

The New *Environmental
Assessment Act* (BC)

January 16, 2020

Context – Environmental Assessment (“EA”) in BC

- Environmental matters are federal in some aspects, and provincial in others, and both orders of government have EA legislation that applies in BC
- BC has had provincial EA legislation for many types of projects since 1995 (and for mines and utility projects before that)
 - *Environmental Assessment Act*, SBC 1994, c 35, (June 30, 1995) → *Environmental Assessment Act*, RSBC 1996, c 119;
 - *Environmental Assessment Act*, SBC 2002, c 43 (Dec. 30, 2002);
 - *Environmental Assessment Act*, SBC 2018, c 51 (Dec. 16, 2019).
- Recent changes to federal EA legislation- the *Impact Assessment Act*, SC 2019, c 28, s 1 came into force on Aug. 28, 2019, repealing the *Canadian Environmental Assessment Act, 2012*

BC's Recent Provincial EA Revitalization Process

- 2017 - provincial election brought the NDP into power, with the support of the Green Party
- Early 2018 - BC government engaged with Indigenous nations on changing the provincial EA process
- June - Oct. 2018 – Discussion Paper, public engagement & report, and Intentions Paper
- Nov. 2018 – Bill 51 - 1st, 2nd and 3rd readings, and received Royal Assent, to come into force later
- Sept. 2019 - Impact Assessment Cooperation Agreement with federal government (coordinates new BCEAA with new federal *Impact Assessment Act*)
- Fall 2019 – Public Engagement on *Reviewable Projects Regulation*
- Dec. 16, 2019 – new BCEAA in force, with several regulations (other regulations still under development)

Categories of Projects Regulated by BCEAA

- Industrial Projects - chemical manufacturing, primary metals, non-metallic mineral products, forest products, certain other manufacturing e.g. pharmaceuticals, tires, batteries
- Mine Projects
- Energy Projects - electricity, petroleum & natural gas
- Water Management Projects - dams, dikes, diversions, GW
- Waste Disposal Projects - category change from Local Gov't Solid Waste Management to Solid Waste Management
- Transportation Projects
- Tourist Destination Resort Projects
- No longer applies to Food Processing Facilities

Major Themes of the new BCEAA (for Project EA)

- Purposes of the Environmental Assessment Office (EAO) include supporting reconciliation with Indigenous peoples in BC & supporting implementation of UNDRIP (the “Declaration”)
- Fundamental changes to how Indigenous nations are engaged in the EA process, including opportunities to express consent or lack of consent
- Minister may enter agreement allowing substitution of Indigenous nation’s EA process for BC EA process if certain conditions are met
- New Early Engagement Phase
- More public comment periods
- Changes to Reviewable Projects list, new effects thresholds, new notification requirements for projects below review thresholds
- New powers to amend a certificate (e.g. arising from report on effectiveness of mitigations)

Purposes of the EAO include (s. 2(2)(b))

In carrying out its responsibilities under new BCEAA, to:

(i) promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities by

- (A) carrying out assessments in a thorough, timely, transparent and impartial way, considering the environmental, economic, social, cultural and health effects of assessed projects, (5 pillars)
- (B) facilitating meaningful public participation throughout assessments,
- (C) using the best available science, Indigenous knowledge and local knowledge in decision making under the Act, and
- (D) coordinating assessments with other governments, where appropriate, including Indigenous nations, and with other provincial ministries and agencies;

EAO's Purposes (s. 2(2)(b) continued)

(ii) support reconciliation with Indigenous peoples in British Columbia by

- (A) supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples,
- (B) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves,
- (C) collaborating with Indigenous nations in relation to reviewable projects, consistent with the United Nations Declaration on the Rights of Indigenous Peoples, and
- (D) acknowledging Indigenous peoples' rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision making under this Act.

Shift in approach regarding Indigenous nations

“The EAO’s approach to collaboration with Indigenous nations is to engage and work with our Indigenous nation partners as governments, with their own jurisdiction and authority and establish a collaborative approach to evaluate a potential project.”

(EAO User Guide, v. 1.0, December 2019, at p. 1)

“A goal of this engagement is to build shared understanding of the Indigenous nation’s history, culture, traditions and connection to the land and resources.”

(EAO User Guide, at p. 10)

Shift in approach regarding Indigenous nations (cont.)

- Old:
 - Form and depth of Indigenous nation participation derived from strength of claim analysis
 - Focus on consultation and, if needed, accommodation (case law)
 - Reviewable projects on treaty lands require Indigenous nation consent if the treaty so requires
 - If a final agreement requires government to negotiate on harmonizing with the treaty first nation's procedures for evaluating projects on treaty lands, the Minister may enter such negotiated agreement

Shift in approach regarding Indigenous nations (cont.)

- New:
 - Indigenous nations may choose whether to be participating Indigenous nations (for the purpose of seeking consensus)
 - Focus on consensus building and on collaboration with Indigenous nations as government
 - Reviewable projects may not proceed without consent if they are:
 - (i) on treaty lands where consent is required under the final agreement OR
 - (ii) in an area subject to an agreement between the provincial government and an Indigenous nation under which such consent is required and the agreement has been prescribed by the LGiC (s. 7)

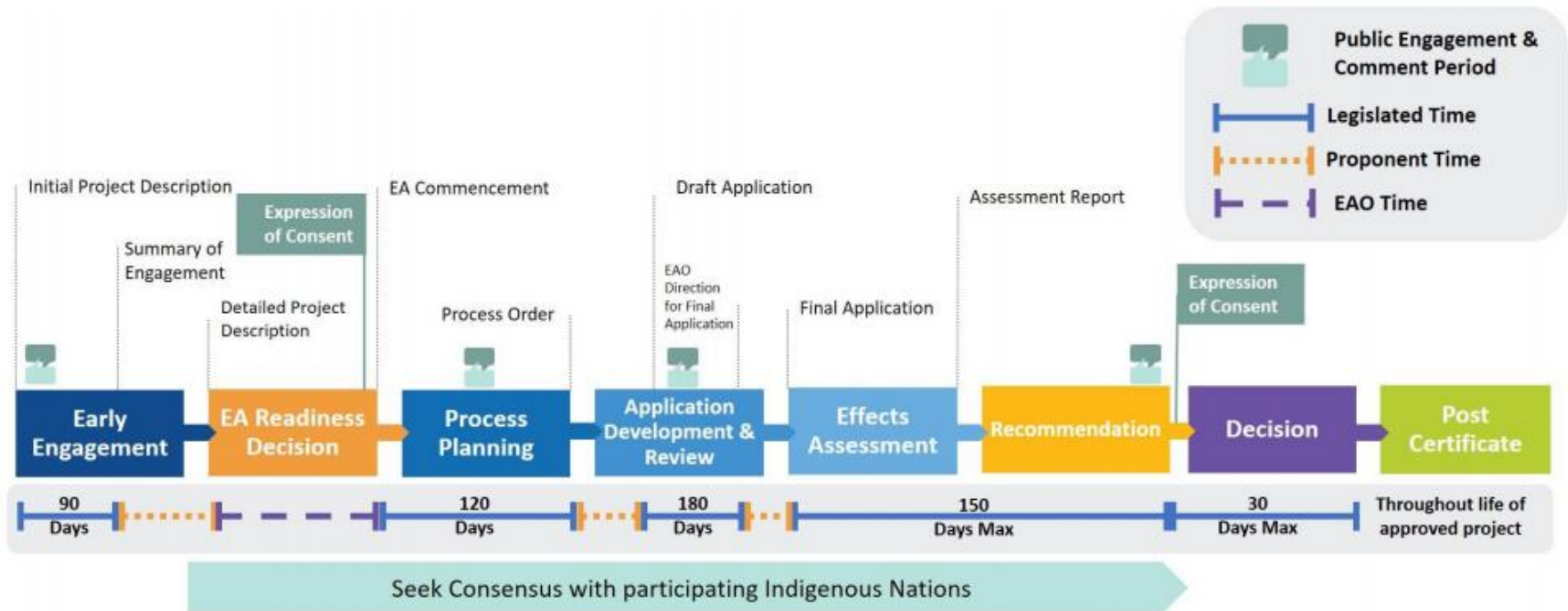
Shift in approach re Indigenous nations

- There are several points in the new EA process where the EAO (or the Chief Executive Assessment Officer) is required to seek to achieve consensus with the participating Indigenous nations
- There are two points in the EA process where each of the participating Indigenous nations may provide a Notice of consent or lack of consent, and such Notices require certain actions from the Minister(s)
- This process is designed to support the implementation of UNDRIP, including Free Prior Informed Consent (FPIC) of Indigenous nations

Project EA Process Phases

1. Early Engagement Phase
2. EA Readiness Decision
3. Process Planning Phase
4. Application Development and Review
5. Effects Assessment and Recommendation
6. Decision Phase
7. Post-Certificate Phase

EAO Graphic of the Process Phases

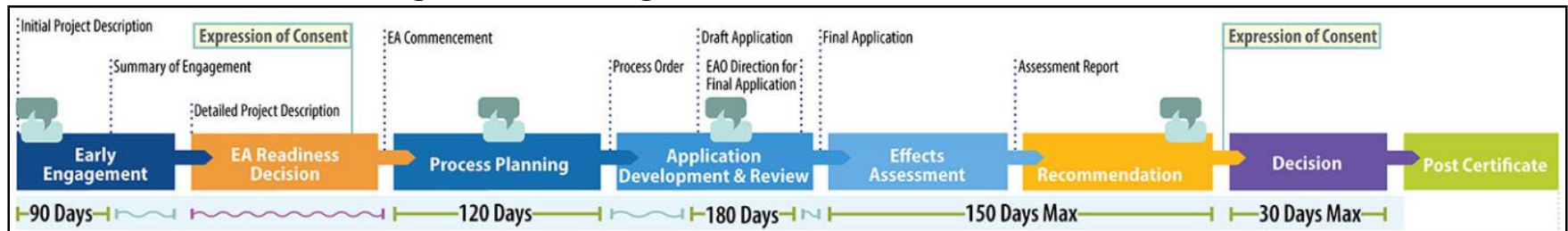


Source: *EAO User Guide - Introduction to Environmental Assessment Under the Provincial Environmental Assessment Act (2018) v. 1.0*, Dec. 2019, at p. 17

- Note: four Public Comment periods
- Note: two “Expression of Consent” points for participating Indigenous nations – Notice of consent or lack of consent

EAO must seek to achieve consensus with participating Indigenous nations

Source: EAO's online Indigenous nation guidance



- EAO must seek to achieve consensus with participating Indigenous nations for:
 - EA Readiness – not ready, ready, recommend exemption, recommend termination (s. 16)
 - Process Planning – details of the Process Order (s. 19)
 - Application Development & Review – before deciding whether to accept Application for review (s. 27(5))
 - Effects Assessment – draft Effects Assessment Report, draft EA Certificate conditions and project description (s. 28)
 - Recommendation – to the Ministers on whether to issue an EA Certificate (s. 28, 29(2)(b)(i))

Dispute Resolution

- Dispute resolution is available:
 - To facilitate consensus among the EAO and participating Indigenous nations on those points; and
 - In the Early Engagement Phase, when determining participating Indigenous nations
- Dispute resolution is time-limited, and non-binding
- The Dispute Resolution Regulations are still under development
 - DR Intentions Paper expected early 2020
 - DR Regulation expected mid-2020

Participating Indigenous Nation Consent Notices

- Participating Indigenous nations have the opportunity to provide a Notice of their consent or lack of consent:
 1. At the EA Readiness Decision phase, if the EAO intends to recommend either
 - EA Termination or
 - EA exemption.
 2. At the end of the Effects Assessment & Recommendations Phase – to be provided to the Ministers along with the EAO's recommendations on issuing an EA Certificate for the project.
- Participating Indigenous nations may abstain
- Indigenous nations may choose not to be participating Indigenous nations, but still be engaged in the EA

Obligations of Ministers regarding consent

- Exemption Orders, Termination Orders - Minister must consider the sustainability and reconciliation purposes in s. 2, and
 - If the decision is contrary to a Notice of consent/lack of consent, the Minister must provide reasons for issuing the Order. (s. 17)
- Issuing/not issuing an EA Certificate - the Ministers must consider the sustainability and reconciliation purposes in s. 2, and
 - if the EAO's recommendation is contrary to a Notice of consent/lack of consent, the Ministers must offer to meet with that Indigenous nation before making a decision, and if the meeting is accepted must seek to achieve consensus;
 - if the Ministers' decision is to issue an EA Certificate contrary to a Notice of lack of consent, the Ministers must provide reasons (s. 29)

Substitution of the EA, and other Collaboration

- Minister may enter agreement allowing substitution of an Indigenous nation's EA process for the BC EA process if certain conditions are met (s. 41) e.g.
 - the required s. 25 matters will be taken into account
 - similar requirements to seek consensus with Indigenous nations
 - the public will have an opportunity to participate & see records
 - provincial authorities under other Acts are able to participate
 - Report provided to Ministers, for decision on issuing EA Cert.
- Examples of other forms of collaboration:
 - Cooperative completion of an EA
 - Indigenous nation conducts certain portions of the effects assessment
 - Joint drafting (e.g. Application chapters, EA Report chapters)
 - Participation in the Technical Advisory Committee

Which Projects Require an EA

- Still 3 intake pathways – *Reviewable Projects Regulation (RPR)*, Ministerial designation, or Proponent opt-in
- Recall the high level categories of projects in the RPR (Industrial, Mining, Energy, Water Management, Waste Disposal, Transportation, Tourist Resorts)
 - mostly the same as before, although the Industrial categories now use NAICS codes instead of SIC codes to identify the industry
 - some changes to listed categories of projects within these groupings
- New “effects” thresholds apply to most project categories:
 - Emits \geq 380,000 tonnes/year of GHGs
 - In or partially in an area in the Protected Areas Regulation & will have significant adverse effects there (environmental, economic, social, cultural or health)
 - Clearing \geq 600 ha or 60 km strip of land (some exceptions)

Reviewable Projects (cont...)

- Criteria for some **new** projects have changed, e.g.:

Project Category	Change to New Project Criteria
Placer mines	↓ from 500,000 to 250,000 tonnes/yr of pay dirt
Transmission lines	↓ voltage criterion, from 500 kV to 340 kV (40 km except if alongside and contiguous to existing linear)
Power plants	New criteria (used to be ≥ 50 MW): <ul style="list-style-type: none"> • In-stream tidal power ≥ 15 MW, • All other tidal power generating facilities, • Land-based wind power ≥ 15 turbines, • Wind power ≥ 10 turbines with 1+ in water
Energy storage	New LNG storage capacity threshold 136,000 m ³ (same as <i>Impact Assessment Act</i>)
Oil refineries (new category)	Heavy oil upgrader with input capacity $\geq 10,000$ m ³ /day

Reviewable Projects (cont...)

Project Category	Change to New Project Criteria
Natural gas processing plants	Removed size threshold, only criterion is ≥ 2 tonnes/day of sulphur emissions
Transmission Pipelines	New carve-out - not reviewable if alongside and contiguous to land previously developed for a transmission line, pipeline, public highway or railway
Public Highways	(same carve-out as Pipelines)
Railways	(same carve-out as Pipelines)
Groundwater Extraction Projects	New carve-out – not reviewable if deep groundwater extraction solely for oil and gas purpose
Golf resorts; Ski resorts	removal of 600 commercial bed unit criterion (still ≥ 2000 bed units)
Marina resorts	removal of 600 commercial bed unit criterion (still $\geq 1000\text{m}$ of linear moorage)

Reviewable Projects (cont...)

Project Category	Change to New Project Criteria
Hazardous waste facilities	<p>New exceptions for:</p> <ul style="list-style-type: none"> • thermal treatment of drilling mud in closed-loop unit if at a drilling rig site or a secure landfill, and • discharge to an underground formation, of produced water or fluids recovered from a well completion or workover (in accordance with <i>Oil and Gas Activities Act</i>)
Solid Waste Management (used to be Local Government Solid Waste Management)	<p>Both municipal solid waste and non-hazardous solid waste - same thresholds as before:</p> <ul style="list-style-type: none"> • landfill capacity \geq 250,000 tonnes/yr, • device destroying waste using high temperatures & capacity \geq 225 tonnes/day, or • device that destroys the waste with high temperatures and is located in Metro Vancouver Regional District or Fraser Valley Regional District

Reviewable Projects changes (cont.)

- Project Modification thresholds DO NOT apply to projects that already have an EA Certificate
- Project Modification thresholds apply to projects without an EA Certificate:
 - constructed pre-1995, or
 - post-1995 but below the new project threshold at the time
- Several project categories have changes to the project modification criteria
- EAO provides an online RPR Interpretation Guide

Ministerial Designation of a Reviewable Project

- Minister may designate a project as reviewable if it:
 - has not already been substantially started, and
 - is not reviewable under the Regulations, and
- Minister has considered the following factors (s. 11):
 - Whether the applicant (if any) seeking the designation is an Indigenous nation,
 - Whether project could have effects on an Indigenous nation and the rights recognized & affirmed in s. 35 of the Constitution Act, 1982,
 - If the project is within one of the RPR categories, whether it's potential effects are equivalent or greater to those of reviewable projects in that category, and
 - Whether an EA of the project would be consistent with s. 2.
 - For some regulated projects there is also a public interest test.

Notifiable Projects

- New “notification” thresholds will come into effect April 1, 2020 for new projects (not started regular operations):
 - Designated projects under the *Impact Assessment Act* (Canada) if not wholly on federal lands or reserves under *Indian Act*
 - Projects that exceed 85% of certain applicable RPR thresholds (all categories are affected - see the specific rules)
 - Projects with peak full-time employment by proponent of ≥ 250 persons (during construction or operations)
 - Projects with direct GHG emissions $\geq 125,000$ tonnes/year
 - Transmission lines > 230 kV and > 40 km long
 - Certain projects involving clearing of 450 ha of land, or of 40 km not alongside and contiguous to existing transmission line, pipeline, railway, public highway or resource road

Notifiable Projects (cont.)

- Notification for modification to an existing project that emits $\geq 125,000$ tonnes/year of GHGs (only one Notification is required, even if there are subsequent modifications)
- Deadlines for notification:
 - Within 15 days after first applying for certain types of permits (see *Reviewable Projects Transition Regulations*), or
 - June 29, 2020 if all such applications have been made before April 1, 2020 but no such permits have been obtained by April 1, 2020
- Notification facilitates designation by Minister of Environment and Climate Change Strategy, but is not a pre-requisite for designation

Factors to be considered in an Effects Assessment

- Every effects assessment must consider s. 25 matters:
 - Must assess effects on Indigenous nations and their Constitutionally protected s. 35 rights
 - Must also consider:
 - Positive and negative direct & indirect effects (enviro, economic, social, cultural, health), and adverse cumulative effects
 - Risks and uncertainties associated with those effects, and interactions
 - Risks of malfunctions and accidents
 - Disproportionate effects on distinct human populations (including gender)
 - Effects on biophysical factors that support ecosystem function
 - Effects on current and future generations
 - (cont.)

Factors to be considered in an Effects Assessment (cont.)

- (s. 25 continued:)
 - Consistency with relevant land-use plans of gov't or an Indigenous nation
 - GHG emissions, including potential effect on meeting provincial targets
 - Alternative means of carrying out project -technically & economically feasible
 - Potential changes to the project that may be caused by the environment
- In addition to the Assessment Report and Recommendations, the Ministers also consider (s. 29):
 - section 2 (recall purposes of the EAO – promote sustainability, support reconciliation with Indigenous peoples in BC), and
 - any other matters the Ministers consider relevant to the public interest in making their decision

Post- Certificate Phase

- Project is monitored to ensure it complies with EA Certificate conditions → monitoring reports
- Amendment - CEAO may amend EA Certificate if
 - Application by proponent,
 - A regulator who issues a permit recommends amendment,
 - CEAO considers amendment appropriate,
 - In case of a certificate with a substantial start deadline of 5 or more years, the 5th anniversary has passed, or
 - Proponent applies for extension of time for substantial start.
- Expiration – NEW* - If a project is not operational by the 20th anniversary of the EA Certificate, Minister may amend/suspend/cancel Certificate even if project was substantially started on time – also applies to Certificates issued under the old BCEAA.

Next Steps

- Additional Guidance documents:
 - Public Engagement Guide (early 2020)
 - Dispute Resolution Intentions Paper (early 2020)
 - Indigenous Knowledge Guide (early 2020)
 - Guide to Consensus & Consent Seeking in EA process (early 2020)
 - Indigenous Participation Guide (early 2020)
- Additional Regulations:
 - Dispute Resolution Regulation (mid-2020),
 - Indigenous Capacity Funding Regulation (mid-2020),
 - Administrative Monetary Penalties Reg. (mid-2020)
 - Regional Assessment Regulation (late 2020)
 - Strategic Assessment Regulation (late 2020)
- Various Policy documents (ranging from early to mid-2020)

Next steps (cont.)

- Projects on deck: No new projects yet posted* to the Project Information Centre (EPIC) under the new BCEAA
- Transition projects:
 - any under old BCEAA that did not yet have a section 11 Order (process order)
 - any that have a s. 11 Order but no Ministerial decision yet and that do not notify before June 16, 2020 that they are continuing under old BCEAA
 - any old BCEAA assessment in progress that doesn't complete within 3 years (by December 16, 2022)
- Certificate amendments - none yet posted* under the new BCEAA (several underway under old BCEAA)

** as of January 14, 2020*



Questions?

Thanks for Listening

Presented by Jennifer Nyland



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