Responding to West Coast Environmental Law's "Deregulation Backgrounder"

British Columbia's *Environmental Assessment Act* was repealed and replaced in 2002. Later that year, new regulations were approved by Cabinet when the statute came into force at the end of 2002.

Shortly after passage of the new Act, West Coast Environmental Law sought to critique the legislation. In its "Deregulation Backgrounder", the Vancouver-based legal advocacy organization cited 10 problems with the legislation. Unfortunately, the critique misinterprets key parts of the Act and regulations, or it relies on information and makes presumptions that are either inaccurate or incorrect. This response provides the perspective of the Environmental Assessment Office on each of the 10 assertions set out in the 2002 document which are reproduced below.

Introduction

The new legislation resulted from a Government-wide "Core Review" exercise whereby all programs were examined and either maintained, updated, replaced or eliminated. Part of the exercise included the achievement of targeted reductions in the number of "regulatory requirements" contained in statutes and regulations.

1. Environmental assessment is now discretionary. There is no certainty that an EA will be conducted for reviewable projects.

The head of the Environmental Assessment Office, the Executive Director, now has the ability to avoid bringing projects into the process unnecessarily. If there is no evidence that a project would result in significant adverse effects based on consultation with permitting agencies and First Nations, an assessment may not be required.

When faced with a request by a proponent to be exempted from the process, EAO consults with all levels of government to determine whether the proposed project would be expected to have significant adverse effects. There is also consultation with First Nations to determine whether they anticipate any impact on Aboriginal rights. If a decision is made to "waive" a project out of the process, it may be subject to obtaining various commitments from the proponent.

In practice, this authority has only been used eight times in six years meaning that 93 percent of reviewable projects have been reviewed through the provincial process. Any decision to exercise this authority is posted on the EAO website. Consequently, it is clear that this discretionary power is exercised sparingly and only where it is supportable.

The Act now provides a formal mechanism for a proponent to "opt in" and seek an environmental assessment (EA) for a proposed project that would not otherwise be reviewable. Sixteen proposals have been accepted under this provision since the legislation became effective. There is a further mechanism that allows the Minister

to direct that an EA be undertaken where he or she believes that the proposed project would have potential adverse effects and that a review would be in the public interest.

2. Fewer projects will be subject to EA, and larger projects will proceed without an EA, as a result of changes to the Reviewable Projects Regulation that have increased the thresholds for review.

The thresholds for review of project proposals were adjusted following several years of operating experience with the former levels. The objective is to ensure that the process is applied to those proposals likely to have potential significant adverse effects and to avoid requiring smaller developments that are unlikely to have significant adverse effects to go through the EA process unnecessarily. At the same time, if a smaller project has the potential for significant adverse effects, it is still possible to bring that project into the process.

Even though a smaller project may not be required to be examined through the EA process, it is still required to obtain all the requisite land use permits and authorization before proceeding. All projects also continue to be subject to the common law requiring consultation with First Nations.

3. The new Act allows for considerable political interference in the design and conduct of the EA.

The process has been designed to avoid political interference by conferring a broad range of authority on the Executive Director, who is a public servant. This person makes decisions about whether proposed projects are reviewable in the first instance and then the scope, procedures and methods of each assessment. The Executive Director oversees the preparation of the Assessment Report and then makes recommendations to decision-makers at the end of the process

The discretion given to the Executive Director to establish the terms of the assessment enables the process to be tailored to the unique features of each proposed development. In practice, there is always a Working Group with broad representation from all levels of government and First Nations that corresponds closely to the former project committees.

In terms of public consultation, there are a minimum of two public comment periods (one during pre-application and one during application review). The new legislation provides the flexibility to ensure that an appropriate level of consultation is conducted. Certainty with respect to the process results from the specific terms of reference that are ordered by EAO at the beginning of an assessment. These provisions in the Public Consultation Policy Regulation reflect a change recommended by the Environmental Assessment Advisory Committee during the consultation on the development of this regulation in 2002.

4. The new Act turns EA into a political exercise, not an independent project evaluation mechanism.

As with all government programs, the assessment process must be conducted within the limits of, and be consistent with, overall government policy, goals and direction. In addition, there are extensive program policies established in relation to more specific matters such as wildlife management, air- and watershed protection, preservation of archaeological resources and other critical areas that govern land use in the province. Various program policies related to the other types of effects that are examined – economic, social, heritage and health – will also apply. The process is based on a structure that ensures all of those policies are taken into account as potential adverse effects are examined.

It was suggested in the WCEL critique that the process has ceased to be objective. Previously the project committee was authorized to "make" the recommendation on the application for an environmental certificate – however, it was still open to government to reject the committee's findings. Under the current process, the EAO – in consultation with the Working Group – completes the final assessment report and the Executive Director submits recommendations to ministers, supported by reasons, for disposition of the application. The decision is made jointly by the Minister of Environment and the Minister responsible for the sector in which the project would be undertaken. As a result, the final decision is still made at the political level. This means that the objectivity of the process has not been affected except that the process is now entirely transparent – all documents generated by EAO, including the recommendations of the Executive Director, are posted to the website.

5. There are no independent principles to guide the EA process.

The Act and regulations still include provisions that direct how every assessment will be conducted. At the same time, guidance for EA is derived not only from the legislation but also from the policy directions established elsewhere in government. As noted above, this involves policies respecting all categories of effects – environmental, economic, social, heritage and health. The EAO has recently released a new *Fairness and Service Code* that sets out the guiding principles and services standards that will govern the conduct of every assessment.

6. Public access to EA documents will be entirely discretionary.

The EAO maintains a fully transparent process for the conduct of every assessment. The Public Consultation Policy Regulation lists 13 types of EA documents that must be accessible by the public, including the Executive Director's recommendations and reasons and the ministers' decision, within prescribed timelines. Since the new Act came into force, the EAO has adopted a practice of posting to the website additional documents that it generates such as notes of meetings.

There are, however, some limits to what is posted. For example, public comments received outside a formal comment period are not posted. In addition, access to

documents (or portions of documents) must sometimes be limited because the contents include personal or other information that may be required by law to be kept confidential. Another situation involves a request by the person making the submission to keep the document confidential. The electronic Project Information Centre has vastly improved access to information in terms of the volume of documents, the speed with which they are available, and the convenience of retrieving information online.

7. The role of First Nations in the EA process is completely marginalized.

The assertions by WCEL respecting First Nations have been superseded by decisions of the Supreme Court of Canada rendered after this legislation was enacted. The common law duties of the Crown to First Nations respecting consultation and accommodation were prescribed by the Court in the *Haida* and *Taku* decisions rendered in 2004.

Proponents are required under EAO's procedural orders to consult with First Nations. First Nations are invited to participate on the Working Group. Also, if requested, the EAO will meet separately with First Nations to consider their issues and concerns about such matters as the draft terms of reference or the review of the application.

The EAO's relationship with First Nations is described in the *Fairness and Service Code* and is based on respect for the asserted and established Aboriginal rights, including Aboriginal title, and the treaty rights of First Nations. To facilitate their participation in the process, EAO provides some capacity funding to First Nations and encourages proponents to provide additional funding for this purpose as well.

8. The new Act no longer guarantees a role for local governments and community perspectives in the conduct of the EA.

The views of local governments and community groups continue to be a key part of the review process. Local and regional governments are always invited to participate in the EA process by having representatives sit as members of the Working Group and this invitation is virtually always accepted. Community perspectives are also heard through various organizations and individuals who elect to take part in open houses, public meetings, comment periods and other forums for participation.

9. The time limits imposed will not allow for a meaningful EA to be conducted.

The prescribed time limits for review of the proponent’s application don’t include the significant amount of work that is undertaken during the pre-application stage. Because an application will not be accepted until it is complete and contains all of the information, studies and other material needed to undertake a thorough and comprehensive assessment, proponents continue to invest considerable effort in the development of the application. This also helps to ensure that there are no

suspensions of time during the application review stage as the result of missing information.

An important facet of the regulated timelines is the certainty this brings to the process. Not only the proponent but government agencies, First Nations, and other participants in an assessment will all benefit from knowing the timing for the completion of the process.

10. Environmental assessments that were commenced under the old Act will cease as soon as the new Act becomes law.

Any environmental assessment begun under the former legislation is continued under the new Act and regulations in accordance with transition provisions expressly developed for that purpose. Once new legislation is brought into force, those provisions apply. To address possible conflicts between the former and the new legislation, and to facilitate a smooth transition to the new Act, legislation will always include terms that will assist in avoiding or resolving such conflicts.

Conclusion

WCEL expressed concerns about EAO budget reductions. The EAO budget has increased each year for the past five years and provides sufficient resources to fulfill its legislative mandate. The EAO continues to evaluate its business processes to improve the effectiveness and efficiency of assessments. This includes, for example, initiatives to reduce overlap and duplication with EAs conducted under federal legislation.