

**Building an Effective Yukon Development Assessment Process:
Report on the Draft Yukon Development Assessment Act**



By the Yukon Council on the Economy and the Environment

February 1999



**YUKON COUNCIL ON THE ECONOMY
AND THE ENVIRONMENT**

Yukon Government Executive Council Office
P.O. Box 2703, Whitehorse, Yukon Y1A 2C6
E-mail: ycee@gov.yk.ca

March 22, 1999

"This letter was forwarded with the Report on the Draft Yukon Development Assessment Act to a mailing list of approximately 175 individuals and/or associations."

For your information, enclosed is a copy of the Yukon Council on the Economy and the Environment's report on the proposed Yukon Development Assessment Act (YDAA).

The Council is vitally aware that the eventual YDAA will have a profound impact on the Yukon's economy, environment, and people for years to come. We must take the opportunity now to ensure that what is put in place truly reflects the objectives required under the Umbrella Final Agreement and the needs and input of Yukon people. The difficulty and the challenges faced in drafting a proactive development assessment process that will meet the above requirements are formidable. We commend the parties in being able to develop such a thorough first draft.

In general, the Council believes that the proposed YDAA needs a substantial amount of additional work to ensure that the key objectives of certainty, efficiency, effectiveness, and fairness are clearly articulated in the legislation and the processes that are defined within it.

The Council is strongly recommending that all governments begin working together, with all Yukon people and organizations, in a proactive manner to encourage further public discussion and public-supported solutions. While such a collaborative consultation process is time consuming, it is this type of inclusive process that will ensure the development assessment legislation will more fully meet the needs of Yukon people, the Yukon economy, and the Yukon environment today and into the future.

If you have any questions or comments regarding the enclosed document, please do not hesitate to contact me through the YCEE Secretariat at (867) 667-5997 or 1-800-661-5792 local 5997 (toll free from outside Whitehorse) or at the e-mail address above. The Council will continue to push for a more inclusive process to help ensure the legislation will be effective, efficient, fair and provide certainty for all parties involved.

Jennifer Mauro
Chair



**Building an Effective Yukon Development Assessment Process:
Report on the Draft Yukon Development Assessment Act**

By the Yukon Council on the Economy and the Environment

February 1999

EXECUTIVE SUMMARY

The Yukon Development Assessment Act will be landmark legislation in the Yukon. It will have a profound impact on the Yukon's economy, environment, and people for years to come. The interest of Yukon organizations, communities and First Nations in reviewing the draft legislation and their related concerns are evidence of this fact.

The Yukon Council on the Economy and the Environment has a special interest in the proposed legislation. The Council is a round table of individuals representing the interests of the Yukon mining, business, labour, women's, environmental, municipal and First Nations' communities, and advises the Yukon Territorial Government Cabinet on matters related to the Yukon's economy and environment. It is the Council's responsibility to publicly promote and provide advice to the Cabinet on sustainable development. The Council also has a responsibility to provide advice to the Cabinet on how the Yukon can achieve both a diversified and stable economy and a healthy environment.

This report identifies key issues and concerns surrounding the potential impacts of the draft Yukon Development Assessment Act. It provides recommendations which are suggestions, not prescriptions, for how some of the issues and concerns may be addressed.

Above all else, the Council strongly encourages the Parties take the required time to achieve truly "made in Yukon" DAP legislation. This requires an improved consultation process – a collaborative one – to help ensure that the views and suggestions of Yukon people and Yukon organizations are recognized and incorporated into finalized DAP legislation.

The Council's report reflects the consensus view of its members in promoting good legislation and public policy beneficial to all Yukon people. This view is informed by a thorough and extensive review of the draft legislation. The basic premise for the YCEE's review was simple. To be most effective and efficient, development assessment should:

- be a proactive process – it should encourage enlightened early planning;
- establish clarity in its application and certainty in its procedures for the proponents of development and the public; and
- should also encourage early discussion and public consultation.

The process for establishing a Yukon development assessment act should also be a proactive and inclusive one.

The draft legislation is a product of the Yukon Umbrella Final Agreement (UFA). The UFA provides a blueprint for the design of the Yukon development assessment process (DAP). This is apparent in many aspects of the proposed legislation. In others, the Council has found that the objectives and provisions of the UFA either have not been fully met or there are other preferred alternatives for implementing them.

The Council has found many questions the legislation itself does not and, in some instances, cannot address. In the absence of any supplementary information which addresses these broader issues, a great deal of uncertainty remains for the Council with respect to the potential effects of the legislation in these other areas of regulation, policy and procedures.

The Development Assessment Process “package” is not a complete one in this respect. Much work still remains to be done in these other areas. Consequently, the Council and other groups are forced to speculate on what many of the potential impacts of the legislation might be – particularly in several critical areas:

- what is subject to assessment;
- information and consultation requirements for screening and review and their burden on project proponents;
- the extent and adequacy of the opportunity for public consultation;
- the criteria to be used in making assessment decisions;
- the time frames for project approvals; and
- the efficiency and effectiveness of project monitoring and enforcement in the absence of consolidated decision-making by governments.

The Need for Certainty

Across the Yukon, the settlement of land claims in many areas has brought new certainty to resource development and the management of the environment and resources. At the same time, the implementation of new institutional arrangements between governments and communities as a result of land claims and self-government agreements, and the prospect of devolution have introduced short-term uncertainties. These uncertainties are exacerbated by the current downturn and instability in the Yukon economy.

Yukon people, governments, businesses and organizations are all working hard to address this situation. The public expectation and the Council’s view is that DAP must do the same.

In these times, the “message” that development assessment legislation communicates must be one that produces a good news result, first and foremost, for the Yukon and those who live here. As well, the message must be positive in the eyes of the rest of Canada, the circumpolar north and around the world. It should be one that demonstrates that the Yukon has a clear development-assessment process that is effective, efficient and fair. It should be one that promotes the sustainable development of the Yukon in the broadest and most proactive way.

There is more the draft legislation can do to promote certainty and sustainable development in the Yukon. The Council recommends that more attention be given to the following key areas.

Certainty and Sustainable Development

As the basis for a development assessment process, the legislation should adopt a broader focus and orientation, and deliver on it. The objective should be to promote enlightened planning and ensure that approved projects and other undertakings make a positive contribution to the Yukon.

As proposed, the legislation goes beyond current narrow environmental assessment models to consider socio-economic as well as environmental effects. However, its focus persists in identifying significant adverse effects, and avoiding or mitigating them to the exclusion of desirable effects.

The DAP legislation should require that projects provide net long term benefits, taking into account the need:

- to maintain (and often to rehabilitate) ecosystems and ecological functions;
- to preserve the resource base;
- to protect cultural values; and
- to bring lasting social, economic and community benefits.

It is recommended that a project assessment decision should cover all aspects of concern for sustainability (social, economic, environmental), such as:

- *the acceptability of the purpose;*
- *the selection of the most desirable of reasonable alternatives;*
- *the maximization of benefits;*
- *the minimization of damage;*
- *the life cycle impacts of the project; and*
- *other criteria related to project desirability.*

Certainty of Rules and Procedures

Many important rules and procedures require further attention in the draft legislation. Proponents need to know before they begin any project planning whether they are subject to development assessment requirements and what these requirements are. For the Development Assessment Process, this means predetermining what kinds of projects are exempt, which ones are subject to screening, and which ones are subject to review.

To predetermine what level of assessment (screening or review) applies to what kinds of undertakings, one approach is to start with a list of all the kinds of undertakings subject to review-level requirements that should go directly to review without delay for screening. This would be similar in principle to the Canadian Environmental Assessment Act's comprehensive study list. However, it is also necessary to provide a fair and credible process for revising the list.

The screening process should be used as a last resort for identifying screening-level cases that should go to review.

It is recommended that prior to the proclamation of the legislation, a more reasonable public process is required to clarify and reduce the uncertainty in regulations governing what is exempt from screening, and for predetermining what level of assessment (screening or review) applies to various kinds of undertakings.

It is recommended that a fair and impartial process should be established in the legislation for:

- (i) revising the mandatory review list;*
- (ii) adding to or subtracting from the exemption list; and*
- (iii) considering applications for exemptions of particular undertakings not on the exemption list.*

Certainty and Efficiency

The greatest inefficiency is uncertainty – not knowing what’s required and how, as a proponent or as an intervenor, you fit in from the outset. In the “add-on” approach to assessment where basically everything goes to screening and screening identifies some projects that must go up for more detailed review, proponents must guess what requirements they may have to satisfy. This sends a negative and discouraging message to the proponents of development.

With a better specified approach, where kinds of projects needing review are pre-identified, proponents know up front where they stand and don’t waste time understanding the requirements of screening.

Again, efficiency is served by predetermining requirements for what must be considered and documented so assessment work can be incorporated into project, programme or policy planning rather than added at the end. Good planning and good consultation before anything is submitted will contribute to an efficient process and reduce the need for hearings.

An efficient process also makes more effective use of available resources. In assessment, this entails focusing the resources of the process on what's most significant. The objective is to make the required work efficient as well as effective, ensuring broad coverage without making it unduly onerous, especially for small proponents. By focusing attention at the level where it counts – good planning – (such as the use of class and area assessments) the burden of assessment on smaller projects is reduced and the cumulative effects of incremental undertakings better addressed.

Project exemptions, where justified, can also make for a more efficient process. One criterion for exemption might cover small-scale and moderate-scale projects that have an approved compliance with a plan that has gone through the development assessment process (or another, equally rigorous, public process).

Institutional integration is also important to process efficiency. In the absence of specific provisions, there is little to suggest that DAP will be well-integrated for efficiency of process through the firm linking of broad policy goals and program planning to project development, assessment and regulatory approvals.

While DAP proposes a one-window entry point for assessment, project decisions will not be consolidated. There appears to be little to guarantee consolidation and integration in and between decision documents since DAP functions as a status advisory to real decision-makers.

With this approach, integration and consistency across decision documents and jurisdiction is a big concern. In turn, this will also make integrated monitoring and enforcement more difficult to implement, and increase the likelihood of gaps, duplication and other inefficiencies in these areas.

It is recommended that discretion in the assessment process be minimized by providing clear sets of principles and criteria to guide discretionary decision makers (e.g. criteria and conditions for project referrals, project declarations, specified project decision criteria, etc.) and through such mechanisms as predetermined assessment requirements.

Greater emphasis and focus in the legislation should be given to planning mechanisms which can expedite the assessment process, such as the application of class and areas assessments. Greater emphasis and focus in the legislation should be given to formalizing the linkages to plans and planning processes which can reduce assessment burden on individual projects or classes of projects.

During phase two of the development of the legislation through public consultations, the institutional relationship between screening and review bodies and other regulatory bodies and authorities (e.g. Water Board) should be defined, as well as the linkages between assessment and broad policy goals and program planning.

Improved mechanisms should be established that will facilitate the incorporation of project assessment recommendations into one consolidated decision document that is enforceable and linked to a systematic and well-focused approach to monitoring of actual project effects.

Certainty in Fairness

Fairness in DAP is dependent on the assurance of a practical opportunity to participate, with good and timely information, and on confidence that the process administration and deliberations are impartial in their service to the legislation's purposes. This is not well-specified in the legislation and should be corrected.

Confidence in the impartiality of DAP could also be enhanced by the establishment of an overview and appeal mechanism for DAP to address such matters as:

- the passage of new regulations;
- the preparation of implementation policies;
- anticipated and unanticipated cases to be screened and reviewed;
- reviews to amend the exclusion and review lists; and
- the periodic review of the implementation of the legislation and regulations.

The legislation should specify the minimum notice and time for comments at each level of assessment.

The legislation should provide for timely and convenient provision of information.

The legislation should explicitly provide for the necessary resources for public notice, information distribution, and intervenor support.

The legislation should establish or utilize an impartial and well-qualified body, independent of the DAP Board to review the application of the Act and to provide impartial advice to the governments on matters of discretionary decision-making.

Certainty on Consultation

Consultation is an important element in the larger process of developing “made-in-Yukon” legislation.

The draft legislation is a complex document and has raised many difficult and troubling questions. The answers are not always obvious or apparent. Until they are addressed, the uncertainties associated with diverse interpretations and speculation about various provisions in the legislation leave important issues of substance unanswered.

The draft legislation is not self-explanatory, and has been released as a stand-alone document with only limited supporting material and discussion to explain the various provisions of the legislation. As a result, it has been very difficult for those reviewing it to determine whether their concerns with various provisions of the legislation are real or unwarranted and groundless. Issues related to the timeliness of the process, the potential for duplication in some screenings and regulatory decisions, and the current capacity of

people and institutions at the local and regional levels to make the process work effectively are symptomatic of the many questions and uncertainties that have arisen.

Uncertainties about what is in the legislation are compounded by what is not in the legislation. The legislation has left much to be further developed without any indication of what, when and how this will be done.

It is strongly recommended that the Parties responsible for the development of the DAP legislation establish the opportunity for discussion and review of the proposed legislation throughout a second phase of the development of the legislation. Discussions and meetings should be convened on an on-going basis, possibly through working groups, prior to passage of the legislation. This will allow all Yukon organizations potentially affected by the legislation to better understand its intent and consequences, and provide the opportunity to respond accordingly.

The Challenge and the Opportunity

Development assessment legislation for the Yukon represents a significant challenge at a time when the territory is experiencing profound changes to its economy and its institutions. The prospect of “made in Yukon” legislation continues to represent a tremendous opportunity for an improved, more efficient and more effective development assessment process.

The Council strongly encourages all governments to work together in a proactive manner with all Yukon people to enable further public discussion and publicly supported solutions which will contribute to legislation that more fully meets the needs of Yukon people, the Yukon economy and the Yukon environment today and into the future.

**Building an Effective Yukon Development Assessment Process:
Report on the Draft Yukon Development Assessment Act**

CONTENTS

1.0	INTRODUCTION	1
1.1	The Report	2
1.2	The Current Context	4
1.3	Building an Effective DAP	5
2.0	THE BIG ISSUES	6
2.1	Effectiveness	7
2.1.1	Development Assessment and Sustainable Development	7
2.1.2	The Importance of Planning	8
2.1.3	Certainty and the Rules of Application	9
2.1.4	Documentation Requirements for Submissions	11
2.2	Efficiency	12
2.3	Fairness	15
2.4	The Consultation and Review Process	17
3.0	SPECIFIC CONCERNS	19
3.1	Definitions [s.2]	19
3.2	Purposes [s.4]	22
3.3	Project Exemptions [s.9]	22
3.4	“Designating In” – Project Declarations [s.11]	23
3.5	Application to Plans, Proposals, Policies and Programs [s.70-73, 83]	24
3.6	Designated Offices and the DAP Board [s. 13, 19]	25
3.7	Matters to be Considered in Screenings and Reviews [s.39, s. 72 (1)]	26
3.8	Screenings [s.15, 45, 48]	27
3.9	Reviews [s.26, 46, 49, 50]	29
3.10	Panels [s.51, 52, 54, 55]	30
3.11	Class and Area Assessments [s.42]	31
3.12	DAP Decisions and Duplication	31
3.13	Link to Planning	33
3.14	Public Notice, Public Involvement and Access to Information	33
3.15	Jurisdiction	34
3.16	Monitoring and Enforcement	35
4.0	APPENDIX: List of Recommendations	36

1.0 INTRODUCTION

This report is a review of the draft Yukon Development Assessment Act by the Yukon Council on the Economy and the Environment (YCEE). It is a response to the request by representatives of the federal and territorial governments and the Council of Yukon First Nations for comments on the draft legislation released to the public for the first time in October 1998.

The Yukon Council on the Economy and the Environment has a special interest in the proposed legislation. The Council is a round table of individuals representing the interests of the Yukon mining, business, labour, women's, environmental, municipal and First Nations' communities, and advises the Yukon Territorial Government Cabinet on matters related to the Yukon's economy and environment. It is the Council's responsibility to publicly promote and provide advice to the Cabinet on sustainable development. The Council also has a responsibility to provide advice to the Cabinet on how the Yukon can achieve both a diversified and stable economy and a healthy environment.

The draft Yukon Development Assessment Act will potentially have a profound impact on both the Yukon's economy and the environment.

This report identifies key issues and concerns surrounding these potential impacts. It provides recommendations which are suggestions, not prescriptions, for how some of the issues and concerns may be addressed.

To be most effective and efficient, development assessment should be a proactive process – it should encourage enlightened early planning, discussion and public consultation. Creating development assessment legislation should involve the same process.

The Council strongly encourages all governments to work together in a proactive manner with all Yukon people to enable a public discussion which will contribute to legislation that more fully meets the needs of Yukon people, the Yukon economy and the Yukon environment.

1.1 The Report

The Council's report reflects a consensus view of its members. It does not substitute for, or in any way replace, the representations and submissions on the draft legislation made by other organizations. Like this report, they stand in their own right. However, this report is informed by these other submissions and the comments they have provided.

In particular, the Council has benefitted from reports submitted to the Development Assessment Process (DAP) Directorate by the following organizations:

Yukon Chamber of Mines – Report entitled *Phase 1 Review of Draft Development Assessment Process Legislation* by G.A. Jilson and Associates.

Yukon Conservation Society and Canadian Parks and Wilderness Society (Yukon) – Report entitled *Review of the Draft Yukon Development Assessment Act* by Birchall Northey, Barristers and Solicitors.

Association of Yukon Communities – Report entitled *Position of the Association of Yukon Communities on the Development Assessment Process*.

This report is not a compilation of the individual issues and concerns raised in these other reports. The reports and comments of these organizations should be referred to for an extensive and detailed set of issues and commentary on them. The Council's report does represent the collective interests and concerns of YCEE members in promoting good legislation and public policy beneficial to all Yukon people.

This report is not based on a legal review of the draft legislation. The members are not lawyers and the Council has not commissioned such a review. It is the diverse practical experience of the Council which provides the basis and frame of reference for the Council's review. From this perspective, many of the issues and concerns raised by the Council are not confined to the content of the legislation itself and cannot be addressed through amendment of the legislation alone. Some issues pertain to and will need to be addressed through future regulations, policies and administrative procedures.

In its comprehensive look at the proposed legislation, the Council has found many questions that the legislation itself does not and, in some instances, cannot address. In the absence of any supplementary information which addresses these broader issues, a great deal of uncertainty remains for the Council with respect to the potential effects of the legislation in these other areas of regulation, policy and procedures.

Because the Development Assessment Process “package” is not a complete one in this respect, and because much work still remains to be done in these other areas, the Council and other groups are forced to speculate on what many of the potential impacts of the legislation might be – particularly in several critical areas:

- what is subject to assessment;
- information and consultation requirements for screening and review and their relative burden on project proponents;
- the extent and adequacy of the opportunity for public consultation;
- the criteria to be used in making assessment decisions;
- the time frames for project approvals; and
- the effectiveness of project monitoring and enforcement.

1.2 The Current Context

The uncertainties associated with the draft Development Assessment Process (DAP) legislation, and many of the questions it raises and does not answer, are of particular concern to the Council at the present time. There is a concern that the draft legislation introduces many legal, administrative and procedural uncertainties at a time when the Yukon is rife with uncertainty.

The Yukon economy today is experiencing significant economic instability as a result of declining revenues, expenditures, employment in the resource extraction sector (most notably mining), and the reduced fiscal capacity of the government sector to contribute to the territory's economic activity as an engine of growth. These declines in economic activity associated with the Yukon's traditional economic strongholds have introduced into and are a feature of, structural instability in the Yukon economy. The instability and declines have had a negative ripple effect on the retail sector and other areas of the private sector.

Yukon society is also going through a period of profound social and political change. Land claims settlement in many areas has brought long-needed certainty to questions of land title and resource ownership in the Yukon. However, institutional uncertainties and confusion associated with the post-claims and devolution environment have proven challenging for all Yukon people, First Nations governments, municipalities, businesses, non-government organizations and federal and territorial government agencies. These challenges are occurring as they attempt to embrace the prospect of new approaches to land and resource planning and management, new responsibilities and new relationships between governments.

The Yukon is a small jurisdiction with limited capacity – financial, human and institutional – and adapting to these institutional changes has been difficult. The issue of capacity also has produced public uncertainties and environmental concerns regarding government's capability to enforce regulations and plan for long-term sustainability.

1.3 Building an Effective Development Assessment Process

In this setting of heightened public sensitivity to uncertainty, there are correspondingly high expectations for clearly defined rules, responsibilities and procedures that pertain to the assessment of development projects, notwithstanding an increasingly complex regulatory environment. It is with these public expectations that the proposed DAP legislation must be considered and, inevitably, evaluated.

In these times, Yukon people are sensitive to the “messages” this draft legislation communicates to those with an interest in sustainable development — those who want sound economic and environmental decision-making. They look for a development assessment process that is effective, efficient and fair. They look for an assessment process that is well-integrated with planning, management and enforcement processes, and, in so doing, avoids duplication.

The Yukon Umbrella Final Agreement (UFA) requires a “made-in-Yukon” development assessment process, consistent with the provisions of the UFA’s Chapter 12. This is both a challenge and an opportunity. “Getting it right” means more work, more discussion, and more certainty with respect to many of the issues and questions raised by the proposed legislation.

The proposed legislation is a good beginning, and owes much (as it should as an instrument of implementation) to the UFA’s Chapter 12 provisions. But there are many issues of principle and substance that need further careful thought – both in the legislation as it relates to the UFA’s objectives for development assessment, and with respect to the links between the proposed legislation and related regulations, and other institutional processes and procedures. Not all of these issues should be deferred to a later day because many have direct bearing on the content of the proposed legislation and what is intended by specific provisions. There is also much to be done to provide the level of comfort and certainty that Yukon people expect and require.

The Council is vitally aware that the DAP legislation will have profound significance in shaping and determining how the Yukon develops, both today and into the distant future. Caution, care, and full deliberation should be the hallmarks in developing this legislation. All Yukon people desire legislation that will produce a “good news” result to send a message of certainty throughout the Yukon and across the country and to ensure effective and efficient progress toward sustainability for Yukon communities and for the Yukon environment.

The Council is solidly of the view that this result can be achieved by working together through further discussion, collaboration and consultation – amongst Canada, Yukon and First Nations governments, non-government organizations and interested individuals. The comments received by the governments from many Yukon organizations are a strong indication of the good ideas that can and should be discussed further to build a better development assessment process for the Yukon.

2.0 THE BIG ISSUES

The big issues the Council has identified in the proposed legislation relate back to some of the fundamental requirements and purposes of chapter 12 – the DAP chapter – of the Yukon Umbrella Final Agreement. The Council encourages the parties to address these big issues.

The broad purpose and objectives of this chapter relate to the promotion of a development assessment process that is effective, efficient and fair – features of good assessment. With respect to each of these, the Council suggests improvements that should be made to the proposed legislation to achieve the purposes and meet the requirements of the Umbrella Final Agreement and the expectations of Yukon people.

Issues of interpretation will inevitably creep into readings of the UFA and shape understandings of what various provisions mean. After all, the draft legislation is a negotiated proposal. However, at this stage in the development of DAP legislation we suggest there is more the legislation can do to meet the promise and requirements of the UFA and to address the concerns which have been raised by others.

In addition to improving the effectiveness, efficiency and fairness of the proposed development assessment process as legislated, the Council also recommends an improved consultation process to help ensure that the views and suggestions of Yukon people and Yukon organizations are recognized and incorporated into finalized DAP legislation.

2.1 Effectiveness

2.1.1 Development Assessment and Sustainable Development

The first general concern relates to the very character and purpose of development assessment. As proposed [s.4, 39], the legislation goes beyond current narrow environmental assessment models to consider socio-economic as well as environmental effects. But it persists in focusing on identifying significant adverse effects and avoiding or mitigating them.

As the basis for a development assessment process, the legislation should adopt a broader focus and orientation. In particular, the objective should be to promote enlightened planning and ensure that approved projects and other undertakings make a positive contribution to the Yukon. The law should require that projects:

- provide net long term benefits, taking into account the need to maintain (and often to rehabilitate) ecosystems and ecological functions;
- preserve the resource base;
- protect cultural values; and
- bring lasting social, economic and community benefits.

A project assessment recommendation should cover all aspects of concern for sustainability (social, economic, environmental) such as:

- the acceptability of the purpose;
- the selection of the most desirable of reasonable alternatives;
- the maximization of benefits as well as the minimization of damage;
- the life cycle impacts of the project; and
- other criteria related to project desirability.

2.1.2 The Importance of Planning

It needs to be recognized that DAP is an important planning tool that should be used to ensure due attention to environmental, socio-economic and cultural matters at the earliest stages of a development. This will allow all the affected parties ample opportunity and flexibility to achieve the most desirable project and project outcome. The various elements of DAP must be established and configured to enable it to be an effective tool for ensuring good planning.

The ability of the proposed DAP law to serve this objective is compromised by the narrowness of purpose noted above and by the vagueness of central provisions about the process and its application. Currently, much is not specified in the proposed legislation. The result is that DAP's effectiveness as a planning tool is open to question and concern by both proponents of development and others potentially affected.

The imprecision that appears to remain throughout DAP, partly as a function of elements yet to be fully specified and developed, suggests that much will be left to regulation and the discretion of individual regulatory authorities. This threatens to allow a process that is reactive and of limited predictability. This is a result far removed from the goal of a DAP that anticipates developments and gives proponents clear and certain guidance.

In the Council's view, the central purpose of the legislation should be to get proponents to develop their project ideas in a way that incorporates environmental, economic, social and cultural concerns. It should encourage proponents to select, design and propose projects that are of the greatest benefit to the long term interests of the Yukon, its people and its environment. Ideally, the formal parts of the process – the screenings and reviews should only be needed to check what was done. The real assessment work should be integrated efficiently in the planning process before any proposal is submitted.

This can only happen if the proponents know what is expected of them – what they have to think about in their planning – from the beginning. Therefore, reasonable certainty about what is expected is crucial. Two central aspects are the rules of application and the documentation requirements for submissions.

2.1.3 Certainty and the Rules of Application

Rules of application are fundamentally about certainty – what is expected and what is required. In other words, what are the rules for development assessment? For the reasons set out above, proponents need to know before they begin any project planning whether they are subject to development assessment requirements and what these requirements are. For the DAP, this means predetermining what kinds of projects are exempt, which projects are subject to screening, and which projects are subject to review.

The approach to application set out in the Umbrella Final Agreement begins with the basic rule: "all in (subject to assessment requirements) unless exempted out." This approach should be, but is not, consistently used in the proposed DAP legislation. It is desirable since it encourages all proponents of projects not clearly exempted to begin their planning with an eye to environmental and socio-economic effects. But it also depends on a fair and reasonable process for exempting insignificant projects. This way, unnecessary aggravation is avoided, and attention and resources can be focused on the cases that matter.

Exemption arrangements are not limited to establishing a reasonable initial exemption list. Not everything can be adequately anticipated. A fair process is also needed for:

- (i) adding to or subtracting from this list; and
- (ii) considering applications for exemptions of particular undertakings not on the list.

To predetermine what level of assessment (screening or review) applies to what kinds of undertakings one approach is to start with a list of all the kinds of undertakings subject to review-level requirements and immediate review without delay for screening. This would be similar in principle to the Canadian Environmental Assessment Act's comprehensive study list.

It is also necessary to provide a fair and credible process for revising the list and for early identification of individual non-listed projects that should be reviewed. The screening process should be used as a last resort for identifying screening-level cases that should go to review.

Recommendations

1. A project assessment decision should cover all aspects of concern for sustainability (social, economic, environmental) including:
 - the acceptability of the purpose;
 - the selection of the most desirable of reasonable alternatives;
 - the maximization of benefits as well as the minimization of damage;
 - the life cycle impacts of the project; and
 - other criteria related to project desirability.

2. Prior to the proclamation of the legislation, a more reasonable public process is required to clarify and reduce the uncertainty in regulations governing what is exempt from screening, and for predetermining what level of assessment (screening or review) applies to various kinds of undertakings. This entails the following:
 - (i) public consultation and review in the development of the initial exemption list; and
 - (ii) public consultation and review in the development of a list of all the kinds of undertakings that are subject to review level requirements and that go directly to review without screening.

3. A fair and impartial process should be established in the legislation for:
 - (i) revising the mandatory review list;
 - (ii) adding to or subtracting from the exemption list; and
 - (iii) considering applications for exemptions of particular undertakings not on the exemption list.

2.1.4 Documentation Requirements for Submissions

If proponents are to do properly enlightened and efficient planning from the outset, they need to know what documentation will be expected of them upon submission of proposals at the screening and review levels. Reasonable basic requirements are now set out in the proposed legislation, chiefly in s.39, which outlines the matters to be considered in screening [s.39(1)] and reviews [s.39(2)]. These requirements will, however, need to be adjusted if the process is to seek net benefits as recommended above.

Other needed improvements include:

- more clarity regarding the requirement to consider reasonable "alternatives to the project" and "alternative ways of carrying it out" [s.39(1)(c)]; and
- the addition of an item requiring consideration of the proponent's efforts to consult with affected and concerned interests, and to respond to any concerns raised.

Such documentation requirements, which apply to all cases, are unavoidably general. More detailed generic documentation guidelines are needed, especially for common kinds of projects. The crucial point, however, is these guidelines should be prepared in anticipation of new projects so they can guide project planning. Developing assessment guidelines only after projects have already been planned and proposed is a recipe for delay and aggravation.

Recommendation

4. Prior to the proclamation of the legislation, there should be specific public consultation and review of the assessment requirements which will apply at the screening and review levels to ensure that the broad purposes of the process are met and that proponents know what is expected of them.

2.2 Efficiency

An efficient process is one that avoids unnecessary delay. One big factor in this is minimizing uncertainty.

The discussion on effectiveness carries over into concerns about the efficiency of the development assessment process. The greatest inefficiency for a proponent is uncertainty – not knowing what’s required and how you fit in from the outset.

In the “add-on” approach to assessment where basically, everything goes to screening and screening identifies some projects that must go up for more detailed review, proponents must guess what requirements they may have to satisfy. This sends a negative and discouraging message to the proponents of development. With a better specified approach identifying projects needing review in advance, proponents know up front where they stand and don’t waste time understanding the requirements of screening.

Again, efficiency is served by predetermining requirements for what must be considered and documented (see 2.1 above) so assessment work can be incorporated into project, programme, or policy planning rather than added at the end.

Screening and review should focus on making sure that proponents did a good job of considering environmental and socio-economic factors in their project planning, rather than on making them do a good job of addressing these matters later, through the process of screening and review. Good planning and good consultation before anything is submitted will contribute to an efficient process and reduce the need for hearings.

While efficiency is well served by predetermination of requirements, this is not always feasible or reasonable. Some flexibility is also needed. The need for flexibility is often used as an excuse for including plenty of openings for discretionary decision-making by the relevant authorities. This may lead to arbitrary, unfair, inconsistent and unpredictable decisions.

Solutions include:

- minimizing openings for discretion;
- providing clear sets of principles to guide discretionary decision-makers;
- enabling effective public scrutiny; and
- establishing a transparent and fair process for addressing discretionary decisions.

An efficient process makes effective use of available resources. In assessment, this entails focusing the resources of the process on what's most significant. A process which succumbs to extensive coverage of trivial details, delays in decisions for no evident gain, and failure to ensure the assessment findings are incorporated in practice, sends out the most negative of messages and undermines its own integrity with the absence of broad public support.

The objective is to make the required work efficient as well as effective, ensuring broad coverage without making it unduly onerous, especially for small proponents. One way to achieve this is by using area and policy/plan assessments and class assessments to establish a framework, and reduce assessment obligations for many smaller projects.

By focusing attention at the level where it counts – good planning – the use of class and area assessments can reduce the burden of assessment on smaller projects and better address the cumulative effects of incremental undertakings.

Project exemptions, where justified, can also create a more efficient process. One criterion for exemption might cover small-scale and moderate-scale projects that have an approved compliance with a plan that has gone through the DAP (or another, equally rigorous, public process).

Institutional integration is also important to process efficiency. In the absence of specific provisions, there is little to suggest that DAP will be well-integrated for efficiency of process through the firm linking of broad policy goals and program planning to project development, assessment and regulatory approvals, although steps are taken in this direction.

In a related vein, while DAP proposes a one-window entry point for assessment, project decisions will not be consolidated, and there appears to be little to guarantee consolidation and integration in and between decision documents (since DAP functions as a status advisory to real decision-makers). With this approach, integration and consistency across decision documents and jurisdiction is a big concern. In turn, this will also make integrated monitoring and enforcement more difficult to implement, and increase the likelihood of gaps, duplication and other inefficiencies in these areas.

Similarly, the role of institutions like the Yukon Territorial Water Board under DAP remains a point of concern and confusion that needs to be addressed. In particular, with respect to integrated decision-making, and the circumstances and conditions which would typically call for joint panels.

Recommendations

5. Minimize discretion in the assessment process by providing clear sets of principles and criteria to guide discretionary decision-makers (e.g. criteria and conditions for project referrals, project declarations, specified project decision criteria, etc.) and through such mechanisms as predetermined assessment requirements. Establish a transparent, impartial and fair process for addressing discretionary decisions and ensuring public scrutiny.
6. Bring greater emphasis and focus in the legislation to planning mechanisms which can expedite the assessment process, such as the application of class and areas assessments. Formalize the linkages to plans and planning processes which can reduce assessment burden on individual projects or classes of projects.
7. Consider the listing of projects that have an approved compliance with a plan that has gone through the assessment process as one criterion for exemption from assessment.
8. During phase two of the development of the legislation through public consultations, define the institutional relationship between screening and review bodies and other regulatory bodies and authorities (eg. Yukon Territorial Water Board), as well as the linkages between assessment, broad policy goals, and program planning.
9. Improve mechanisms that will facilitate the incorporation of project assessment recommendations into one consolidated decision document that is enforceable and linked to a systematic and well-focused approach to the monitoring of actual project effects.

2.3 Fairness

Fairness is a central consideration for DAP legislation for two main reasons. Firstly, DAP legislation is meant to change how things are done. While the intended results may bring significant benefits for everyone, there are inevitably added burdens and responsibilities. It is crucial that burdens be minimized and distributed equitably, and that responsibilities be realistic and accompanied by appropriate support.

Secondly, DAP legislation is meant to foster better informed and more open decision-making. It is intended to serve the public interest by ensuring closer and more complete attention to socio-economic and environmental effects that might otherwise be neglected. To do this well, fair opportunities must be provided for all affected and concerned interests to contribute to the decision-making in a well informed and timely way.

Therefore, fairness in DAP is dependent on the assurance of practical opportunity to participate, with good and timely information, and on confidence that the process administration and deliberations are impartial in their service to the legislation's purposes.

As noted above, assurance of practical opportunity for participation by interested and concerned parties in the main aspects of the process – screenings, reviews, discretionary decisions, development of regulations and procedures, and so on – is not now well-specified in the law. This should be corrected.

Confidence in the impartiality of DAP could also be enhanced by the establishment of an overview and appeal mechanism for DAP to address such matters as:

- the passage of new regulations;
- the preparation of implementation policies;
- anticipated and unanticipated cases to be screened and reviewed;
- reviews to amend the exclusion and review lists; and
- the periodic review of the implementation of the legislation and regulations.

This could be best be accomplished by an impartial body of people who are independent of the DAP Board, and who are well-qualified to carry out such a review function.

Recommendations

10. The legislation should specify the minimum notice and time for comments provided at each level of assessment.
11. The legislation should provide for timely and convenient provision of information including use of electronic communication mechanisms such as the electronic submission and distribution of proposals and comments, and maintenance of a continually updated and broadly accessible public registry.
12. The legislation should explicitly provide for the necessary resources for public notice, information distribution, and intervenor support.
13. The legislation should utilize or establish an impartial body, independent of the DAP Board, to review the application of the Act and to provide impartial advice to the governments on matters of discretionary decision-making. (See recommendations #3 and #5.)

2.4 The Consultation and Review Process

Consultation is an important element in the larger process of developing “made-in-Yukon” legislation. Within the Council’s membership, among the groups that the Council’s members belong to, and from the Yukon people who have spoken to Council members, there is a strong and widespread concern that the consultation on the draft legislation has been hurried. This has not allowed adequate time for Yukon people to be informed about the legislation and to understand its potential impacts, implications and practical consequences.

The draft legislation is a complex document and has raised many difficult and troubling questions. The answers are not always obvious or apparent. Until they are addressed, the uncertainties associated with diverse interpretations and speculation about various provisions in the legislation leave important issues of substance unanswered. For instance, it remains very unclear to many people what projects are “in” and what projects are excluded from the development assessment process.

The draft legislation is not self-explanatory, and has been released as a stand-alone document with only the most limited supporting material and discussion to explain the various provisions of the legislation.

Consequently, it has been very difficult for those reviewing it to determine whether their concerns with various provisions of the legislation are real or unwarranted and groundless. Issues related to the timeliness of the process, the potential for duplication in some screenings and regulatory decisions, and the current capacity of people and institutions at the local and regional levels to make the process work effectively are symptomatic of the many questions and uncertainties that have arisen.

Uncertainties about what the legislation does contain are compounded by what the legislation doesn’t contain. It leaves much to be further developed without any indication of what, when and how this will be done. For example, many regulations, administrative procedures, decision-making criteria, categories of projects, exclusion and mandatory review lists have not been addressed adequately. Most importantly, the process for addressing them has not been described.

Consultations that were done to develop the Yukon Environment Act may offer an improved model for how to proceed with further work and public consultation on the development assessment legislation. Extensive meetings and working sessions were held with various organizations directly affected by the legislation to discuss the practical implications of it. Indeed, the YCEE itself played a facilitating role in some of these discussions, in addition to the direct participation of government officials.

The upshot of this approach was to raise the level of understanding and comfort, if not outright agreement, of those who were to be potentially affected by the legislation. They were provided with an ongoing voice in the development and implementation of the legislation so they also had the opportunity to clearly understand how they would be affected by it.

Recommendations

14. The Parties should establish the opportunity for discussion and review of the proposed legislation throughout the second phase of the development of the legislation. Discussions and meetings should be convened on an on-going basis prior to passage of the legislation to allow all Yukon organizations potentially affected by the legislation to better understand its intent and consequences, and to have the opportunity to respond accordingly.
15. The standard of consultation established in the UFA should be the standard to which further development of the legislation adheres.

3.0 SPECIFIC CONCERNS

This section addresses a range of issues of common concern to the Council. In a number of instances, the Council refers to issues it raises for further clarification and discussion. For other issues, it also recommends certain changes or actions to address the identified concern.

3.1 Definitions [s.2]

Several definitions appear problematic in the draft legislation.

The term “socioeconomic” needs better definition to be more explicitly comprehensive and to capture the full range of effects (positive and negative) that a project could have on a community. In this regard, the definition of sustainable development in the UFA provides some useful guidance. It refers to the social and economic wellbeing of the community and the underlying environmental health on which Yukon communities depend.

The considerations that need to be apparent in the definition of “socioeconomic” include:

- employment;
- wealth creation;
- diversification of the economic base;
- equitable distribution of benefits and burdens;
- social and cultural integrity;
- project benefits capture and distribution; and
- economic sustainability.

The term “project” as defined in the draft legislation has also generated considerable confusion and debate. Many have suggested the term “project” in the UFA conveys a meaning that is all-inclusive of development activities, while the draft legislation is more restrictive to what is cited on the inclusion list. It has been suggested that both an inclusion and an exclusion list will be confusing for project proponents.

The Council suggests following the direction provided in the UFA. There should be consistency in applying an “everything in” approach so projects are assessed unless specifically exempted on the exclusion list. This means deleting the inclusions list.

In a related vein, “plans” should be defined in a manner consistent with the UFA definition.

The term “sustainable development” has significant meaning for the development assessment process. The UFA’s definition of “sustainable development” should be explicitly adopted.

Concern has arisen over the inclusion of “compensation” in the definition of “mitigation.” Typically in environmental assessment, compensation is considered a last resort alternative to “mitigation” where mitigative measures appear ineffective or impractical. It is suggested that the definition of “mitigation” be revised to exclude reference to “compensation.”

The distinction between the stages “screening” and “review” could be clearer to those reading the legislation without having to refer the main body of the legislation to discern the difference. Indeed, definitions for these terms are provided in “Fact Sheet 11” of the DAP public consultation package as part of the “Glossary of Commonly Used DAP Terms.” As with other terms in Fact Sheet 11, the Council suggests including definitions of the terms “screening” and “review” in the definitions section of the legislation to provide greater clarity in the distinction between these two stages.

The term “public” is often confusing as it is applied in the legislation. It should be defined in relationship to “community”, Yukon Indian people, and Yukon First Nation so the distinctions between the terms are clear and the interests of all Yukon people are recognized.

Recommendations

16. The Parties should add or revise the following definitions:

“socioeconomic” defined to be more explicitly comprehensive in scope so as to better capture the full range of effects (positive and negative) that a project could have on a community;

“projects” defined to be consistent in applying an “everything in” approach so projects are assessed unless specifically exempted on the exclusion list;

“plans” defined to be consistent with the UFA definition and to provide explicit meaning about what is being referenced;

“sustainable development” to be consistent with UFA’s definition;

“mitigation” defined to exclude compensation;

“screening” and “review” defined in a manner consistent with their application in the proposed legislation and as set out in DAP Fact Sheet #11; and

“public” should be defined in relationship to “community”, Yukon Indian people, and Yukon First Nation so the distinctions between the terms are clear and the interests of all Yukon people are recognized.

3.2 Purposes [s.4]

The general purpose of development assessment which is set out in 12.1.1.8 of the UFA has been excluded from the purpose section of the proposed legislation. Careful consideration of socioeconomic and environmental effects, project alternatives, and mitigative measures in the design of projects is an important purpose of development assessment and should be included in this section of the legislation. Although these matters are included later in the legislation, they should be explicitly stated in the purpose section of the legislation. They should emphasize that development assessment as a planning tool requires the early submission of project proposal and the earliest consideration of these factors to introduce maximum flexibility and efficiency for all parties in the development assessment process.

The reference to “opportunities for public participation” appears weak in the purpose section. It should be amended to provide the guarantee of participation parallel to the provision for guaranteed Yukon First Nations participation established in this same section.

Recommendations

17. Amend the statement of purposes to ensure their conformity with the general purpose section of chapter 12 of the UFA.
18. Provide a provision for guaranteed public participation in the legislation.

3.3 Project Exemptions [s.9]

It is not clear what is meant in s.9(2)(c) by a “project for which the essential details have not been specified”. This should be written in plain language.

3.4 “Designating In” – Project Declarations [s.11]

The proposed legislation appears to place a great deal of reliance on the power to declare activities or enterprises as “projects” subject to assessment requirements (often known as the power to “designate in” projects). This reliance on project declarations (which may include existing projects and plans) compounds the uncertainties associated with “what is in and what is out.”

Project definitions which rely on the listing of activities in inclusion and exclusion lists are already unacceptably confusing. Greater certainty in the legislation with respect to what is subject to development assessment and what is not, should reduce the reliance on declarations which should be treated as an instrument of rare and last resort.

If the purpose of development assessment is to ensure early assessments of projects in the design stage, declarations typically undermine that objective. Due to the fact that declarations typically occur later in the assessment process, the consideration of project and public needs, and alternatives usually occurs too late to be influential or efficient. Indeed, the public accountability associated with project declarations appears weak. The procedures and requirements for declarations are vague and, as established, appear to undermine the transparency of the assessment process.

The emphasis in the legislation should be in specifying as clearly as possible what is subject to assessment (everything in) and what is not (the exemption list), thereby reducing the discretionary reliance on project declarations.

The proposed legislation limits declarations (for projects and plans) to the federal, territorial and First Nations governments.

Subject to explicit criteria for declarations, and parallel to similar provisions in the Yukon Environment Act, the Council suggests that the proposed legislation should be amended to include a mechanism for public requests for a declaration. The process for the treatment of declarations and the discretion it implies should be credible, impartial and established explicitly in the legislation.

Recommendations

See recommendations #2 and #3 above.

19. Amend the legislation to provide for public requests for a declaration, subject to explicit criteria for such an initiative.
20. Establish an impartial and transparent process for evaluation of proposals for “declarations” (ie. designating project and plans into the assessment process) and related discretionary decisions. Linked to recommendation #5 above.

3.5 Application to Plans, Proposals, Policies and Programs [s.70-73, 83]

The inclusion and treatment of plans, proposals, policies and programs in the development assessment process is voluntary and highly discretionary. Throughout the legislation there is little certainty in this area.

Notice of reasons for the refusal of a request to conduct an assessment is limited to informing other governments [s.83(1)(d)]. Classes of plans that may be reviewed by panels may be described in regulations [s.83(1)(d)] but there has been no indication from the Parties that such regulations will be developed or what they will contain. No process appears to exist for the pre-identification of plans which should be assessed. No process appears to exist for public requests of plan assessments.

There is also the apparent presumption that declarations will occur only after plans are already prepared [s.72(2)(b)]. The scope of assessments will be determined largely by the originator (proponent) and the originator of the plan can withdraw and terminate the review at any time [s.72(4)].

On this basis, it is very difficult to determine how an independent assessment of “plans” is possible given the discretionary authority that governments retain throughout the process.

No mechanism appears for the use of plan assessments in informing and streamlining subsequent assessments, such as class assessments and area assessments.

Such a mechanism could greatly enhance the efficiency of the development assessment process. It also appears that assessment recommendations only go to the requestor and originator [s.72.1(3)] to the exclusion of other public interests. Written reasons by governments for rejecting recommendations of the Board appear to be conveyed to the Board only, again to the exclusion of public interests.

In summary, it appears that little can be predicted or expected with respect to the assessment of plans, proposals, policies and programs. This approach seems at odds with the general purposes of the legislation and the application of assessment as a means of improving planning.

The Council suggests specific listing of plans or types of plans akin to its suggestions with respect to project assessments to achieve greater certainty and clarity with respect to their treatment. For example, an exclusion list could include Official Community Plans where there has been thorough and comprehensive public consultation.

The Council also suggests that the legislation’s provisions for the assessment of plans should be amended to specify public notice and information provisions, and that the legislation should contain a mechanism to enable use of plan assessments to streamline assessments of projects covered by approved plans.

Recommendations

21. Amend the legislation to reduce the broad discretion associated with the designation and treatment of plans, proposals, policies and programs. Provide for specific listing of categories of plans or types of plans on mandatory review and exclusion lists.
22. Amend the legislation to provide for public requests for plan assessments, subject to the appropriate criteria.
23. Amend the legislation to ensure public notice of plan declarations and public notice and information provisions related to plan assessments and recommendations, and refusals for plan declarations.
24. Amend the legislation to provide a mechanism so plan assessments may result in the streamlining of subsequent assessments.

3.6 Designated Offices and the DAP Board [s. 13, 19]

Designated Offices are viewed by the Council as a critical element of the development assessment process. They are the “front door”, “first contact”, so to speak and they set the screening process in motion on receipt of a proposal for the deliberations that follow. The DAP Board has a central responsibility to ensure that Designated Offices are staffed by highly competent, qualified and effective personnel.

To this end, and given the Board’s overall responsibility for most of the rules and procedures (yet to developed) that will govern the actual screenings and reviews, the importance of the appointments to the Board cannot be overstated. This should be recognized and could be conveyed in the proposed legislation by listing criteria to better ensure that the quality and qualifications of appointed Board members reflect the scope of the development assessment process and can contribute to its overall effectiveness.

Recommendations

25. Amend the legislation to include membership criteria that will contribute to the appointment of high-quality and well-qualified Board members.

3.7 Matters to be Considered in Screenings and Reviews [s.39, s. 72(1)]

The list of matters to be considered by the Designated Office, executive committee or panel of the Board provides good general coverage of purposes, need and environmental effects. But the list omits important considerations with respect to the promotion of sustainable development and its social, economic and environmental attributes.

These considerations should include:

- the acceptability of the purpose;
- the selection of the most desirable of reasonable alternatives;
- the maximization of benefits as well as the minimization of damage;
- the life cycle impacts-of the project; and
- other criteria related to project desirability associated with UFA's definition of sustainable development as embodied in s. 4(3) of the Purpose section of the proposed legislation.

For greater certainty and clarity, explicit reference of matters to be considered could also be made to public consultations which have already been conducted, although this is implied later in the legislation [s.48(1)), 49(1)].

Recommendations

26. Amend the legislation to include the following in matters to be considered in screenings and reviews:

- acceptability of the purpose;
- promotion of sustainable development and its social, economic and environmental attributes.
- the selection of the most desirable of reasonable alternatives;
- the maximization of benefits as well as the minimization of damage;
- the life cycle impacts-of the project;
- other criteria related to project desirability, and
- the extent of, and responses to, relevant public consultations conducted prior to submission of the proposal.

3.8 Screenings [s.15, 45, 48]

Screenings are basic level assessments of projects subject to development assessment. In preparing for these screenings, proponents want to be clear from the outset what is expected of them and how the process will treat them.

Considerable uncertainty remains regarding three critical questions:

- (i) What is subject to screening?
- (ii) What projects will typically be limited to screening?
- (iii) What information is required for screenings?

Future discussion on these questions is critical to the certainty of the development assessment process and the acceptability of the legislation. These questions are tied to related concerns about how “projects” are defined, the development of an exemption list, the defining of those categories of projects typically subject to screening, and those categories of project typically subject to review.

Clarity on these matters is critical to an efficient and streamlined process. If the requirements of development assessment are clear to proponents from the outset of project planning, proponents can be better prepared for screenings. They will have considered and planned for the best project alternative, assembled the necessary information, and conducted the appropriate consultations so screening is simply a public check against process requirements and decision criteria.

The Council encourages the development of common rules and procedures with full public consultation.

The Council is particularly interested in the different categories of projects that will be established and the specific procedures for each category. While it is understandable there will be some variation in these procedures across Designated Offices, the Council expects that most basic procedures will be common to all Designated Offices for each category of project and that any variations will not compromise essential consistency and harmony among regional offices.

Until rules and procedures and the categories of projects that apply in Designated Office screenings are developed and subject to public review, the development assessment process will be fraught with substantial uncertainties surrounding one of the most critical points in the process – the point of entry.

The different categories of projects and the procedures which will apply to each, are significant outstanding matters to be addressed in a timely manner. The information requirements which proponents must address for different categories of projects are among the most notable.

Notable by its absence is any reference to public notice or consultation requirements in screenings [s.45, 48] and any reference to public access to screening recommendations.

To streamline the screening process, consultation should also be encouraged in project planning and reflected in the project proposal.

Recommendations

See recommendations #2 and #4 above.

27. Amend the legislation to include the requirement for public notice and consultation in screening, and public access to screening decisions.
28. Key regulations pertaining to the project exemption list, and categories of project subject to review, should be completed and available for public consultation prior to the passage of DAP legislation. Failing that, the legislation should be amended to provide for the development of these regulations with guaranteed public participation. This should be done within 12 months of the passage of the legislation. A public review of the legislation should be required within two years of its passage.
29. Amend the legislation to provide for full and informed public consultation on the development and review of rules and procedures that will apply to the different categories of projects assessed by the Designated Offices and Executive Committee, and the information requirements associated with each level of assessment.
30. To streamline the screening process, consultation should be encouraged in project planning and reflected in the project proposal.

3.9 Reviews [s.26, 46, 49, 50]

Similar to the situation with screening, common rules remain to be developed [s.26(1)]; 26(1) and may vary for different categories of projects [s.26(2)]. Public consultation on these rules is planned [s.26(5),(6)] but no time limits are specified for the development of classes of projects and related rules and procedures following the passage of legislation. Again, this introduces considerable uncertainty with respect to what is expected of proponents with respect to such matters as information requirements.

No reference is made to public notice or consultation requirements in reviews (s. 46, 50) or to public access to recommendations.

As with screening, project consultation should be encouraged as a part of project planning and reflected in the proposal to contribute to a timely review process.

It is puzzling that the Board's executive committee must consult with governments if it is contemplating a review [s.49 (1),(2)], but is not required to do so when considering approval. It cannot be for the purposes of obtaining project-related information because the opportunity to do so is provided in s. 39(3). At minimum, this creates the appearance of a committee that functions with limited independence from the governments in certain types of decisions (the more serious and significant ones). The rationale behind this requirement should be made clear and subject to further discussion.

Recommendations

See recommendations #2, #4, #13 and #14 above.

31. Amend the legislation to include the requirement for public notice and consultation in reviews and public access to review recommendations as soon as they are submitted to governments.
32. Clarify the rationale behind the requirement that the Board's executive committee must consult with governments if it is contemplating a review [s.49 (1),(2)], but is not required to do so when considering approval.
33. To streamline the review process, consultation should be encouraged in project planning and reflected in the project proposal.

3.10 Panels [s.51, 52, 54, 55]

The Panel process generally appears to avoid duplication with CEAA and other processes [s.51, 52(1), 51(2)]. Panels, subject to their terms of reference [s.54(1)], are responsible for deciding information requirements and public participation opportunities. However, it is not clear on what basis or according to what criteria these decisions will be made. All of this remains to be determined and consulted upon [s.26(5),(6)].

As with rules and procedures that apply to screenings and reviews, the significance of these administrative tasks cannot be overstated. Until they are made public, consulted upon, and adopted, considerable uncertainty will remain in the overall development assessment process. As with screenings and reviews, the legislation should endeavour to address these matters in a timely manner.

The legislation is notably silent on some standard concerns. These include the opportunity for public review of draft terms of reference for panels before they are finalized, and provision of adequate resources for poor but important parties to make their case (e.g. intervenor funding). These should be provided for in the legislation and refined in future discussions associated with the development of administrative procedures.

The proposed legislation makes provision for shared public proceedings with other regulatory or assessment bodies. But it is not clear what bodies are being referred to (the Water Board?) and under what circumstances shared proceedings would occur.

As with the Designated Offices, and the executive committee, the Panel's recommendations appear to be conveyed to the proponent and decision bodies, and not to the public [s.55(3)]. As with other recommendations of this nature in the proposed legislation, this deficiency needs to be addressed.

Recommendations

See recommendation #14.

34. Include, in the legislation, opportunities for public review of draft terms of reference for panels and provision of adequate resources for important parties requiring financial assistance to make their case in panel hearings.
35. Clarify the provision for shared public proceedings with other regulatory or assessment bodies, under what circumstances they would occur, and how the Yukon Territory Water Board could be implicated.
36. Amend the legislation to provide for public access to Panel recommendations as soon as they are submitted to governments.

3.11 Class and Area Assessments [s.42]

Class and area assessments are anticipatory of specific projects “likely to be proposed”. The rules to be developed are not yet available and further contribute to the overall uncertainties around the development assessment process.

Broader class and area assessments, if they are timely, can streamline subsequent assessments. For instance, they can lead to the fast-tracking of approvals on projects which fall within the general terms and conditions of area and class assessments. This reduces the burden on individual proponents.

These types of assessments can potentially provide more certainty for project specific proposals, especially in project design. However, the proposed legislation fails to articulate the relationship between class and area assessments and subsequent assessments, leaving the carry-forward effect of these assessments unclear and uncertain.

Recommendations

37. Amend the legislation to specify the relationship of class and area assessments to subsequent assessments and process requirements.

3.12 DAP Decisions and Duplication

No explicit criteria exist for decisions by the Designated Office, and the executive committee and panel of the Board. Instead, factors to be considered and the possible need to take into account the purposes of the Act are outlined. There is no obligation on the Designated Office or Board to require that the best alternative is selected, or that net gains for sustainability are reasonably anticipated, or even that serious environmental effects are avoided. This should be remedied in the legislation.

There doesn't appear to be an enforceable DAP decision. Actual decision documents are under other authorizations and the DAP decision document itself is not a statutory instrument [s.57(6)].

Similar to the approach of the Canadian Environmental Assessment Act (CEAA), superadded powers are provided to allow application of conditions of approval through other legal instruments. In the proposed legislation, DAP conditions of approval are to be applied under other federal authorizations [s.58(1)] or territorial authorizations [s.58(3)] or First Nations authorizations [s.58(5)], or mutually [s.61(4)]. These authorizations will be enforceable under DAP only as a provisional and temporary regime to enable the transition for each government to develop its own authorizing instruments (regulations, laws).

Unless the approach is changed, a wide range of ill-coordinated regulatory decisions will continue to be the principle tool for final and enforceable decisions under DAP. No provision has been made for consolidation of DAP recommendations in one enforceable decision. Some provisions have been made to encourage integration consistency of Decision Documents between Decision Bodies, but multiple documents in the form of other federal, territorial and First Nations authorizations remain the result in the proposed legislation.

Decision documents must cite reasons for departing from DAP recommendations [s.57(3)]. However, the terms and conditions of these documents may conflict [s.59(3)] or there may be further inconsistencies in other federal or territorial regulatory permits [s.63(1)].

Superadded powers appear to apply only to mitigation provisions [s.58] and requirements for monitoring are not covered [s.67].

The proposed approach represents a major disappointment for a process that began with the public anticipation of consolidating and streamlining existing decision-making processes. On this matter, it is difficult to perceive how the proposed legislation offers any improvement on existing environmental assessment processes in the Yukon.

It was expected by many that a common regime would lead to a common, consistent and consolidated process, decision and result. This is not the case with the proposed legislation and represents a major setback from what was expected by the Council.

Recommendations

See recommendation #1 and #9 above.

38. If provision for superadded powers are retained in the legislation, include provisions for monitoring.

3.13 Link to Planning

The current link between DAP and land use planning is weak. Land use planning commissions advise DAP screening and review as to whether projects are in conformity with plans [s. 65(1)]. But while conformity is encouraged, it is not required [s. 65(2), (3)].

There appears to be no explicit anticipation that Regional Land Use Plans or other plans – such as Official Community Plans - may be designed to provide explicit guidance for DAP projects. There appears to be no explicit anticipation that they may set out more streamlined processes for planning, assessment and approval of projects that conform with the objectives and other requirements in the planning area.

There is no explicit anticipation of links between Regional Land Use Plans and area assessments. The net result is that DAP as a planning instrument is weakened by its tenuous links to the external planning processes that could inform and guide it.

It is not clear whether Regional Land Use Plans themselves will be subject to development assessment.

Recommendations

See recommendations #6 and #13.

39. Establish a clear and certain relationship in the legislation between Regional Land Use Plans and DAP with respect to application.

3.14 Public Notice, Public Involvement and Access to Information

Section 3.3 above raises a number of concerns related to fairness. These include issues related to public notice, public involvement and access to information.

Access to Designated Office and Board recommendations is available through the public registry, but no mention is made of the timeliness of posting (s. 79). This should be corrected because many critics assert that failure to provide information in a timely way has made the federal environmental assessment registry essentially useless.

The issues of confidentiality of information will emerge for some proponents and intervenors with respect to the information that they provide for assessment. If the development assessment process is to be a public and transparent one, all information should be made public. This may entail limiting the information required of some proponents if it is of a confidential nature – information that if made public could be seriously detrimental to a proponent's commercial interests. Similarly, some traditional knowledge may be of a confidential nature. These matters should be discussed through

public consultations on information requirements.

No provision has been made in the legislation for a DAP advisory or monitoring board to independently deal with public requests for declarations, development of guidelines, rules and regulations, and auditing of the DAP process (the proposed five-year review). This should be corrected.

Finally, public participation throughout the DAP process should ensure the interests of all Yukon people, as those who have the most to gain or lose from development in territory, are given full and effective hearing.

Recommendations

40. The legislation should specify that access to Designated Office and Board recommendations available through the public registry should be posted in a timely manner.
41. The confidentiality of information should be discussed in future public consultations on information required and submitted.
42. The legislation should ensure that the interests of all Yukon people, as those who have the most to gain or lose from development in the territory, are given full and effective hearing. This should be discussed in future public consultations through the phase two development of the legislation.

3.15 Jurisdiction

The scope of development assessment and the purposes which guide it give the Yukon Government and Yukon First Nations a significant stake in the assessment process. Of prime interest are such matters as the net long term benefits of projects, the need to maintain ecosystems and ecological functions, the conservation of the resource base, the protection of cultural values, and the capture of lasting social, economic and community benefits.

However, given the Yukon's limited jurisdiction and the absence of regulatory instruments in many of these areas, the Yukon is seriously constrained in its ability to affect and implement project decisions which it deems to be in the best interests of Yukon people.

The failure of the legislation to provide for a consolidated and enforceable decision document exacerbates this problem. A consolidated enforceable decision document would help to overcome this difficulty.

In addition, the legislation fails to recognize the significant jurisdictional interest of Yukon communities in project outcomes and project decisions. The relevant jurisdictional interest and authority of Yukon municipalities pertaining to the screening and review of project applications, and the issuance of a decision document, should be recognized in the legislation.

Recommendations

See recommendation #11 concerning a consolidated and enforceable decision document to strengthen Yukon jurisdictional authority.

43. Recognize the interest of Yukon municipalities in the screening and review of project applications and the authority of municipalities as it relates to the issuance of a decision document.

3.16 Monitoring and Enforcement

As we have indicated above, there is broad concern that multiple decision documents will give rise to less effective and efficient monitoring, and enforcement of specific project effects. Well-focused monitoring which is especially important in the Yukon given the area to be covered and the limitations of human and financial resources, will also be difficult to achieve with multiple decision documents.

In addition to project-specific monitoring, the legislation should provide for periodic high-level monitoring on a broad territorial basis. This will help to determine whether the assessment process is achieving the general purposes established for development assessment in the law.

Recommendations

See recommendation #11 concerning a consolidated and enforceable decision document to support effective and efficient monitoring and enforcement.

44. Amend the legislation to provide for periodic monitoring of the territory-wide impacts of the development assessment process. Amend the legislation to provide for an evaluation of the assessment process to determine whether DAP is achieving the purposes of the legislation and other indicators of sustainable development.

**Building an Effective Yukon Development Assessment Process:
Report on the Draft Yukon Development Assessment Act**

4.0 APPENDIX: LIST OF RECOMMENDATIONS

1. A project assessment decision should cover all aspects of concern for sustainability (social, economic, environmental) including:
 - the acceptability of the purpose;
 - the selection of the most desirable of reasonable alternatives;
 - the maximization of benefits as well as the minimization of damage;
 - the life cycle impacts-of the project; and
 - other criteria related to project desirability.

2. Prior to the proclamation of the legislation, a more reasonable public process is required to clarify and reduce the uncertainty in regulations governing what is exempt from screening, and for predetermining what level of assessment (screening or review) applies to various kinds of undertakings. This entails the following:
 - (i) public consultation and review in the development of the initial exemption list; and
 - (ii) public consultation and review in the development of a list of all the kinds of undertakings that are subject to review level requirements and that go directly to review without screening.

3. A fair and impartial process should be established in the legislation for:
 - (i) revising the mandatory review list;
 - (ii) adding to or subtracting from the exemption list; and
 - (iv) considering applications for exemptions of particular undertakings not on the exemption list.

4. Prior to the proclamation of the legislation, there should be specific public consultation and review of the assessment requirements which will apply at the screening and review levels to ensure that the broad purposes of the process are met and that proponents know what is expected of them.

5. Minimize discretion in the assessment process by providing clear sets of principles and criteria to guide discretionary decision-makers (e.g. criteria and conditions for project referrals, project declarations, specified project decision criteria, etc.) and through such mechanisms as predetermined assessment requirements. Establish a transparent, impartial and fair process for addressing discretionary decisions and ensuring public scrutiny.

Appendix: List of Recommendations

6. Bring greater emphasis and focus in the legislation to planning mechanisms which can expedite the assessment process, such as the application of class and areas assessments. Formalize the linkages to plans and planning processes which can reduce assessment burden on individual projects or classes of projects.
7. Consider the listing of projects that have an approved compliance with a plan that has gone through the assessment process as one criterion for exemption from assessment.
8. During phase two of the development of the legislation through public consultation, define the institutional relationship between screening and review bodies and other regulatory bodies and authorities (e.g. Yukon Territorial Water Board), as well as the linkages between assessment, broad policy goals, and program planning.
9. Improve mechanisms that will facilitate the incorporation of project assessment recommendations into one consolidated decision document that is enforceable and linked to a systematic and well-focused approach to the monitoring of actual project effects.
10. The legislation should specify the minimum notice and time for comments provided at each level of assessment.
11. The legislation should provide for timely and convenient provision of information including use of electronic communication mechanisms such as the electronic submission and distribution of proposals and comments, and maintenance of a continually updated and broadly accessible public registry.
12. The legislation should explicitly provide for the necessary resources for public notice, information distribution, and intervenor support.
13. The legislation should utilize or establish an impartial body, independent of the DAP Board, to review the application of the Act and to provide impartial advice to the governments on matters of discretionary decision-making.
14. The Parties should establish the opportunity for discussion and review of the proposed legislation throughout the second phase of the development of the legislation. Discussions and meetings should be convened on an on-going basis prior to passage of the legislation to allow all Yukon organizations potentially affected by the legislation to better understand its intent and consequences, and to have the opportunity to respond accordingly.

Appendix: List of Recommendations

15. The standard of consultation established in the UFA should be the standard to which further development of the legislation adheres.
16. The Parties should add or revise the following definitions:
 - “socioeconomic” defined to be more explicitly comprehensive in scope so as to better capture the full range of effects (positive and negative) that a project could have on a community;
 - “projects” defined to be consistent in applying an “everything in” approach so projects are assessed unless specifically exempted on the exclusion list;
 - “plans” defined to be consistent with the UFA definition and to provide explicit meaning about what is being referenced;
 - “sustainable development” to be consistent with UFA’s definition;
 - “mitigation” defined to exclude compensation;
 - “screening” and “review” defined in a manner consistent with their application in the proposed legislation and as set out in DAP Fact Sheet #11; and
 - “public” should be defined in relationship to “community”, Yukon Indian people, and Yukon First Nation so the distinctions between the terms are clear and the interests of all Yukon people are recognized.
17. Amend the statement of purposes to ensure their conformity with the general purpose section of chapter 12 of the UFA.
18. Provide a provision for guaranteed public participation in the legislation.
19. Amend the legislation to provide for public requests for a declaration, subject to explicit criteria for such an initiative.
20. Establish an impartial and transparent process for evaluation of proposals for “declarations” (i.e. designating project and plans into the assessment process) and related discretionary decisions. Linked to recommendation #5 above.
21. Amend the legislation to reduce the broad discretion associated with the designation and treatment of plans, proposals, policies and programs. Provide for specific listing of categories of plans or types of plans on mandatory review and exclusion lists.

Appendix: List of Recommendations

22. Amend the legislation to provide for public requests for plan assessments, subject to the appropriate criteria.
23. Amend the legislation to ensure public notice of plan declarations and public notice and information provisions related to plan assessments and recommendations, and refusals for plan declarations.
24. Amend the legislation to provide a mechanism so plan assessments may result in the streamlining of subsequent assessments.
25. Amend the legislation to include membership criteria that will contribute to the appointment of high-quality and well-qualified Board members.
26. Amend the legislation to include the following in matters to be considered in screenings and reviews:
 - acceptability of the purpose;
 - promotion of sustainable development and its social, economic and environmental attributes.
 - the selection of the most desirable of reasonable alternatives;
 - the maximization of benefits as well as the minimization of damage;
 - the life cycle impacts-of the project; and
 - other criteria related to project desirability, and
 - the extent of, and responses to, relevant public consultations conducted prior to submission of the proposal.
27. Amend the legislation to include the requirement for public notice and consultation in screening, and public access to screening decisions.
28. Key regulations pertaining to the project exemption list, and categories of project subject to review, should be completed and available for public consultation prior to the passage of DAP legislation. Failing that, the legislation should be amended to provide for the development of these regulations with guaranteed public participation. This should be done within 12 months of the passage of the legislation. A public review of the legislation should be required within two years of its passage.
29. Amend the legislation to provide for full and informed public consultation on the development and review of rules and procedures that will apply to the different categories of projects assessed by the Designated Offices and Executive Committee, and the information requirements associated with each level of assessment.

Appendix: List of Recommendations

30. To streamline the screening process, consultation should be encouraged in project planning and reflected in the project proposal.
31. Amend the legislation to include the requirement for public notice and consultation in reviews and public access to review recommendations as soon as they are submitted to governments.
32. Clarify the rationale behind the requirement that the Board's executive committee must consult with governments if it is contemplating a review [s.49 (1),(2)], but is not required to do so when considering approval.
33. To streamline the review process, consultation should be encouraged in project planning and reflected in the project proposal.
34. Include, in the legislation, opportunities for public review of draft terms of reference for panels and provision of adequate resources for poor but important parties to make their case (e.g. intervenor funding) in panel hearings.
35. Clarify the provision for shared public proceedings with other regulatory or assessment bodies, under what circumstances they would occur, and how the Yukon Territory Water Board could be implicated.
36. Amend the legislation to provide for public access to Panel recommendations as soon as they are submitted to governments.
37. Amend the legislation to specify the relationship of class and area assessments to subsequent assessments and process requirements.
38. If provision for superadded powers are retained in the legislation, include provisions for monitoring.
39. Establish a clear and certain relationship in the legislation between Regional Land Use Plans and DAP with respect to application.
40. The legislation should specify that access to Designated Office and Board recommendations available through the public registry should be posted in a timely manner.

Appendix: List of Recommendations

41. The confidentiality of information should be discussed in future public consultations on information required and submitted.

42. The legislation should ensure that the interests of all Yukon people, as those who have the most to gain or lose from development in territory, are given full and effective hearing. This should be discussed in future public consultations through the phase two development of the legislation.

43. Recognize the interest of Yukon municipalities in the screening and review of project applications and the authority of municipalities as it relates to the issuance of a decision document.

44. Amend the legislation to provide for periodic monitoring of the territory-wide impacts of the development assessment process. Amend the legislation to provide for an evaluation of the assessment process to determine whether DAP is achieving the purposes of the legislation and other indicators of sustainable development.