

CHAPTER 13

British Columbia's Environmental Assessment Act

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The stated purpose of British Columbia's Environmental Assessment Act (EAA) is to ensure that proposed projects subject to regulation and those designated by the Minister undergo a comprehensive, integrated, and coordinated assessment. The environmental assessment (EA) process in British Columbia provides a decision-making framework from which to assess the potential impacts of a proposed project on the surrounding environment. The process provides opportunities for interested and affected parties to participate in and provide input into the planning of the project and review technical studies that identify potential environmental impacts. The BC process also provides a forum to discuss how these impacts might be minimized or prevented. The early identification of a project's potential effects helps stakeholders avoid irreversible project design and construction decisions and reduces or eliminates costly mistakes for proponents, the public sector, First Nations, and local communities.

HISTORY OF EA LEGISLATION IN BRITISH COLUMBIA

Prior to 1995, proposed major projects in British Columbia were reviewed under separate processes managed by different authorities, depending on the project sector (e.g., mining, energy, or industrial). The first EAA in British Columbia was introduced in June 1995 and established a single process for the review of large-scale projects. The designation of projects subject to the EAA was identified in the Reviewable Projects Regulation. The EAA also established the Environmental Assessment Office (EAO), a neutral agency with responsibility for administering and managing the environmental assessment process (EAO 2003a).

The 1995 EAA established a process for the assessment of a full range of potential effects associated with large-scale projects, and prescribed time limits for certain steps in the process. However, the process was still criticized for being lengthy, costly, and uncertain. In particular, critics claimed that the legislation should provide for greater procedural flexibility in order for the assessments to be designed to focus on the specific issues and circumstances associated with an individual project rather than on a cumbersome government process. After practical experience, it was determined that improvements to the current process were required.

KEY AMENDMENTS TO THE ENVIRONMENTAL ASSESSMENT ACT

New legislation came into effect on 30 December 2002, replacing the previous Environmental Assessment Act (R.S.B.C. 1996, c.119). In order to respond to proponent and government concerns, amendments were made to customize the EAA process to tailor-fit specific project proposals, rather than to continue with the previous principle of 'one size fits all'. The legislation and accompanying regulations establish a framework for delivering EAs, while the scope, procedures, and methods of each assessment are flexible and allow tailoring to the specific circumstances of each proposed project. This allows each assessment to focus on the key issues that ultimately determine whether a project should proceed or not.

To address some of the criticisms of the previous EAA, the Environmental Assessment Office was eager to enshrine in legislation a pre-application process (procedural order and terms of reference). This new step ensures that project submissions contain the necessary information to deem an application 'complete' and thus reviewable. With the pre-application stage incorporated into the EA process, proponents are assured that they have included aspects of the project that the assessment requires and are made familiar with how the assessment procedure will be conducted. A further revision to the EAA enabled the EAO to reduce past policy uncertainties that often crippled proponents' projects. Under section 21, the EAO can, at its discretion, seek policy direction from Cabinet. This again serves to increase certainty for proponents, for if they follow the process as outlined, their project will not be delayed on a policy basis (Crook 2003; Alexander 2003). Some also argue that these revisions were undertaken to help revitalize the provincial economy, which was seen to be impacted by last-minute policy debates (e.g., forestry sector projects) (EAO 2003a).

PRINCIPLES OF THE BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT

Several fundamental principles provide the context of the EAA in British Columbia. While the methods and procedures may vary with specific projects, all assessments are designed to incorporate the following principle:

Access to Information

Information and documentation related to EA in British Columbia are now available through the Project Information Centre website. Where Internet access is inadequate, hard (paper) copies of some documents may also be housed in the region of a proposed project. The EAO manages the Project Information Centre (EAO 2003a).

Balanced Decision Making

Certification decisions are made at the end of the process by three ministers: the Minister of Sustainable Resource Management; the Minister of Water, Land, and Air Protection; and the responsible minister for the type of project under assessment

(e.g., a mine project would be the mandate of the Minister of Energy and Mines). These ministers represent a broad range of interests: sustainability, conservation, and economic development. All three ministers must support a ‘go/no go’ decision. Ideally, this triad structure ensures that all components of the proposed project—for example, project benefits, impacts, and costs—are considered before a balanced and politically accountable decision is made. If the ministers are unable to reach a unanimous decision, the proposal is forwarded to Cabinet for consideration (EAO 2003a).

Comprehensiveness

Assessments must be comprehensive in scope, assessing the relevant, environmental, economic, social, health, and/or heritage effects of on-site and off-site facilities and activities for the life cycle of the project. They must also consider post-project implementation and retirement where provided for in the Reviewable Projects Regulation (EAO 2003a).

Consultation

Assessments must incorporate consultation with all potentially affected parties, including government agencies, First Nations, and the public, as well as provide opportunities for those parties to provide input. A separate regulation has been developed to address consultation; this will be discussed in more detail in the section under consultation requirements.

Coordination

The requirements for projects subject to both the federal and provincial EA legislation are to be coordinated in a single process. Provincial permitting requirements are identified during the EA to facilitate a streamlined transition once an EA certificate has been issued (EAO 2003a). In chapter 9 of this volume, Fitzpatrick and Sinclair discuss a case study of multi-jurisdictional agreements, and in chapter 2, Gibson and Hanna provide some insight into harmonization. As these authors suggest, provincial interest in coordination might have a good deal to do with limiting the federal government’s role.

Flexibility

Assessment methods and procedures should be tailored to the specifics of individual projects. This enables the focus to be on key issues pertinent to the project rather than on the process alone (EAO 2003a).

Integration

Proponents must document all relevant issues, such as technical problems, land use considerations, in one integrated submission, to be considered by all review participants. At the end of each review, one report is prepared on all assessment-related matters, offering a conclusion based on all of the impacts the project will have on the environment.

Neutral Administration

The EAO has been established as a neutral agency dedicated to reviewing EAs, and it reports directly to the Minister of Sustainable Resource Management. The EAO is not part of any other ministry or agency and is therefore impartial with respect to the outcome of the assessment.

Timeliness

All assessments are subject to legislated timelines for milestones and decision points to ensure that reviews are conducted in a timely and efficient manner. However, additional time limits may be established on a project-by-project basis as appropriate (EAO 2003b).

OTHER ELEMENTS OF THE BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT

Other features of the EAA are designed to achieve the government's directive to deliver a more effective and timely EA process. The new EAA confers certain powers to the Minister of Sustainable Resource Management and the Executive Director (Deputy Minister) of the EAO.

The Minister of Sustainable Resource Management has specific powers in relation to EAs. The Minister can designate a project as reviewable under the EAA, determine what path the review will take when a project is referred by the EAO, appoint parties to conduct assessments (e.g., panels, commissions), suspend an assessment to allow other investigations to be completed, provide policy advice if requested by the EAO, and direct the EAO to investigate any matter and report back to the Minister.

The Executive Director (Deputy Minister) of the EAO also has significant powers. This Minister can approve procedural orders and Terms of References; suspend and extend time limits of the assessment; determine if an EA application is complete; vary or amend procedural orders, Terms of Reference, and environmental assessment certificates; request policy direction from the Minister of Sustainable Resource Management and other ministers; and waive EA requirements. The Executive Director can also delegate any of the powers and duties of the Executive Director under the EAA or regulations to any person employed in the EAO or assigned to the EAO. These increased powers enable the ministers and the Executive Director of the EAO to make timely and accountable decisions.

The powers of the Minister of Water, Land and Air Protection and the responsible minister regarding decisions on the issuance of an EA certificate remain unchanged.

REGULATIONS ACCOMPANYING THE EAA

Five regulations accompany the EAA. These regulations are intended to provide specific direction on matters relating to the carrying out of the EA process:

1. The *Concurrent Approvals Regulation* allows a proponent to apply to have applications for other provincial approvals reviewed concurrently with the EA application (e.g. for a water licence, land tenure).
2. The *Prescribed Time Limits Regulation* requires certain steps in the EA to be carried out within a specified time limit. These timelines apply to both the proponent and the government.
3. The *Public Consultation Policy Regulation* sets out general policies with respect to public consultation that the EAO must take into account when determining consultation requirements for an EA.
4. The *Reviewable Projects Regulation* defines those projects that are subject to the EAA by established categories of projects and quantified thresholds for each category.
5. The *Transition Regulation* defines projects that although reviewable in size based on the criteria in the Reviewable Projects Regulation, are grandfathered or exempted from the application of the EAA because they have been reviewed in detail and granted one or more key approval before the new EAA came into force (EAO 2003a).

TYPES OF PROJECTS SUBJECT TO THE BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT

Projects are subject to the British Columbia EAA in three ways: they are identified by the Reviewable Projects Regulation; the Minister of Sustainable Resource Management designates them as reviewable; or the proponents request the EAO to designate them as reviewable. The Reviewable Projects Regulation is the most commonly used method to determine if an EAA is required. Proponents are responsible for determining if their projects meets or exceeds the thresholds set out in the Reviewable Projects Regulation and are therefore reviewable under the EAA. Projects subject to review include the following:

- Industrial projects (chemical manufacturing, primary metals industries, forest products industries)
 - Energy projects (power plants, electric transmission lines, natural gas processing plants, transmission pipelines)
 - Mine projects (coal and mineral mines, sand and gravel pits, placer mines)
 - Water management projects (dams, dykes, water diversions, groundwater extraction)
 - Waste management projects (special waste facilities, local government solid and liquid waste management facilities)
 - Food processing projects (meat and meat products manufacturing, fish processing)
 - Transportation (large public highways and railways, large ferry terminals and marine ports)
 - Tourist destination resorts (large golf, marina, and ski hill destination resorts)
- (EAO 2003b)

A full environmental assessment is required for all of these projects, despite the variations in their size and complexity. While the new EA process allows for flexibility in the scope and assessment of the review, projects, if subject to the EAA must still complete the entire process, unless this requirement is waived by the Minister.

PROPONENT ACTIVITIES IN TYPICAL ENVIRONMENTAL ASSESSMENT LED AND MANAGED BY THE ENVIRONMENTAL ASSESSMENT OFFICE

Step 1: Determining Whether the EAA Applies

As previously mentioned, there are three ways to determine whether a project is subject to the EAA. In most cases, the project proponent contacts the EAO and provides basic project information. The EAO determines whether the proposed project is included in the Reviewable Projects Regulation and, if so, whether it meets the thresholds for that category. The EAO then notifies the project proponent of their decision.

In a few exceptional cases, the Minister of Sustainable Resource Management may designate a proposed project as reviewable even though it is not included in the Reviewable Projects Regulation; for example, a project may have significant adverse effects, and the Minister may determine that it would be in the public interest for the project to undergo an EA.

The proponent of a project that is not included in the Reviewable Projects Regulation may apply to the EAO to have the project designated as reviewable. In this case, the EAO considers the reasons for the request and makes a decision on whether or not to make the designation (EAO 2003a).

Step 2: Determining the Review Path

In nearly all cases, the EA will follow the regular review process, led and managed by staff at the EAO. The Executive Director of the EAO, under section 10 of the EAA, issues an order to the proponent outlining the review path the project is required to follow. The new EAA, however, facilitates variations from the regular process. For example, the EAO can examine any special circumstances related to the project that would warrant either of the two options below:

1. The project is referred to the Minister of Sustainable Resource Management to determine how the EA will be conducted. The Minister can refer the project to a commission or panel or other party to conduct the assessment.
2. The requirements for an EA may be waived by the Executive Director of the EAO. This may occur if the project has been reviewed under another credible EA process, is a relatively minor change to a grandfathered project; or is of a type where management practices to address the primary impact concerns have been codified or standardized in regulations or rules of practice.

In addition to these, the EAO has added a third option based on practical experience:

3. In cases where a project is proposed for an existing industrial/built-up area and the development and operation of the facility will not change any of the existing approvals (e.g., air emissions, water discharge) and is deemed to have no measurable adverse environmental effects on-site or off-site, the Director of the EAO may waive EA requirements based on project specifics (EAO 2003b).

Step 3: Determining How the Assessment Will Be Conducted

The EAO is responsible for determining how the assessment will be conducted, including the breadth of the scope of the assessment and the procedures and methods to be used. EAO staff consider input and advice from the affected stakeholders in making this determination.

The proponent is responsible at this time for providing information about the project to interested parties, undertaking consultations, and working with the EAO to initiate the issue identification and scoping process. This leads to the development and finalization of the procedural order (section 11 of the EAA).

Proponents are encouraged to identify potentially affected members of the public and undertake public consultation activities as early as possible. The EAO will determine which, if any, First Nations may have interests affected or impacted by the project and will advise the proponent as early as possible in the assessment process. The proponent should identify the level of support for the project and any arrangements that must be made with the First Nations.

As described in section 11 of the EAA, the procedural order is issued by the EAO at an early stage in the EA process. Matters such as those described above will be included in the original order; however, in most cases there is insufficient information available at this time to specify all the assessment requirements. Therefore, the procedural order tends to be more of a road map or framework that the EA intends to follow than an explicit set of directions. The review of procedural orders is project-specific, and the need to consult on a procedural order is determined by the EAO. In general, the procedural order will address the following issues:

- The facilities and activities defined by the Reviewable Projects Regulation
- The procedures and methods to be used in conducting the assessment
- The potential environmental effects to be considered in the assessment
- Information required from the proponent primarily in its application for an EA certificate
- First Nations consultation requirements
- Public consultation requirements
- Timelines for activities in the assessment not otherwise covered by legislation

The procedural order sets out how the assessment will unfold and is legally binding on the EAO and the proponent. The issue identification and scoping process

supports the development of a Terms of Reference for the EA application, which will contain the detailed information and consultation requirements that the proponent must satisfy in its EA application.

The procedural order may vary later in the process if the proponent modifies the project or if an adjustment is necessary in order for the EA to be completed in an effective and timely way. Variations are intended to accommodate unforeseen changes and are not intended to be routine.

Step 4: Developing and Approving Terms of Reference for the Application

The project proponent is required to submit an application for an EA certificate. To ensure that the application will contain the necessary information, the proponent will in most cases be required to prepare terms of reference for the application under section 16(2) of the EAA, in consultation with the EAO, other government agencies, First Nations, the public, and other parties as appropriate. The terms of reference (ToR) set out the information requirements and how they will be met. This must be approved by the EAO. Development of the ToR is a key step for the proponent. Terms of reference are developed in accordance with any requirements set out in the procedural order and are based on an issue identification and scoping process conducted in cooperation with the EAO.

The content of the ToR is an elaboration on the content of the approved procedural order. The terms of reference are a tool used to ensure the adequacy of the proponent's application for an EA certificate, and they provide greater certainty to the proponent and clarity to government and affected and interested parties. The development of the ToR is often iterative and evolves out of discussions between the EAO and the proponent, other government agencies, First Nations, the public, and other parties as appropriate.

The EAO then coordinates a review of the draft ToR, which may include a formal public comment period. Following the review of the draft ToR, the proponent makes revisions as required. There is no time limit on the preparation and approval of the ToR unless one is stipulated in the procedural order. The final version of the ToR is then posted on the Project Information Centre website.

As an example, the draft ToR for the Sea to Sky Highway Improvement Project (the road between Vancouver and Whistler) included a description of the project and outlined the procedures for the assessment process. As well, the draft ToR was reviewed by working groups set up under the procedural order. Under the ToR of the Sea to Sky Highway Improvement Project, consultations were carried out and input solicited from working groups and the public to determine issues and concerns regarding the project. A consultation plan was also submitted identifying relevant government ministries, First Nations, and the public who will participate in the review of the application.

The ToR stage of the EA process is still being refined. The EAO is working with proponents and other parties to improve the terms of reference and produce guidelines that will aid proponents in the preparation of a project-specific ToR. It is anticipated

that these guidelines will be developed by the end of 2003 (EAO 2003b; Crook 2003; Alexander 2003).

Step 5: Preparing and Submitting the EA Application

Under section 16(2) of the EAA, the application is considered to have been completed when it includes approved terms of reference and any other requirements specified in the procedural order. One of the key questions asked at this stage is if the application contains the information required to complete the assessment. This is an iterative process; the application is developed through discussions between the proponent, the EAO, other government agencies, First Nations, the public, and other parties. Once the application is completed, the proponent submits it to the EAO for approval. The EAO has 30 days to ensure that the application contains the required information. The EAO can only accept an applications for review if it contains the required information as specified in the Terms of Reference. If any deficiencies are detected, the proponent must address them and resubmit the application. If a proponent does not submit an application within three years after the TOR for the application have been finalized, the assessment may be suspended or terminated.

Step 6: Reviewing the Application

When an application is accepted for review under section 16(4), the official timeline begins from the date the EAO receives the required additional copies from the proponent. If no additional copies are required, the timeline begins on the date that the EAO notifies the proponent of the acceptance of the application for review. The review of the application is carried out as specified in the procedural order (or in any variation to that order). Stakeholder review of the application, any formal comment period, and opportunities for the proponent to respond to issues raised are normally scheduled within 180 days. Within this period, the government must also prepare the assessment report and refer the application to the ministers for a decision on issuance of an EA certificate. The time it takes to complete the review will depend on the complexity of the project and issues raised, however, a review can be concluded within the 180 days. The EAO has the authority to suspend the 180-day timeline if

- the review is delayed at the request of the proponent (e.g., the proponent needs more time to respond to issues than was originally outlined in the procedural order);
- actions are to be taken or not taken by the proponent (e.g., the proponent has not completed required consultations); or
- the proponent is required to provide additional information.

When a proponent is required to submit additional information, there will be a suspension in the EA proceedings only if the required information is substantial enough that the assessment cannot effectively proceed until the information is received. However, if additional information is required on a particular issue but the

EA can still effectively proceed on all other aspects of the review, it is unlikely that there will be a suspension in the EA review (EAO 2003b). A review application may be suspended up to three years.

Step 7: Preparing the Assessment Report and Referring the Application to Ministers

At the end of the application review, the EAO prepares an assessment report that documents the findings of the EA, including any issues raised in the process and how these issues have or could be resolved/addressed. The EAO may also prepare recommendations to the Minister and reasons for the recommendations. Under section 17(1) of the EAA, the assessment report and application are referred to three ministers for decision (EAO 2003b).

Step 8: Deciding to Issue/Not to Issue an Environmental Assessment Certificate

In accordance with section 17(3) of the EAA, after referral of the application and assessment report, the ministers have 45 days to decide whether or not to issue an EA certificate or whether to request further assessment. In making this decision, the ministers consider the information provided by the EAO and any other matters they consider relevant. The ministers must also consider whether the province has fulfilled its legal obligations to the First Nations.

If ministers decide to grant an EA certificate for the project, the EAO delivers the decision and certificate to the proponent, notifies government agencies and First Nations involved in the review, and makes the decision and certificate available through the Project Information Centre website. The certificate usually contains project-specific conditions to which the proponent must adhere in proceeding with the project (EAO 2003b).

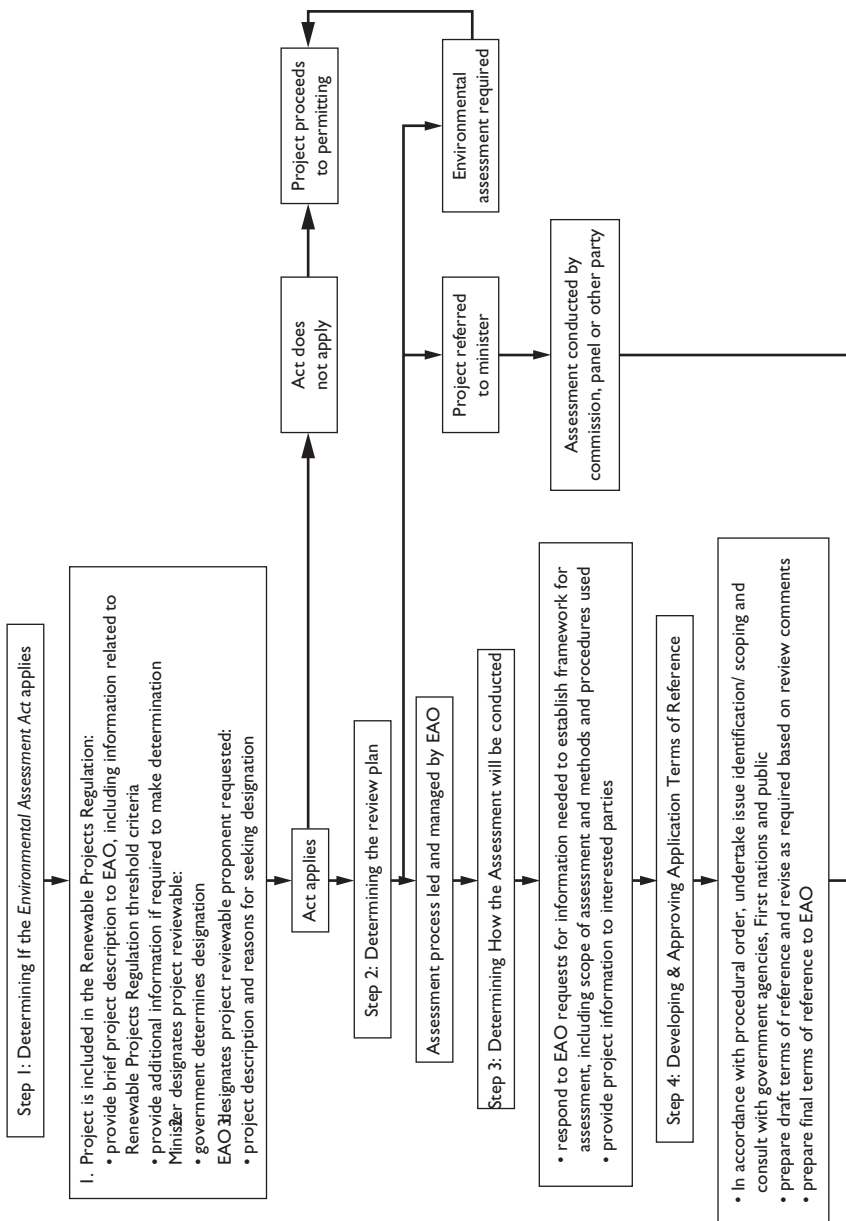
SPECIAL PROVISIONS FOR THE EA PROCESS

Prescribed Time Limits

As discussed above, the EAA requires that certain actions and decisions be carried out within a prescribed time limit. These time limits apply to both government and proponent activities and are specified in the Prescribed Time Limits Regulation. For government, there is little tolerance for missed timelines. Government departments have internal performance measures against which they are assessed, and adherence to timelines is part of the performance review. If proponents miss time limits, the EAO can halt the process and suspend the time limits until the proponent has fulfilled the conditions set out in the procedural order or TOR. Additional time limits may be established on a project-by-project basis, although this kind of flexibility is not intended for routine matters. Figure 13.1 outlines the prescribed timelines in the process (EAO 2003b).

Alternatives to Typical Process

Proponent Activities



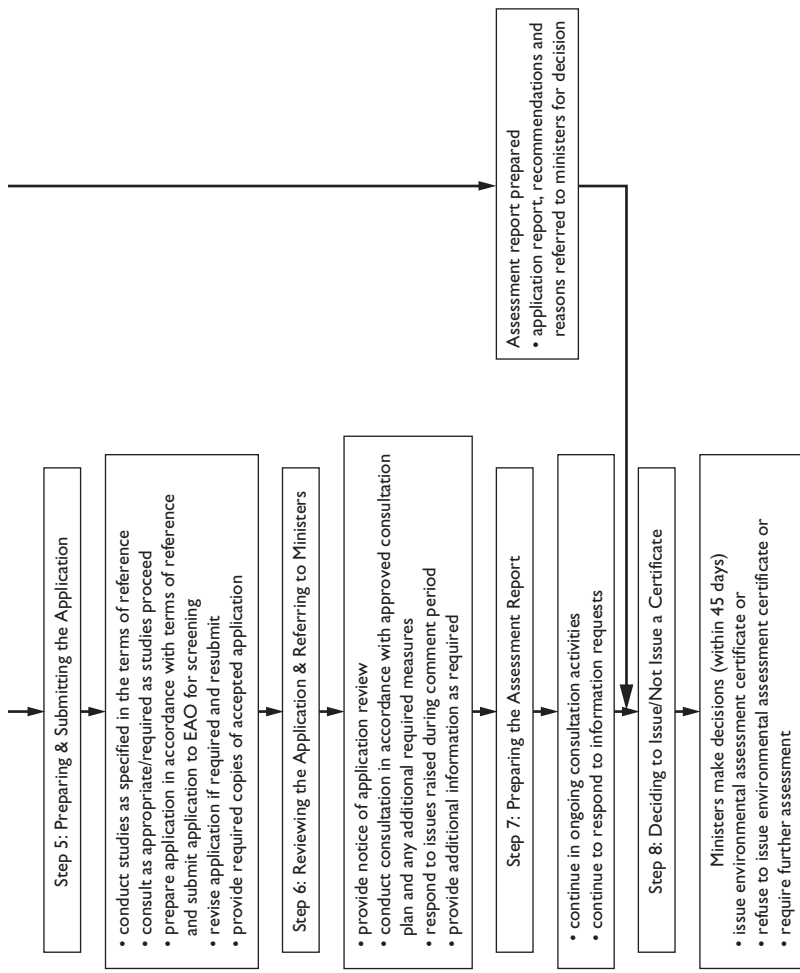


FIGURE 13.1 Proponent activities in a typical environmental assessment led and managed by the Environmental Assessment Office
SOURCE: EAO 2003b, 5.

Class Assessments

The EAA provides for the use of partial or full class assessments to address the potential adverse effects of specified categories of reviewable projects. Partial class assessments would cover activities with specified effects and could replace the need for a proponent to provide, in its application, information on these effects. Partial class assessments are well suited for repetitive projects/activities such as stream crossings. Full class assessments would cover all significant potential effects and could replace all EA and certification requirements. They are sector rather than proponent driven. Full class assessments are similar to the type of class assessments proposed by the Canadian Environmental Assessment Act (CEAA) as opposed to Ontario's Class Environmental Assessment program, which is proponent based. An example of a full class assessment under the British Columbia EAA process would be the construction of a pipeline. In Ontario, forest activities have a Class EA. For further elaboration on these types of Class EAs, see chapter 12 (Herring's discussion of federal EA process) and chapter 17 (Graci's discussion of Ontario EAA process).

To date, no class assessments have been established. However, should any partial class assessment be established in the future, the information requirements would be set out in a procedural order. If a full class assessment applied, the project would not be subject to a procedural order, as all assessment requirements would be specified in the provisions of the full class assessment (EAO 2003b).

Minister Determines Assessment Process

In special circumstances, the EAO, under section 10, may refer a reviewable project to the Minister of Sustainable Resource Management to determine how the assessment ought to be conducted, including what the scope of the assessment should be and what procedures and methods should be used (section 14 of EAA). This could occur if the project requires an alternative forum for conducting the assessment, such as an independent commission of inquiry or a quasi-judicial hearing panel. If harmonization with another level of government is required, this route is more appropriate.

When the Minister decides upon the review process, a commission, hearing panel, or any other person or body (including the EAO) can be designated to conduct the EA. The Minister may confer certain powers and protections to a commission or hearing panel, as set out in British Columbia's Inquiry Act. These could include the power to summon witnesses. The Minister may set the assessment scope, procedures and methods to be used, or may delegate some or all of this responsibility to the party assigned to conduct the assessment. As the Minister has broad discretion to determine how an assessment should be conducted, there is no typical process. If the Minister refers a decision to a hearing panel or another party, an assessment report has to be prepared. This report, along with the application and any recommendations and reasons, is referred to the Minister of Sustainable Resource Management, the Minister of Water, Land and Air Protection and the responsible minister for decision. The ministers have 45 days to decide whether or not to issue an EA certificate. To date, the provisions for establishing a hearing panel or commission have not been utilized (EAO 2003b).

Waiving the EA Requirements of a Project

As discussed above, under 'Step 2: Determining the Review Path', the option to waive EA requirements is only considered in rare cases where such an option can be readily determined without the need for detailed analysis and/or further study or information gathering. This only occurs if the potential for significant adverse effects is minimal, taking into consideration best management practices or readily available mitigation options. An example where EA requirements were waived was with the Sooke Reservoir Dam project. The dam was an existing facility where the proponent proposed to alter the spillway elevation to 186.75 m above the 185.75 m elevation as approved under the Water Act and grandfathered from the EAA by the Transition Regulation. The project was approved under the Canadian Environmental Assessment Act and deemed unlikely to cause significant adverse environmental effects, taking into account proposed mitigation and compensation measures. The EAO provided information about the project to the appropriate provincial authorities, and no adverse environmental effects were identified. The Executive Director then declared that an EA certificate was not required for the project and that the proponent could proceed without an assessment (Crook 2003; Alexander 2003).

Relationship to Other Provincial Legislation

Environmental assessment is only one component of British Columbia's overall land and resource management system (EAO 2003b). Other components include land use planning, land and resource tenuring, permitting and other approval processes, and operations management (EAO 2003b). EA is conducted within the context of existing land use plans. It is not a land use planning tool, however, as it examines the effects of a project on the surrounding environment. The land and resource tenure process may already be completed when a proponent applies for an EA certificate, or conversely, options to grant the land and resource tenures may be reserved until the proponent completes the EA. The EA certificate does not supersede or encompass the provincial permitting and approval processes (e.g., waste or water management licence).

These approvals must still be obtained by the appropriate ministries/agencies. Once an EA certificate and other approvals to construct a project are obtained, the project is subject to ongoing operations management. This stage includes proponent management and monitoring activities to ensure that the project is undertaken in compliance with the various approval conditions; it also includes complementary government monitoring, inspection, and enforcement activities to ensure project compliance with all relevant provincial laws, regulations, and approval conditions (some of which might be covered by conditions of the EA certificate) (EAO 2003a).

Harmonization with the Canadian Environmental Assessment Act (CEAA)

When a project is subject to the British Columbia EAA and the CEAA, the EAO works closely with the Canadian Environmental Assessment Agency and other federal agencies to ensure that the legislated EA requirements of both levels of government are met and integrated through a coordinated process. To ensure that both federal and provincial reporting requirements are fulfilled, both governments will work with

proponents during the development of the Terms of Reference and the preparation of the EA application and federal agencies will provide input into the assessment report (EAO 2003b). Coordination with the CEAA is vital to British Columbia, as many of their assessments trigger federal EA because of fish or fish-related issues.

Coordination with Neighbouring Jurisdictions

Some projects located within British Columbia may have the potential to have an effect in neighbouring jurisdictions (Alberta, Yukon, Northwest Territories, Alaska, Washington State, Idaho, and Montana). Under these circumstances, the EA procedures may require the proponent or the EAO to consult with authorities in neighbouring jurisdictions, and there may be opportunities for neighbouring jurisdictions to provide comments during the assessment. British Columbia has signed a memorandum of understanding with Washington State to facilitate notification and information exchange regarding major project proposals in the vicinity of the other jurisdiction (EAO 2003b).

CONSULTATION REQUIREMENTS

Public Consultation Policy Regulation

Environmental assessment is a balanced and open process that includes participation by all interested members of the public, including individuals, community organizations, and special interest groups (e.g., business, environmental, outdoor recreation, trade, residents', and women's groups). While there are separate obligations related to First Nations consultation, Aboriginal people might also participate as part of the broader public (EAO 2003b). (The involvement of First Nations is discussed in the following section.)

Emphasis is placed on early consultations. Proponents are encouraged to identify potentially affected members of the public and undertake consultation as early as possible in the process to facilitate effective issue identification. The EAA specifies provisions for public notification, access to information, and consultation. The Public Consultation Policy Regulation sets out general policies with respect to public consultation that the EAO must take into account when determining the consultation requirements for an environmental assessment (e.g., at least one formal comment period of between 30 and 75 days was established by the executive director in an order under section 110). In general, however, each assessment must include information sharing with the public, proper notification of key steps in an assessment, opportunities for the public to identify interests and potential impacts related to the projects, and an opportunity for an issue resolution. Additional consultation requirements and opportunities for participation are determined on a project-by-project basis (EAO 2003b). However, the executive director of the EAO has discretionary powers relating to public consultation and can determine if and when public consultation is required. For instance, the development of the Terms of Reference, the waiving of EA requirements, and the amending of a procedural order

do not require mandatory public consultation; rather it is at the discretion of the EAO to determine if and how the consultation occurs.

First Nations Consultation

Recent court decisions have established that provincial government activities cannot infringe on existing Aboriginal rights and/or title unless there is proper justification. The courts have further held that where a First Nation has asserted but not yet proved Aboriginal rights and/or title, there is a constitutional and fiduciary obligation to consult and consider the interests being asserted. As a result of the *Haida Nation v. B.C. and Weyerhaeuser* court of appeal case, proponents of a reviewable project may also have a duty to consult in good faith with First Nations and to seek workable accommodations of First Nations interests, separate from any specific obligations that may be required as part of a project assessment under the EAA. In this case, the courts found in favour of the Haida Nation, citing that neither the Crown nor Weyerhaeuser met their fiduciary responsibilities or their obligation to consult with the Haida Nation (*Haida Nation v. B.C. and Weyerhaeuser*, BCAA 462, 2002).

In response to the court ruling, the EAO has developed a Provincial Consultation Policy (2002) for managing First Nations engagement. This policy ensures that the province, through consultation, must consider and attempt to address and/or accommodate Aboriginal interests prior to making decisions that may affect those interests. The policy outlines five stages of consultation:

1. To conduct pre-consultation assessment to define the First Nation in question and ensure that all potentially affected First Nations are consulted
2. To initiate consultation to identify and assess the soundness of Aboriginal interests
3. To consider the impact of the decision on Aboriginal interests and whether the decision infringes on Aboriginal interests in any way
4. To consider whether any likely infringement of Aboriginal interests could be justified, and if justified, the consultation should inform decision makers of the likelihood of infringement and identify efforts made to address issues and/or reach workable accommodations, and any justification for infringement
5. To look for opportunities to address and/or reach workable accommodations of Aboriginal interest and/or negotiate resolution, while keeping in mind that the solution might be precedent setting and impact other ministries/agencies

(EAO 2003c)

In accordance with legal and policy requirements, the province will consider Aboriginal interests in relation to an EA to ensure that First Nations issues and concerns are identified and the province's legal obligations towards First Nations are met.

First Nations consultation requirements are established for every EA within the framework of the policy. First Nations with interests in the area of the proposed project or whose rights may be affected are provided the opportunity to be consulted by the proponent and the EAO.

In cases where a First Nation may choose not to participate in the EA, the proponent may be required to identify and report on First Nations interests through other means, such as independent studies or literature reviews (e.g., traditional use studies or existing archival data) (EAO 2003c).

POST-EA CERTIFICATION ACTIVITIES

Monitoring, Evaluating, and Reporting

The EA certificate may contain requirements for monitoring, evaluating, and reporting to the EAO the effects of the project once implemented. This would include comparing the anticipated effects of the project as set out in the application with the actual effects; evaluating the adequacy of the measures taken to prevent or mitigate any adverse effects; and periodically reporting the results of the above activities to the EAO or another agency that either requested the condition or has a mandate for the particular issue. These agencies review these reports and keep them on file.

Monitoring plans may specify the key parameters that need to be monitored, sampling requirements (e.g., frequency), and analytical procedures. Impact management procedures and/or contingency plans to respond to issues and unforeseen impacts during the construction or operational phases may also form part of the monitoring plan (EAO 2003b). These plans can be part of the procedural order or attached condition (in a more conceptual form) or in the ToR, or they may be required as a condition of the EA certificate.

Evaluating generally involves assessing the project's compliance with the certification terms and conditions. It may also include evaluating the actual effectiveness of approved mitigation measures through a monitoring program. This may involve field inspection and appraisal by the appropriate regulatory authorities and adjusting the mitigation requirements so as to more effectively manage impacts. The conditions of the EA certificate are posted for public review (EAO 2003b).

Compliance and Enforcement

Regulatory agencies have several ways to ensure project compliance. In addition to agency requirements, the EAA prohibits a proponent from developing a reviewable project without an EA certificate, providing information that is false or misleading, and developing projects contrary to the terms of the EA certificate. Staff from appropriate regulatory agencies may inspect any works or activities on the site of a reviewable project. In the event of non-compliance with the conditions of an EA certificate, the Minister of Sustainable Resource Management may halt the construction, operation, modification, dismantling, or abandonment of a project until the proponent complies, or the Minister may require the proponent to carry out measures to mitigate the effects of non-compliance. The Minister may also propose a compliance agreement whereby the certificate holder agrees to comply with certificate requirements. Sanctions and penalties for these prohibited activities include fines of up to \$200,000 and imprisonment for up to 12 months. There have been no such cases to date (EAO 2003b).

STRENGTHS OF THE BRITISH COLUMBIA EAA

The new powers conferred on the Executive Director of the EAO may reduce the backlog and delays in determining how projects get assessed. Under the new EAA, the effects to be included in the project assessment are negotiated with the Executive Director. In theory, the proponent can focus on the effects most relevant to the project and direct resources to address these effects. This means that all aspects of the assessment are left to the discretion of the Executive Director (O'Callaghan 2003). The Executive Director approves procedural orders and Terms of References and can also vary or amend procedural orders, Terms of Reference, and environmental assessment certificates. This eliminates red tape and reduces protracted timelines and delays often associated with political decision making.

The Executive Director can also suspend and extend time limits of the assessment and determine if an EA application is complete. These extended responsibilities keeps proponents and government accountable and on track, reduces bureaucratic delays, and hastens a go/no go decision for a project to proceed. The ability of the Executive Director to request policy direction from the Minister of Sustainable Resource Management and other ministers means that proponents can be assured that the EA process will not be used to make policy decisions, but rather that these decisions can now be made outside the review process and in the political arena where they belong. This key element in the British Columbia EA process does not appear to be captured in the EA legislation of other jurisdictions. Finally, the Executive Director can waive EA requirements. This decision is intended for projects that meet the criteria laid out in the *Guide to the British Columbia Environmental Assessment Process 2003*, not as a matter of routine.

The Minister of Sustainable Resource Management can suspend an assessment to allow other investigations to be completed; provide policy advice if requested by the EAO; and direct the EAO to investigate any matter and report back to the Minister. The ministerial ability to provide policy direction safeguards against the EA process being used to make policy decisions and places responsibility for these decisions with Cabinet, where a thorough debate can be held. In some cases, when a project is under EA review, another related matter/project is found to have significant adverse environmental impacts that could jeopardize the approval of the project under EA review. Under the old EAA, there was no mechanism to halt the review and await the findings of the other investigation. Now the Minister can halt or suspend the time limits and await the findings of the related matter, and make a determination on how the findings impact the project under review, thus avoiding redundancy and further waste of resources. The Minister's ability to request the EAO to investigate any matter and report back to him or her gives the Minister the flexibility to conduct parallel investigations on matters that are directly related to a project under EA review.

The procedural flexibility provided for under section 11 of the EAA for defining project scope, procedures, and methods allows for increased certainty and clarity for the proponent, the government, and affected and interested parties. The procedural order and TOR encourage the identification of issues and potential environmental effects early in the process so as to allow stakeholders to avoid costly and irreparable

decisions. This pre-application stage ensures that the review process reflects the specific project's impacts; this is in contrast to the previous EAA, which adopted a one-size-fits-all approach that focused more on government process than on the individual project. The time limit binds government ministries/agencies to provide their comments in a timely manner and enforces accountability on all parties.

WEAKNESSES OF THE BRITISH COLUMBIA EAA

While enshrining the pre-application stage in the EAA process is a positive step, the EAO will need to move quickly to provide the proponents with guidance and support material on how to prepare and develop the procedural orders and ToR if this is to truly work effectively.

While the powers conferred on the Executive Director of the EAO may reduce time delays, they also have the potential to weaken the intent of the EA process. The apparent de-politicization of key EA decisions blurs political accountability and responsibility to the residents of British Columbia. If an Executive Director is making decisions on the review path, approving the content of procedural orders and ToR, then the role of the elected official in this decision-making frame is relegated to the end of the process, where previous decisions may have already resulted in irrevocable impacts. British Columbia may experience a rise in legal challenges as a result of this delegated decision making.

The ability to waive EA requirements represents significant power and it will be interesting to see how this power is wielded in the upcoming years. The Executive Director may come under intense pressure from both politicians and industry to use this power to make decisions that benefit only a few.

The EAO also has significant discretionary powers in determining how a project is to be assessed, what issues are to be addressed, who should be consulted, and when the consultation is sufficient. The requirements for a project committee with a mandated constituency have been eliminated. The participation of government agencies, community groups, First Nations, and public interest groups is now at the discretion of the Executive Director (O'Callaghan 2003). While there are regulations and policies to guide the Executive Director and EAO staff, these are significant matters that should be deliberated on with great care and consideration. Decisions of this nature should not be made unless collaboration and consultation within the EAO and appropriate government agencies and departments are demonstrated. The delegation of key EA decisions to bureaucrats rather than elected officials raises caution flags and may be viewed as the watering down of legislation and government decision making; time will be the judge.

The British Columbia EAA is in the early stages of implementation, and given that few projects have completed the process, it is difficult to assess its effectiveness as a tool for ensuring good environmental planning. The changes to the legislation seem to be comprehensive in scope and appear to have the necessary elements to ensure that the environmental effects of major projects are considered and affected parties are given the opportunity to participate in the decision-making process. But the present process

does not provide strategic assessment; rather, it is project focused. It does, however, seek to account for a range on physical and social impacts, and it is responsive to First Nations dynamics. Despite the absence of experience in assessments, the British Columbia EA process appears to have heeded the lessons and successes of other jurisdictions and developed a somewhat comprehensive process.

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