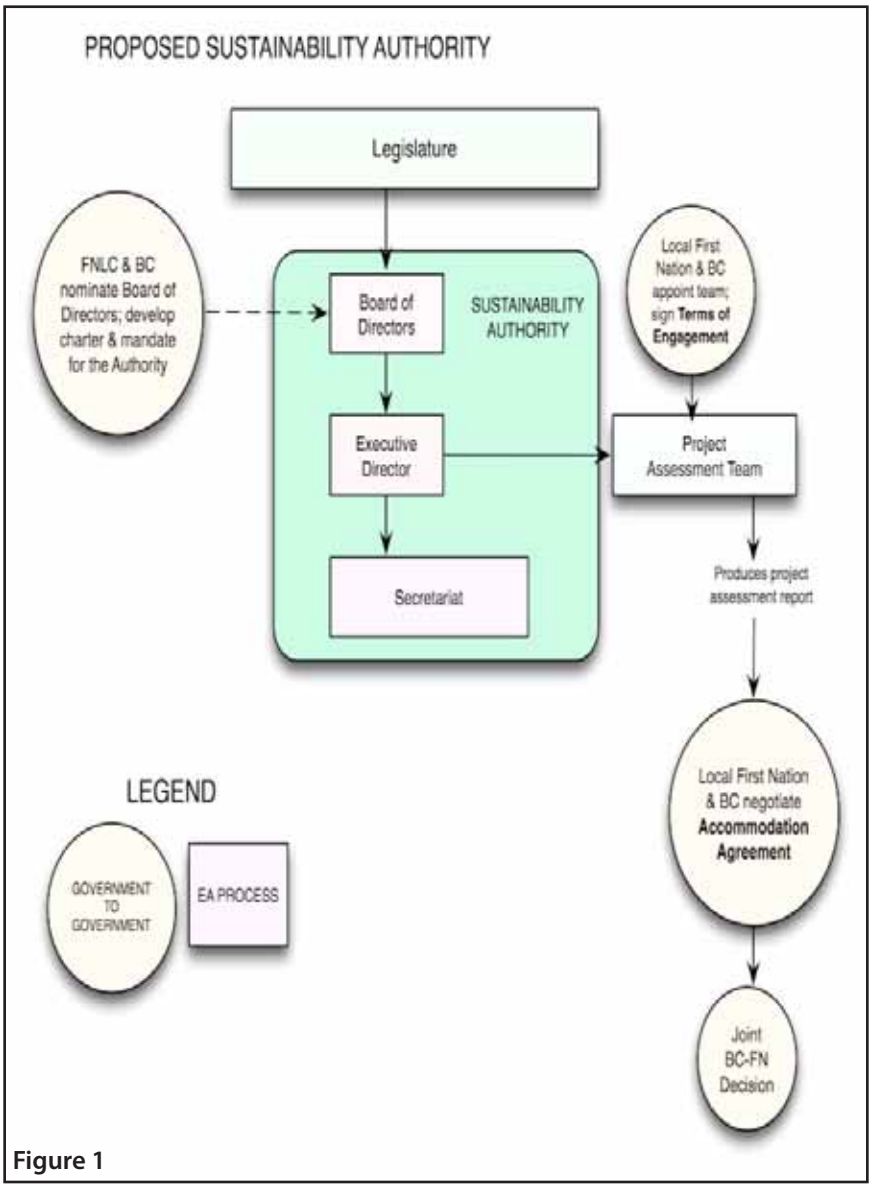

Figure 1

Recommendation:

27. **Government** should seriously consider the reform proposal put forward by the First Nations Leadership Council and facilitate an open and inclusive EA reform process that includes all EA stakeholders.

Conclusion

It has been four decades since Lynton Caldwell[243] first saw the need for a broad-reaching procedural law to build a bridge between decision-makers and scientists who understand environmental impacts. In convincing the U.S. to enact the *National Environmental Policy Act* in 1969, Caldwell kick-started an impressive policy that would change the way jurisdictions around the world approach decision-making in pursuit of sustainable development's tripartite objectives of economic development, social well-being and environmental protection.[244]

In British Columbia today the EA process suffers from a clear lack of public confidence. There is a notable gap between what legislators claim that the EA process represents and what courts say the legislation actually delivers in terms of environmental protection. BC is not unique in this. The organizers of a recent conference of legal scholars sponsored by the *Journal of Environmental Law and Practice* and the University of Windsor law school looked at the state of EA across the country and decided that the conference title should be the question: "The Demise of Environmental Assessment in Canada?"

Some experienced practitioners in this field question whether EA is fixable or worth fixing, and feel that the process has become irretrievably captured by a politically-driven, bureaucratic mindset. However, viable alternatives to the EA process have not been well articulated to date. Despite the many problems that have been identified in contentious projects, environmental assessment plays a valuable role in subjecting some projects to closer scrutiny than they might otherwise receive and in filling regulatory gaps by placing approval conditions on projects.

It seems clear that British Columbia could improve its EA process by adopting some of the approaches of other provinces and the *Canadian Environmental Assessment Act*. The notion that the current BC process is equivalent to CEAA is not credible. In implementation, it can be more rigorous in some ways than initial screenings under CEAA but lacks the due process and diligence of most federal review panel processes. When one looks more broadly to international best practices, reform options open up considerably. Many jurisdictions have gone well beyond Canada in developing processes that attempt to bridge sustainable development goals with EA processes, public participation and accountability measures.

243 Caldwell is considered by some to be the "father of EA legislation" as the major author and inspiration behind the *US National Environmental Policy Act* of 1969 (NEPA).

244 The Nature Conservancy. *Lynton Keith Caldwell: Indiana's Conservation Giant*, online: TNC <http://www.nature.org/wherewework/northamerica/states/indiana/misc/art24490.html>

List of Recommendations

(Page 21) 1. Carry out a comprehensive review of provincially regulated activities that are likely to impact the environment and determine the best mechanism for assessing and evaluating those impacts, including:

- Project level assessment;
- Strategic environmental assessment;
- Land use planning;
- Regional effects assessment;
- Class assessment;
- Regulatory impact assessment;
- Species recovery planning;
- Other mechanisms.

(Page 21) 2. Triggering criteria for project level environmental assessments should be redesigned and based on additional factors to project size or production rate: the criteria should also incorporate factors going to impacts such as:

- the location of a project (e.g. environmentally sensitive area, fisheries watersheds, community watershed, critical wildlife habitat, highly fragmented landscapes, trans-boundary waters, etc.); and
- the environmental values at stake (e.g. threatened or endangered species, drinking water aquifer, etc.)

(Page 21) 3. Thresholds (such as those in the *Reviewable Projects Regulation*) should be reviewed based on the outcome of Recommendations 1 & 2 above: project level thresholds should be revised to capture projects that are likely to have adverse environmental impacts.

(Page 27) 4. Strategic environmental assessment of government's policies, enactments, plans, practices and procedures should be utilized in British Columbia. While it is presently enabled in the *Environmental Assessment Act*, this important tool needs to be more robust. We specifically recommend:

- Identifying circumstances in which SEA will be mandatory;
- Incorporating sustainability objectives and international best practice standards for SEA into the Act, ensuring that assessments will be reliably comprehensive, participatory and rigorous;

- Clearly linking SEAs to project level assessment;
- Clearly identifying who is responsible for carrying out these assessments.

(Page 27) 5. The Province should reaffirm the importance of land use planning in addressing regional environmental impacts and restore the mandate of the Integrated Land Management Bureau to develop, oversee and refine land use plans to address strategic level environmental effects. This needs to be done in a manner that is consistent with First Nations rights and the issues addressed under Issue #5.

(Page 27) 6. Consideration should be given to adopting a "traffic light" approach to strategic and land use issues before a given project proceeds to the detailed technical assessment stage of environmental assessment. Under such a scheme:

- a "green light" could mean "approval in principle, subject to resolution of environmental impacts";
- a "yellow light" could mean "approval to proceed to technical EA subject to strong cautions identified" (e.g. where project acceptability cannot be determined until some significant issues have been addressed);
- a "red light" could mean that the project may not proceed to technical EA due to unacceptability based on social, political or land use factors including First Nations rights.

This process should be transparent and inclusive, and incorporated into the *Environmental Assessment Act*.

(Page 35) 7. The *Environmental Assessment Act* should specify the key mandatory "scope" requirements for an assessment, while leaving room for discretion and project-specific and location-specific details. The range of what is currently open for negotiation needs to be narrowed. For example, the Act should require:

- Evaluation of the need for a project, reasonable alternatives to a project, and alternative methods of carrying out a project;
- That established standards and protocols be used in the assessment;
- Cumulative effects assessment;
- Worst case scenario evaluation;
- Other key matters currently set out in the Application Information Requirements Template.

These amendments will require careful attention to concept and definition, and should be developed in an open and transparent manner.

(Page 35) 8. Section 11 orders should incorporate more substantive details on the scope, procedure and methods for an assessment, rather than addressing mostly procedural issues and methodology.

(Page 35) 9. The Environmental Assessment Office should continue to develop detailed guidance on standard issues that arise in similar projects, as it has done in its helpful "Common Issues and Commitments" for landfills.

(Page 40) 10. The *Environmental Assessment Act* should allow for public engagement in project assessment, planning and design that is more meaningful than the rudimentary "review and comment" opportunities now provided. The discretion to establish public advisory committees does not need to be exercised for every project, but may go a long way to re-establishing public trust and confidence in the EA system. The Public Consultation Regulation should address when public advisory committees are appropriate, and their mandate and membership.

(Page 40) 11. The *Environmental Assessment Act* should specify mandatory entry points for public engagement opportunities.

(Page 40) 12. Rules should be developed and consistently applied concerning the timely posting of information, documents and correspondence relating to a project. Government records that would be routinely releasable under the *Freedom of Information and Protection of Privacy Act* should be posted on the e-PIC website routinely and shortly after receipt (notices or caveats can accompany the records if there are legitimate concerns about references being out of date or misunderstood).

(Page 44) 13. Rules should be developed concerning the use of qualified professionals in the assessment process, and requirements for their signature and/or seal on reports and related documents.

(Page 44) 14. Professional associations should be encouraged to develop practice directives concerning conflict of interest, practice standards and other matters that arise when members are retained to prepare environmental assessments.

(Page 44) 15. Government needs to support environmental assessment by ensuring that line agencies have the resources necessary to diligently participate in the EA process, including attending project locations in the field and not just "paper reviews."

(Page 44) 16. There needs to be greater clarity of roles and transparency in fact-finding between agencies and the EAO on matters involving expert opinion. If the EAO is to maintain its decision-making role in the process (a First Nations' proposal suggests not), it should be required to justify in detail its rationale for rejecting the opinion evidence of agency experts. In the event of strong professional disagreement between agency experts and proponents, the EAO should invoke more rigorous dispute resolution procedures and fact-finding exercises.

(Page 61) 17. The purposes of the EA process should be set out in the *Environmental Assessment Act* and serve as the basic and over-arching criteria for decision-making.

(Page 61) 18. Sustainability criteria should be explicitly incorporated into the *Act*. These should be used as the foundation for developing project-specific evaluation criteria relevant to the local context. This should be an open process that occurs at the outset of the EA process.

(Page 61) 19. The *Act*, regulations and policies should incorporate definitions and criteria to guide decision-making, including the 7 bullet point issues on page 59 (page 50 in discussion paper).

(Page 61) 20. Independent review panels should be utilized more frequently, particularly for controversial projects. There should be an open and transparent process for appointing panel members and developing the panel terms of reference. The *Act* should require panel independence, neutrality and objectivity. It should also address panel powers in greater detail, such as *Inquiry Act*-type powers of subpoena, oath-taking, recommendations and public reporting. This doesn't necessarily mean that panels will or should act like quasi-judicial tribunals.

(Page 61) 21. There should be a more robust and transparent means of dealing with conflicting expert opinion. This could include use of independent review panels, appeals to the Environmental Appeal Board, and mediation or other dispute resolution by qualified practitioners.

(Page 63) 22. Guidelines should be developed for EA certificates to ensure that terms and conditions are measurable and enforceable.

(Page 66) 23. Dispute resolution and appeal mechanisms should be available to parties to provide greater accountability for decision-making. These could include independent arbitrators, review panels, appeals to the Environmental Appeal Board, and alternative dispute resolution by qualified practitioners. Care would have to be taken in determining the timing and circumstances under which these mechanisms would be available.

(Page 69) 24. The *Environmental Assessment Act* should provide broader ministerial authority to amend EA certificates in response to unexpected or changing circumstances identified through project monitoring in order to give meaning to adaptive management. Likewise, licensing/permitting legislation should be reviewed to ensure that regulators can respond to new information gained through monitoring.

(Page 69) 25. Rules should be developed to govern the use of environmental monitors hired by proponents while a project is in the operational phase. The rules should address:

- Qualifications of monitors
- Conflict of interest
- Direct reporting obligations to agencies and the public in a timely manner
- Record keeping and the accessibility of records
- The time frame over which monitors are required.

(Page 69) 26. There should be greater clarity around agency roles and responsibilities for monitoring, inspection, enforcement of project impacts, compliance with approval conditions, as well as the effectiveness of mitigation measures and adaptive management. The EA process currently focuses on event leading up to approval and suffers from lack of post-certificate follow-up.

(Page 75) 27. Government should seriously consider the reform proposal put forward by the First Nations Leadership Council and facilitate an open and inclusive EA reform process that includes all EA stakeholders.

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