



THE DEVELOPMENT-ASSESSMENT PROCESS

At the present time in the Yukon, the Canadian Environmental Assessment Act is the piece of legislation which governs environmental assessment in the Yukon. The Umbrella Final Agreement, the comprehensive land claim settled in the early 1990s, outlines a new kind of environmental assessment regime for the Yukon. The Development Assessment Process (DAP) will apply to all lands in the Yukon, and is currently being further developed by the three parties that signed the UFA.

In late 1998, the federal and Yukon governments, together with the Council of Yukon First Nations, released for public comment draft legislation respecting a new Yukon-based development assessment regime: the Yukon Development Assessment Act (the "DAP"). The Yukon Conservation Society ("YCS"), the Canadian Parks and Wilderness Society, Yukon chapter ("CPAWS - Yukon") and their legal counsel provided detailed responses to this 11th draft of the DAP. YCS and CPAWS-Yukon have also participated in workshops and other stakeholder discussions regarding DAP and related issues.

Since that time, there have been months of considerable discussion and negotiation between the relevant governments and Council of Yukon First Nations and more drafts have been generated. Yet the YCS and CPAWS - Yukon, along with the rest of the public, have been excluded from commenting on subsequent drafts of the DAP

This document focuses on five areas that the YCS and CPAWS - Yukon continue to assert as fundamental to ensuring an effective and efficient development assessment regime, particularly any new development assessment legislation for the Territory. They are:

- (i) assessment decision-making;
- (ii) stages of assessment;
- (iii) scope of alternatives;
- (iv) public involvement; and
- (v) enforcement mechanisms.

If these five areas are not satisfactorily addressed in the DAP, then it is certain that future projects and plans in the Yukon will be subjected to the same failings and mistakes that have been experienced under other federal and provincial development assessment regimes.



Framework for Yukon Development Assessment

Chapter 12 of the Umbrella Final Agreement sets out the scope and shape for new development assessment legislation to govern all lands in the Yukon regardless of whether federal, territorial or First Nation jurisdiction has application. This approach is unique in Canada. Elsewhere, the presence of both federal and provincial development assessment legislation can make it difficult for proponents as well as the public to know which requirements apply to any given project. The UFA is intended to simplify the process by placing all projects (subject to certain exceptions) under one regime.

The UFA also contains both mandatory and optional elements for the DAP, and includes a general provision to provide for any other matter required to implement the development assessment process.

Assessment Decision-Making

There are at least two key issues concerning the DAP approach to decision making.

First, the DAP fails to provide any substantive criteria for decision-making. This means that there is no minimum standard for decisions. The UFA objectives, on the other hand, set out at least four criteria that should be met by every assessment:

1. the assessment protects and promotes the well-being of Yukon Indian People and their communities and other Yukon residents;
2. the assessment recognizes and enhances, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness environment;
3. the assessment protects and maintains environmental quality and heritage sources;
4. the project is consistent with sustainable development.

The reference to alternatives in the UFA Objectives also suggests that a further decision-making criterion should be that the project represents the preferred alternative.

Second, the DAP fails to apply the process to projects based on their potential to harm the environment and communities. Instead, the DAP follows the Canadian Environmental Assessment Act (the “CEAA”) model by only triggering an assessment when a decision body is the proponent of the project or provides an authorization, land or funding.



YCS and CPAWS - Yukon take the position that if the DAP is intended to be “one act for all governments and all lands” in the Yukon, then the CEAA “trigger” approach is neither sufficient nor appropriate. While the DAP could continue to include a decision-making body that provides an authorization, land or funding, it should also provide that any government whose jurisdiction is affected should be a decision body for the purpose of development assessment. For example, if a proposed mine requires permits and land from the federal government, then it should ensure implementation of the assessment recommendations related to its jurisdiction, namely, navigable waters, air quality and fisheries. If that same mine is going to impact a local community, local wildlife and territorial highways, then the Yukon government should have the jurisdiction to deal with the assessment recommendations linked to these areas - even where it does not provide a permit, land or money to the mining project. Obviously, in this example, the two governments would need to co-ordinate their respective decision-making activities in order to reduce the time and expense required to conduct multiple assessments.

Equally as worrisome, there is currently no provision to ensure that all recommendations must be addressed by the decision-makers. This leaves a huge gap between assessment and implementation, with or without enforcement provisions.

Stages of Assessment

The DAP assessment process has potentially five stages:

- Stage 1: project screening by a local designated office (s. 50 (1));
- Stage 2: where required, project review by a local designated office (s. 51 (1));
- Stage 3: where required, project screening by the executive committee (s. 53 (2));
- Stage 4: where required, project review by a panel of the Yukon Development Assessment Board (the “Board”) (s. 57 (1));
- Stage 5: where required, referral back from the decision-maker to the executive committee or the panel for reconsideration (s.68 (b)).

It is clear that a five stage process is complex in relation to other assessment regimes and could lead to significant delays, expense and uncertainty for all parties involved in the process. One part of the process that could be deleted is the executive committee screening of a referral following a designated office review. If a project is too complex for the designated office to deal with, leading to its referral to the executive committee, then it is very unlikely that a screening by the executive committee will ever be enough to resolve the issues. At this point, the executive committee should be limited to the choice of a panel review for the project or referral of the matter back to the designated office for resolution.



Scope & Timelines for Assessing Alternatives

DAP requires a designated office, the executive committee and a panel to consider “alternatives to the project or existing project or alternative ways of carrying it out that would avoid or minimize significant adverse environmental or socio-economic effects”. While this language is reflected in the UFA, it is unclear why the drafters would insist on a consideration of either alternatives to the project or alternative ways of carrying it out. To reduce a review to a selection of one alternative seems like an unnecessarily narrow approach to environmental planning. Other jurisdictions, such as Ontario, permit a review of both types of alternatives.

YCS and CPAWS - Yukon take the position that a better approach (that would not run counter to the language in the UFA) would be avoid this type of categorization of alternatives. It is not helpful to good planning. The better approach is simply to require consideration of alternatives. This would permit a reviewing body to conduct what is regarded in the environmental planning field as the most important part of an effective development assessment. By considering alternatives, a reviewing body would determine as early as practicable in the process what purpose the project is trying to address and the options for addressing that purpose.

To meet the objectives of the UFA, the final decision on what can proceed must be based not just on what prevents negative effects, but on which approach is most socially and environmentally preferable and economically viable. We need to do more than minimize significant effects. The DAP must be about making positive choices. The UFA requires that this be done as its objectives are to not only “protect” the well-being of Yukoners but to promote their well-being, to foster beneficial socio-economic change and to enhance the traditional economy of the Yukon Indian people.

The UFA objectives also require “timely review” of projects yet this has not been included anywhere in the DAP. The rationale for “early” assessment is that it allows for a realistic consideration of various alternatives to a project before too many decisions have been made respecting project design.

Finally, the structure of the DAP is such that a proponent is discouraged from formally entering the process until its environmental review has been completed, including assessment of alternatives. YCS and CPAWS - Yukon would propose that the DAP be amended to permit an initial scoping of the review with the proponent and interested parties. This would be done prior to the documentation being submitted for a formal review such as a screening thereby preserving the permitted time for conducting such a review.



Public Involvement

The UFA provides a clear commitment to public involvement in the regulatory process. For example, the list of mandatory considerations commits the designated offices and the Board to protect “the special relationship between Yukon Indian people and the wilderness environment” and to consider “the interests of Yukon residents and Canadians outside the Yukon” (s. 12.4.2). Additionally, the UFA provides that designated offices “shall ensure that interested parties have the opportunity to participate in the environmental process” (s.12.6.1.3). It also requires that proponents before the Board shall have “consulted with affected communities” (s. 12.9.1.1) and it makes additional provision to provide for public participation in the review of projects (s. 12.19.2.11). Thus the UFA is entirely supportive of making public involvement a mandatory consideration in all DAP assessments.

In contrast to the UFA, the draft DAP does not commit to public involvement in all stages of assessment. In particular, it makes no provision for public involvement in designated office screenings or reviews. This absence is at odds with the DAP purpose of providing the public with “opportunities” to participate in the assessment process. Equally, this absence appears to be at odds with the assessment provision that public concern may trigger a review or a referral to the Board.

It has been suggested that since the UFA provides for “public or other reviews” that public participation is optional and can be superseded by another type of review. YCS and CPAWS - Yukon strongly disagree with this position. The UFA provides a clear commitment to public involvement in the regulatory process. It is not optional. Further, it is imperative that the legislation clearly set out the role and extent of public participation in the review of projects. Leaving it up to the Minister or First Nation to determine the extent of public participation on a case-by-case basis will lead to an erratic record of public involvement.

Finally, in order for the public to participate effectively in development assessment, it is vital that all information relating to a project be readily accessible in timely fashion. The YCS and CPAWS - Yukon recommend that any timelines that are put into the regulations should only take effect once the recommendation, decision or related information is put on the public registry. This will ensure prompt entry of all information and actions.



The DAP and its regulations should be further amended to include:

1. a requirement that all designated office or Board recommendations, terms of reference or other notices sent to a proponent, government or First Nation be entered promptly on the public registry;
2. opportunities for participant funding at all stages of the process;
3. a provision that if information is released after an appeal finding that it was not confidential, the timelines for that assessment should be restarted;
4. opportunity for public comment on draft terms of reference;
5. avenues for public participation in the audit/monitoring process;
6. access to all communications to and from governments to decision bodies regarding assessment matters, including decisions; and
7. the right of the public to request: reviews of plans; reviews of existing projects; and a Board compliance hearing concerning the violation of terms and conditions of a decision document.

Enforcement & Compliance

One of the greatest concerns that the YCS and CPAWS - Yukon have with the current Draft is that it does not contain any meaningful provision to require parties to comply with the DAP. Even the modest prosecution sections contained in the earlier drafts have been removed. What is left permits the Board, after determining that there may have been a violation of a term or condition of a project decision document, to recommend to the relevant decision body that a public hearing be held. In other words, assuming the Board is kept apprised of project developments, it can only signal problems or violations to the relevant decision body. The Board has no capacity to require compliance with the DAP provisions. In the view of YCS and CPAWS - Yukon, there is little point in expend substantial time and money on assessment review if there is not an adequate mechanism in place to ensure the accepted terms and conditions are in fact implemented.

The YCS and CPAWS - Yukon understand that the federal government has determined that enforcement provisions are not necessary in the DAP since there are such provisions contained in the statutes that govern decision bodies. With respect to the First Nations which do not have regulatory legislation in place, the federal government is confident that such legislation can be drafted and put in place prior to the implementation of DAP.



This approach is wrong. It assumes that legislation which governs decision bodies will give them the power to require compliance with all aspects of a project that has been screened or reviewed under the DAP. One need look no further than the Department of Fisheries and Oceans to see the shortcoming of this assumption. There the Minister can issue an authorization under section 35 of the Fisheries Act permitting the alteration or destruction of fish habitat. Under the proposed DAP, the DFO authorization would be required to contain all terms and conditions that a proponent must comply with, thus extending beyond matters related to fish and to all aspects of the project. Yet DFO has no expertise, mandate, or resources to enforce non-fisheries matters. Therefore, a project could be in non-compliance and there would be no practical recourse to address the issue. It makes no sense to set out good planning in one piece of legislation and leave the enforcement of good planning to the existing legislation that was regarded as inadequate to promote good planning in the first place.

It is also inappropriate to rely for enforcement on other instruments like Impact Benefit Agreements and other contracts between the proponent and select parties. They typically are not third party (publicly) enforceable, or even publicly available.

The proposed DAP approach to enforcement also runs counter to other provincial assessment regimes such as those for Ontario, Manitoba and British Columbia that have compliance mechanisms. Indeed, the 1995 British Columbia Environmental Assessment Act contains monetary penalty and imprisonment provisions for a person who does not comply with a project certificate of approval or an order of the minister. It has been demonstrated time and again that provisions such as these represent best incentive on the part of proponents to comply with the legislation. Indeed, during discussions with provincial officials, the YCS and CPAWS - Yukon heard from them that in the absence of an enforcement mechanism there was little reason to bother with an assessment in the first place. At this point, the federal government, and perhaps others, seem prepared to negotiate a development assessment regime that is fundamentally flawed and ineffective. The YCS and CPAWS - Yukon strongly recommend that the DAP contain penalty provisions for non-compliance as well as a civil right of action by the public against a proponent or relevant government authority for failure to comply with the requirements of a decision document.