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West Coast Environmental Law
DEREGULATION BACKGROUNDER

BILL 38: THE NEW ENVIRONMENTAL ASSESSMENT ACT

On May 9, 2002, the BC government introduced Bill 38, a completely rewritten *Environmental Assessment Act*. In December of 2002, the government followed up the new Act with a new set of Regulations governing environmental assessment. Taken together, the new Act and Regulations abolish the previous assessment process entirely and increase the thresholds for review, reducing the number of projects that will be subject to environmental assessment.

Bill 38 and the new Regulations are a dramatic step backward for environmental assessment (EA) in British Columbia. Specifically:

- the new Act is not open, accountable or neutral;
- the Act's application is discretionary and could be subjected to significant political interference;
- the new Regulations have increased the thresholds for review, removing even larger projects from the purview of an environmental assessment;
- the Act eliminates existing guarantees of participation by communities, First Nations, local governments, or the public;
- the new Act enables the government to decide that economic interests will prevail over environmental protection; and
- the new Act provides no certainty or consistency, either for proponents or the public.

The new *Environmental Assessment Act*, and the process by which it was drafted, signal a serious shift away from openness, transparency and accountability. The previous Act was developed in close consultation with environmental assessment specialists representing both industry and environmental groups. This new Act was developed in secret, with no consultation whatsoever.

Problems with the New Act and Regulations

1. Environmental assessment is now discretionary. There is no certainty that an EA will be conducted for reviewable projects. The new Act maintains a "Reviewable Projects Regulation" that on its face sets thresholds to identify when an EA will occur,[1] but unlike the previous Act this regulation no longer actually triggers the EA; it merely triggers an internal decision as to whether the government appointed Executive Director of the EA Office (the Executive Director) will determine that an EA is necessary. If the Executive Director considers that a project will not have significant adverse environmental, economic, social, heritage or health effects, the project can proceed without an EA (s. 10(1)(b)(ii)). The new Act does not identify a process by which this internal determination will be made, and there are no safeguards to ensure that decisions will not be politically driven.

[1] But as discussed next, those thresholds have been increased as a result of changes in a new Reviewable Projects Regulation.

EA is supposed to be a decision-making tool to ensure that projects that may have negative impacts on our environment are reviewed, and that those impacts are identified and mitigated. Under this new Act, we have no guarantee that potentially environmentally damaging projects identified by the government in its own regulation will even be assessed.

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. Unlike some environmental assessment laws, which require quick and easy screenings of minor projects, the old Act only applied to the largest projects. The new Reviewable Projects Regulation (December 2002) has further limited the purview of EA in British Columbia, by increasing the thresholds for review, including those for some of most contentious projects. For example, the threshold for mineral mines increased threefold, coal fired power generation by 2.5. Some of the changes to thresholds are shown in Table 1.

Table 1 – What's Assessed under the old and new acts?

Type of Project	Must be Assessed under the Old Act if	May be Assessed under the New Act if
New Coal Mine	Production capacity of over 100 000 tonnes/year	Production capacity of over 250 000 tonnes/year
New Mineral Mine	Production capacity of over 25,000 tonnes/year	Production capacity of over 75,000 tonnes/year
Modification of Sawmill*	Waste Increases by 10 percent	Waste Increases by 30 percent
Modification of Pulp/paper mill*	Waste Increases by 10 percent	Waste Increases by 30 percent
Expansion of Coal or Mineral Mine*	Expansion of surface area that can be disturbed by 250 hectares or over 35 percent of original mine site	Expansion of surface area that can be disturbed by 750 hectares or over 50% of original mine site
Coal, Natural Gas or Oil Fired Power Plant or Hydro-Electric Dam	Capacity of over 20 megawatts	Capacity of over 50 megawatts
Hazardous Waste Treatment Facility[2]	Treatment Capacity of over 50,000 kg per day	Treatment Capacity of over 100,000 kg per day
Short term hazardous waste storage	over 5,000 tonnes of hazardous waste stored in piles or 10,000 tonnes stored in containers	Not Required

3. The new Act allows for considerable political interference in the design and conduct of the EA. The old Act contained a number of detailed information requirements that needed to be met in an EA certificate application. It also established "project committees" with federal, provincial, and local

* Only applies if unmodified facility/mine/mill would qualify for environmental assessment
[2] Does not apply to all types of treatment plants.

government representatives. These broadly representative committees played an essential role in the satisfactory completion of the EA, by identifying and seeking further information throughout the course of the review.

The new Act abolishes the project committee structure and does not legislate either the information requirements that are to be met in the application, or how the review process is to be conducted. It merely states that the Executive Director or the Minister is to determine the scope, procedures, and methods of the EA (ss. 11 and 14).

The new Public Consultation Policy Regulation, passed in December 2002, outlines a set of "general policies" on public consultation, public notice, access to information and public comment periods; however, these are not mandatory process requirements. Under the new regulation, the Executive Director in determining the EA process, must only "take into account" the "general policies" set out in the regulation and "ensure that [the general policies] are reflected in the assessment." These provisions mean that there is very little certainty, for either proponents or the public, in how EAs will be conducted.

4. The new Act turns EA into a political exercise, not an independent project evaluation mechanism. In addition to the extensive discretion described above, the new Act requires that where an EA occurs, the review must reflect government policy as defined by the government agency or organization for the identified policy area (s. 11(3)). The intention of this provision seems to be that government can ensure that the EA supports its policy goals.

For example, the government has stated its intention to double oil and gas production in BC by 2011. Government could use the provision to dictate that an EA of a natural gas processing plant must support government's goal of doubling oil and gas production, regardless of environmental implications. Similarly, an EA for a mine proposal would presumably have to consider the Ministry of Energy and Mines stated goal of increasing investment in mineral resource development.

EA is supposed to be about identifying and addressing environmental concerns, not supporting government policy. Under the old Act, government could disregard the recommendations of an EA, but there was at least an objective assessment of the project. EA was not driven by government policy. These new provisions will permit the government to pre-ordain the results of the EA by making sure its scope, findings and recommendations are consistent with government policy. Unfortunately, environmental objectives are not always consistent with economic objectives and under this new Act, the government's short term economic objectives can easily trump environmental protection.

5. There are no independent principles to guide the EA process. This political interference issue is further complicated by the fact that the new Act no longer contains any principles or objectives to guide its application. The old Act contained a purpose section that provided independent guidance to the EA office in the conduct of the EA.[3] The new Act contains no independent principles. Rather, as discussed above, it enables the government to intervene and ensure that its current policy objectives are satisfied in the EA process. There is no independent environmental protection objective that is to be satisfied in this new process.

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[3] Section 2 stated that the purpose of the Act was to promote sustainability by protecting the environment and fostering a sound economy and social well being, to provide thorough and timely assessments, to mitigate adverse effects of projects, to provide an open, accountable and neutral process, and to provide for participation by the public and other levels of government in the conduct of the EA.

6. Public access to EA documents will be entirely discretionary. The old Act established a project registry, and contained a detailed list of EA documentation that was to be made available to the public. The new Act abolishes this Registry, renames it the Project Information Centre, and states that the Executive Director may determine which documents will be available to the public and in what form this information will be made available (s. 25). While the Public Consultation Policy Regulation states that it is a "general policy requirement" that public access be given to certain documents, this is by no means a mandated requirement, since the Executive Director is not bound to prescribe the general policies but enjoys an unfettered discretion under section 11 of the Act. This means that there is no guarantee that even basic information, such as an application, will be publicly available. It is also possible that information will only be made available electronically, and not directly available to residents in communities, as is currently the case. Given the importance of maps and diagrams to the EA process, this raises significant problems for those with limited access to computer resources.

7. The role of First Nations in the EA process is completely marginalized. Whereas the old Act involved Aboriginal governments at the project committee level, thus reflecting a commitment to a meaningful role for Aboriginal governments, the new Act removes any reference to First Nations with one minor exception: section 29 acknowledges the Nisga'a Treaty. Thus, the only Aboriginal government that is recognized in this process is the only one that has signed a modern treaty with the BC government.

This change is particularly alarming, as the BC Supreme Court has upheld the role of First Nations under the old Act. This new Act directly undercuts the court's affirmation of the role of First Nations by removing them from the process altogether.[4] By removing consideration of aboriginal rights and interests from the EA process, it means that Aboriginal governments may have no option but to go to court or to resort to public protest to ensure that their views are considered. The government's deliberate removal of a cooperative mechanism in this new Act may result in greater uncertainty and more delay for project proponents in the long run.

8. The new Act no longer guarantees a role for local governments and community perspectives in the conduct of the EA. The old Act guaranteed that community interests would be represented through the project committee, as local government representatives were participants in the EA. The public was given access to a broad range of information, and able to have input at a variety of stages along the way. Municipalities and local first nations had a right to participate in project committees that oversaw the process. The new Act has removed the project committee requirement, and has replaced it with the "general policies" set out in the Public Consultation Policy Regulation. Since the Executive Director has the discretion to determine the procedures and methods of the EA, this means that there is no guaranteed public consultation; it is only a "general policy requirement" that proponents will be required to propose a public consultation plan, or that the Executive Director will require more consultation "if warranted".

9. The time limits imposed will not allow for a meaningful EA to be conducted. The Prescribed Time Limits Regulation passed in December 2002 further to section 24 of the Act has established a time limit of 6 months for reviewing applications for an environmental assessment certificate. Where additional information requirements are placed on proponents, the clock will stop. Under the old Act, a detailed, two stage EA would take approximately 2 years (although some of this time involved the proponent

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[4] In *Taku River Tlingit First Nation* v. *Ringstad et al*, 2002 B.C.C.A 59, the BC Supreme Court held that the government had failed to consult adequately with this northern First Nation, and forced the government to reconstitute the project committee to consider whether the sustainability of the Taku River Tlingit would be affected by the mine development.

gathering information). This means that the government has slashed the amount of time it will take to conduct an EA by up to 75% or more. Combined with budget cutbacks, we have serious doubts that a meaningful government review can be completed within the government's new time frame. EA is supposed to be about guarding against irreversible environmental damage, not facilitating expeditious economic development.

10. Environmental assessments that were commenced under the old Act will cease as soon as the new Act becomes law. Generally, when laws change, projects subject to an earlier process will continue and be completed under the old process, and new proposals will be subject to the new process. In this case, the old EA process will be suspended as soon as this new Act is passed, and current proposals will immediately be subjected to the new process (s. 51(3)). The notion that the old process will be transitioned out will not occur in this case.

Final Comments

In addition to the new Act and Regulations, the budget for the EA Office is being reduced by 37 percent. While the government maintains that some of its accountability and follow-up mechanisms are being retained in the new Act, the reality is that some of these tools were rarely, and in some cases never, used. For example:

- The hearing provisions of the old Act were never invoked once; it is therefore difficult to imagine that the hearing provisions of this new Act will ever be applied by the BC government, given their new, closed-door approach to EA;
- No enforcement measures, such as monitoring or prosecution have ever occurred with respect to previously certified projects; it is similarly doubtful that the streamlined EA Office will be able to undertake follow up once projects have been approved.

Finally, we question why the government decided to completely revoke the existing law. The old Act, which only became law in 1996, was the result of a successful multi-stakeholder process, which was broadly supported by industry and environmental groups at the time. That Act had been subjected to an extensive external review in 1998, and a number of policy and regulatory changes had been made to clarify and streamline its application.

Under the old Act, over 40 projects had been certified, not one had ever been rejected by the government. In our view, any problems with the existing process should have been resolved through minor changes to the Act.

The purpose of EA is to undertake major project reviews to identify issues and ensure that the environmental implications of a proposed project are understood and taken into account before final decisions are made. By establishing a process with no independence and no neutrality, and increasing the thresholds for review, the new Act and Regulations will create a whole new set of problems in BC. The new system will be a ticket for environmental degradation, and clearly puts short-term economic development over long-term environmental protection.