THE NEW ENVIRONMENTAL ASSESSMENT ACT - A NEW WAY OF DOING BUSINESS

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ABSTRACT

Bill 38 - the new Environmental Assessment Act - has received Royal Assent, and is expected to come into effect in late 2002, once the associated regulations and operating procedures are finalized. The current Act sets out a single obligatory review procedure for major projects. The primary purpose of Bill 38 is to provide much greater flexibility to customize review procedures on a project-by-project basis. The increased flexibility is intended to contribute to the government's strategic priorities for an improved investment climate while preserving high environmental standards. Other objectives of legislative reform include clearer process management accountabilities, increased procedural choice, more certainty and credibility for proponents, reduced agency workloads and government program delivery costs, and improved federal/provincial review harmonization. Most reviews will follow a basic two-stage approach:

- **pre-application stage** - focussed on initial consultations to scope the issues and set terms of reference for the EA application; and
- **application review stage** - review of the proponent's EA application (the assessment findings), leading to a Ministerial decision on EA certification.

INTRODUCTION

On May 30, 2002, Bill 38 - the new Environmental Assessment Act - received Royal Assent. The new Act is expected to come into effect in November 2002, once the regulations and operating procedures necessary to operate the new environmental assessment (EA) process are ready. Once enacted, the new statute will replace the current Environmental Assessment Act, which has been in effect for more than seven years (since June 30, 1995). A copy of Bill 38 may be downloaded from the Environmental Assessment Office (EAO) website (eao.gov.bc.ca). Further information may also be obtained by contacting the EAO by either telephone (250-356-7441) or e-mail (eaoinfo@gems5.gov.bc.ca). This paper was written in July 2002, at a time when much work remained to be done to develop the operating procedures. Thus the paper cannot be definitive in some areas.
INTENT OF LEGISLATIVE REFORM

Bill 38 has been enacted to comply with the direction received from the Government of British Columbia in late 2001, following completion of the Core Review process for the province's EA program. The government concluded that:

• An EA process for major developments in British Columbia is in the public interest. It was recognized that EA is normal practice in more than 100 countries world-wide, and in every jurisdiction in Canada.

• The province should continue to undertake EA reviews of major development projects.

• A neutral central agency (similar to the EAO) should continue to deliver and manage the EA process. This approach was considered more credible and cost-effective than a series of separate sector-based processes.

• The current Environmental Assessment Act should be substantially overhauled and streamlined, to deal with concerns with respect to procedural inflexibility in the current Act.

• New legislation should be ready for the Spring 2002 session of the Legislature.

The new legislation was to reflect a new vision having the following characteristics:

• more flexible procedures;

• clearer process management accountabilities;

• increased procedural choice for proponents;

• improved certainty and credibility with proponents;

• reduced agency workloads;

• greater cost-effectiveness for government; and

• improved federal/provincial review harmonization.

The current Environmental Assessment Act prescribes a single mandatory review procedure which must be followed for environmental assessments of all major projects which are subject to the Act. The primary purpose of Bill 38 is to provide much greater flexibility to customize review procedures on a project-by-project basis. The increased flexibility is intended to contribute to the government's strategic priorities for an improved investment climate while preserving high environmental standards.
WHAT WILL BE RETAINED FROM THE CURRENT EA PROCESS?

Strong features of the current legislation are retained. Like the current Act, Bill 38 provides for:

- an open, accountable, integrated and neutrally administered process for assessing the same broad range of effects (environmental, economic, social, heritage and health effects);
- meaningful participation by the public, proponents, First Nations, local governments, provincial agencies, federal agencies and, where warranted, British Columbia's neighbouring jurisdictions, based on procedures set by policy or in regulation; and
- co-operative review arrangements with federal environmental assessment procedures, although with increased flexibility to tailor the process to accommodate federal requirements.

Other features of the existing process which will be retained include the following:

- A neutral agency (the EAO) will continue to manage environmental assessments.
- A certificate (renamed an "environmental assessment certificate") must be granted before proponents may obtain approvals to construct and operate reviewable projects.
- Reviewability of projects will continue to be established primarily by regulation, with the option to designate other projects to be reviewable where this is in the public interest. The intent is that the same kinds of projects will be reviewed as under the current Act - i.e. major changes to the current Reviewable Projects Regulation are not planned at this time.
- The process will continue to meet high standards of openness and transparency, with current levels of public involvement maintained.
- Public and First Nations consultation programs will be tailored to each project.
- Access to information will be provided through the "project information centre" (currently called the "project registry"). A key change is that the system will switch over to predominantly electronic information circulation over the next three years.
- Balanced Ministerial decision making is retained. Three (instead of two) Ministers will make decisions on project approval or rejection - the Ministers of Sustainable Resource Management and Water, Land and Air Protection, plus the minister responsible for the sector (the "Responsible Minister").
- Similar, but broader, concurrent permitting provisions will be available to proponents.
- Bill 38 retains current powers to impose fees and recover process costs from proponents. These powers have not been used in the past.
- Bill 38 retains current provisions to impose sanctions, remedies and penalties for non-compliance with the Act.
WHAT WILL CHANGE?

• The EAO will have primary responsibility and accountability for designing the review process for each project on a case-by-case basis.

• There will be no mandatory project committee system. The EAO may decide to work with smaller technical advisory committees, focused on specific issues or groups of issues. The memberships of such committees would be tailored to specific review needs, and could include non-governmental parties as well as government agencies.

• Where the EAO is satisfied that a project does not raise any strategic impact concerns, it has the option to waive all environmental assessment and certification requirements. The EAO does not anticipate frequent use of this provision, given the regular fine-tuning of the Reviewable Projects Regulation since 1995.

• Where a staff-level review managed by the EAO may not be the most efficient or effective approach to project review, the EAO may ask the Minister of Sustainable Resource Management to consider establishing a more arm's length review procedure, such as a public hearing or commission.

• Under Bill 38, assessments of impacts and the acceptability of proposed mitigation measures will be guided by government policy of more general application (such as performance-based standards), where relevant policies and/or standards exist.

• Legislated timelines will be retained, but the existing system of timelines imposed on government will be simplified. Proponents will now also be subject to timelines with respect to the filing of information and the performance of other required actions (such as required consultations).

• The EAO will have the option to seek Ministerial direction when policy uncertainties are delaying project reviews, and only political direction can provide the policy clarification and certainty necessary to guide the remainder of the assessment.

• Ministers may make an early decision to terminate a review and reject a project where it is clear that a project is not able to satisfy key government requirements.

• Proponents will be able to "opt in" to the process if their projects are not automatically reviewable, but they see advantages in a formal EA review (such as a "one window" contact point, or legislated timelines, or federal/provincial review cooperation, or more generally, to be able to demonstrate the environmental sustainability of their projects in the global market place).

• Proponents will be given the flexibility to develop their own terms of reference for the EA application, subject to government sign-off.
• With the elimination of the project committee system, the procedures for First Nations involvement will change. Bill 38 provides broad flexibility to work with individual First Nations to develop consultation mechanisms to identify and address their issues and concerns. The province will have to continue to meet its constitutional obligations with respect to First Nations rights and title issues.

**HOW DOES BILL 38 MEET GOVERNMENT'S VISION?**

Bill 38 is designed to meet the vision endorsed by the Government of British Columbia in the following ways:

- **More flexible procedures** - The current Act mandates one process which must be followed in all cases. Under Bill 38, review procedures will be designed on a project-by-project basis.

- **Clearer process management accountabilities** - The EAO currently manages the EA process, but shares decision making responsibilities with project committees, comprised of all levels of government and First Nations. Bill 38 makes no provision for project committees, and vests responsibility for designing and managing all aspects of each review in the EAO.

- **Increased procedural choice for proponents** — Under the current Act, there is little procedural flexibility for either proponents or government. Under the new process, concurrent permitting options will be broadened to cover more permits, proponents of non-reviewable projects will be able to opt into the process where they see benefits in doing so, and proponents will develop their own study terms of reference, rather than responding to government project report specifications.

- **Improved certainty and more credibility for proponents** - Whether or not the new process is ultimately seen as an improvement by proponents is for proponents to decide. Currently, review scope and overall review duration are sources of considerable uncertainty for proponents, even though government now has a good track record in meeting legislated timelines imposed on its own actions. The intent under Bill 38 is for review scope to be more focussed on strategic issues which are relevant to whether or not projects should proceed. In addition, reviews managed by the EAO will incorporate pre-application work and one formal review stage. This will mean more pre-application effort by all parties, to ensure that EA applications are complete, but will eliminate the uncertain timelines associated with the current project report review stage. If enough effort is invested in compiling complete initial applications, the opportunity cost savings associated with reduced overall review durations should be significant for proponents.

- **Reduced agency workloads** - The current process places considerable technical and procedural demands on review agencies (primarily in connection with the project committee system), at a time
when agency staffing levels and budgets are being downsized. Procedural demands on review agencies will be much reduced under the streamlined process. Technical workloads should also be reduced in cases where it is possible to rely on performance-based standards to clarify -at the outset of a review - the government's impact management expectations. Clear direction of this type has not been available in many areas of government policy in the past.

- Greater cost-effectiveness for government - Current cross-government process costs need to be reduced in line with agency budget reductions. The EAO's budget will be reduced by 37% over the current three-year budget cycle, and substantial budget reductions are also being experienced by other review agencies. With the procedural streamlining made possible under Bill 38, the goal is to conduct EAs within the reduced budget targets without reducing the number of projects assessed.

- Improved federal/provincial review harmonization - Federal/provincial review cooperation presents numerous challenges, some of which are exacerbated by the inflexible prescriptiveness of the current Act. Bill 38 should create enough procedural flexibility to allow for federal review requirements to be more readily accommodated without affecting overall review timelines.

CONCEPTUAL OVERVIEW OF NEW "CONVENTIONAL" EAO-LED PROCESS

Most projects will continue to be subject to a staff-level review managed by the EAO. Bearing in mind that new operating procedures are still under development, this section lays out the basic steps currently envisaged for a "conventional" staff-level EA review organized by the EAO. It should be noted that, in the rare cases where the EAO asks the Minister of Sustainable Resource Management to establish a review process, procedures could vary considerably from one project to another, based on the special circumstances surrounding that project.

Where the EAO decides to conduct the review itself, a conventional review will consist of two review stages, replacing the three-stage system which most mining projects have experienced in the past. While there will be flexibility to adapt each review to project circumstances, conceptually, the process envisaged is as follows:

- Pre-application - This stage is intended to focus on complete issue identification, based on consultations with interested and potentially affected parties - government agencies, First Nations and the public. Pre-application concludes with EAO sign-off of the proponent's terms of reference for its EA application.

- Application review - This stage is devoted to a review of the formal EA application, and concludes with a certification decision by Ministers.
Conceptually, the main steps in a "conventional" review are expected to be as outlined below.

**Pre-application Stage**

1. *Establishing project reviewability* - The first step in the pre-application stage will be for the EAO to confirm with the proponent that the project is reviewable under the Reviewable Projects Regulation (section 5). Projects may also be reviewable by Ministerial designation (section 6) or where proponents have "opted in" to the EA process (section 7).

2. *Selection of review path* - Under section 10, the EAO has a choice of three "review paths", and will issue an order identifying the chosen review path as early as possible in the pre-application stage:
   - *Ministerial referral* [section 10(l)(a)] - The EAO may ask the Minister to set review procedures for the assessment, where a conventional staff-level review is not deemed the most appropriate. The Minister may select from a range of procedural options, not all of which are available to the EAO, such as an arm's length public hearing or commission.
   - *Waiver* [section 10(l)(b)] - The EAO may waive a project out of the process without an assessment or the need for a certificate if satisfied that the project does not raise impact concerns which cannot be readily managed. Likely this option will only be used where it is self-evident, without significant review effort, that the project does not raise strategic concerns. Through fine-tuning over the last seven years, the Reviewable Projects Regulation should now be "capturing" the right kinds of projects, so that there should be few situations where this option would need to be considered.
   - *"Conventional" (EAO-managed) review* [section 10(l)(c)] - The EAO may conduct a review where some potential is deemed to exist for significant adverse effects. This is expected to be the case for most projects "captured" by the Reviewable Projects Regulation.

3. *Determining review procedure* {section 11(2)} - Where the EAO is to conduct the review (under section 10(l)(c)), it will issue a "determination" as early as practicable in the pre-application stage, outlining the review procedure to be followed for both the pre-application and application review stages, and addressing the following:
   - *Project scope* - identifying the physical facilities and activities which comprise the project for EA review purposes.
   - *Potential effects* — laying out a pre-application issue scoping procedure which will identify the issues to be addressed in the proponent's application.
   - *Information requirements* - laying out a review and sign-off procedure for the proponent's proposed application terms of reference, to be generated following issue scoping.
• **Class assessments** - identifying the role of any relevant class assessments in fulfilling the information requirements for the application.

• **Information from other sources** - identifying information required from sources other than the proponent to complete the assessment (e.g. from government agencies or consultants to government).

• **Consultation requirements** - stipulating the parties (the public, stakeholder groups, First Nations and government agencies) to be consulted by the proponent and/or the EAO, and the means by which they are to be provided with notice of key steps in the review, access to information, and opportunities to participate (e.g. public meetings or open houses, etc.).

• **Opportunities to comment** - providing for comment periods for the public, First Nations and government agencies.

• **Time limits** — setting binding time limits in addition to any already legislated under the Act.

Under section 13, this determination, once made, can be varied where this is necessary for an effective and timely assessment. Determinations made under sections 11 and 13 are legally binding.

4. **Review/sign off application terms of reference** - The final government step at pre-application is to sign off the information requirements for the proponent's EA application, based on draft terms of reference prepared by the proponent following pre-application consultations and issue scoping. Typically, this step will involve agency review, and there may also be an opportunity for public and First Nations to comment (the relevant operating procedures are still being developed).

5. **Preparation of EA application** - The proponent conducts any required studies and prepares its application in accordance with the approved terms of reference.

**Application Review Stage**

1. **Screening of application** [section 16(2) and (3)] — The EAO screens the application to ensure that it contains the information required under the approved terms of reference. If information is missing, the EAO will return the application for upgrading.

2. **Application review** [section 16(5)] - The EAO will coordinate the review of the application in accordance with procedures set out in its section 11 determination (see above). Typically, application review will include provisions for a formal public comment period, First Nations consultation, government agency review and the preparation of an assessment report for Ministers.

3. **Ministerial decision making** [section 17(3)] - the final EAO assessment report will be referred to Ministers, together with recommendations and reasons for the recommendations, and Ministers will decide whether to grant an EA certificate, to refuse to do so, or to order further assessment (which could take any form they determine).
4. Concurrent permitting [section 23] - Where proponents have applied for concurrent processing of permits, decisions on these applications must be made within a legislated time limit following issuance of an EA certificate.

NEXT STEPS

The EAO is currently coordinating the preparation of several regulations, and also the operating procedures necessary for the "conventional" staff-level process which is to be followed in most cases. In undertaking this work, the EAO is consulting with its EA Advisory Committee - comprising local government, labour, environmental and business/industry groups (including the Mining Association of BC) - and its First Nations EA Technical Working Group (comprising technical advisors to First Nations across BC).

Regulations - The regulations which are considered essential for proclamation of the Act are as follows:

- the Reviewable Projects Regulation, which establishes which projects are automatically subject to the Act;
- the Time Limits Regulation, which sets legislated time limits for steps in the process;
- the Responsible Minister Order, which identifies the Responsible Minister for each project sector;
- the Transition Regulation, which lists those projects which, although of reviewable size, are grandparented from the application of the Act because they have already been approved; and
- the Concurrent Permitting Regulation.

Also being considered are regulations dealing with certain aspects of public and First Nations notification, access to information and consultation.

Operating procedures - The operating procedures which are being developed will provide guidance on various aspects of the EA process, in keeping with the legislated intent to provide the flexibility to adapt the process to project-specific circumstances. An EA Guide will be prepared, summarizing the procedures which will normally be followed.

Feedback - Any party wishing to express views on the development of the regulations or operating procedures should do so by contacting the EAO - see Introduction to this paper for contact information.