



## Site C Dam – the environmental and regulatory process

**Summary:** The Site C Dam will be subject to both provincial and federal government environmental and regulatory processes. These processes are unlikely to stop the Site C Dam from being built, even given the project's severe environmental, social and cultural impacts. The provincial environmental assessment process is weak, lacks independence, and lacks meaningful requirements for public participation and government-to-government engagement with First Nations. It is not required to examine the cumulative, spin-off environmental effects of Site C, and when it does consider these impacts, it often does an inadequate job. While federal environmental assessment is somewhat stronger in these regards, it is unclear whether there will be a federal assessment because Ottawa is planning to give this responsibility to the province. In addition, BC's new *Clean Energy Act* will eliminate the independent oversight of the BC Utilities Commission for the Site C Dam, and establishes a planning process for renewable electricity that is likely to be hobbled in its ability to truly and comprehensively plan for BC's energy future because the government has already determined that it will move ahead with Site C.

### SITE C PROJECT

The proposed Site C Dam will flood over 5000 hectares of Treaty 8 First Nations' territories, creating a reservoir over 80 kilometres long, and deeper in some locations than Vancouver's tallest skyscraper. The dam will further disrupt the flow of the Peace River that has already been disturbed by two other dams. It is a massive, landscape-changing project that will have lasting and significant environmental, socio-economic, and cultural impacts, and which ought to be subject to the most comprehensive environmental and regulatory process possible.

### BC'S PROPOSED PROCESS TO APPROVE SITE C

The BC government has established a five stage process to move the Site C Dam proposal from the drawing board to regulatory approval. Stage 1 consisted of a determination of whether the project is feasible, based on existing studies. Stage 2 involved "consultations with the public, stakeholders, communities, Aboriginal groups and property owners", and a technical review that included "field studies to better understand current conditions related to the physical, biological and socio-economic environment, and to gather engineering and technical information regarding the design, construction and operation of the potential project."<sup>1</sup> The BC government has recently announced that it is in favour of the Site C Dam and that it is proceeding to Stage 3, the Environmental and Regulatory Review (discussed below), which the government expects to take two years. The government indicates that Stage 3 will include refining the project design, "[c]onsulting with Aboriginal groups, the public, communities and property owners", as well as "[a]dvancing environmental and socio-economic studies from baseline work to impact assessment, including measures to avoid or mitigate impacts." Stage 4 will follow the regulatory review and approval, and will consist of detailed design and engineering work, and Stage 5 is the Site C Dam's construction. The BC government has indicated that construction of the dam will depend on

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<sup>1</sup> BC Hydro, *Peace River Site C Hydro Project – Stage 2 Summary Report*, Fall 2009, available at [http://www.bchydro.com/planning\\_regulatory/site\\_c.html](http://www.bchydro.com/planning_regulatory/site_c.html).

ensuring that the Crown's constitutional duties to First Nations are met. The government anticipates that the dam will be completed by 2020.

**The Crown's Duty to Consult First Nations.** The Site C Dam project proposal engages the jurisdiction and lawful authority of Treaty 8 First Nations. If it is built, the dam is certain to have significantly negative impacts on the ability of First Nations to exercise their constitutionally-protected Treaty rights to use the flooded land and rivers, and the areas of land surrounding the reservoir that will be affected by this development, for harvesting and many other activities.

Decision-making about this project brings into play section 35(1) of the Canadian constitution, which recognizes and affirms Aboriginal and Treaty Rights and imposes a duty of honourable consultation and accommodation on the Crown. This federal and provincial regulatory processes are separate from and subject to this constitutional duty to consult. As a result, the Crown must complete its consultation with affected Treaty 8 First Nations, in a way that fulfills the duty, before it makes a decision on the project.<sup>2</sup>

For more detailed information see West Coast's *Legal Backgrounder: Site C Dam – The Crown's Approach to First Nations Consultation*.

## **ENVIRONMENTAL ASSESSMENT PROCESS WILL NOT YIELD THE RESULTS THAT TREATY 8 PEOPLES AND OTHER COMMUNITIES NEED**

The Site C Dam is required under current provincial and federal laws (which may soon be changed) to have both a federal and a provincial environmental assessment. Environmental assessment is vitally important in evaluating and improving projects, but nobody should assume that environmental assessment will stop projects with unjustifiably high environmental costs. For example, only one project was refused out of 114 projects that completed BC's environmental assessment process since 1995 – an approval rate of over 99%.<sup>3</sup> The provincial environmental assessment process suffers from significant shortcomings. The story is the same for federal environmental assessment. Statistics available from the Canadian Environmental Assessment Agency indicate that on average, over 99% of the projects going through the federal environmental assessment process have been approved.<sup>4</sup> Federal environmental assessment panel processes (the most comprehensive process available) are better at addressing site-specific improvements and mitigation than they are at preventing projects with very high environmental costs and that would infringe First Nations Treaty Rights. This practical drawback is about to be made worse by proposed changes to the *Canadian Environmental Assessment Act*.

### **Provincial environmental assessment is weak, lacks independence, and lacks meaningful opportunity for public and First Nations participation**

BC's *Environmental Assessment Act (EAA)* has a number of serious shortcomings that give short shrift to environmental protection and to public participation in environmental decision-making. BC's environmental assessment process lacks independence, and is designed to allow for political interference in what should be an objective assessment of the potential environmental impacts of projects like the Site C Dam. BC's environmental assessments were significantly weakened in 2002, resulting in a dramatic step backward for environmental protection in the province.

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<sup>2</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 67.

<sup>3</sup> See statistics available at <http://www.eao.gov.bc.ca/Statistics.html>.

<sup>4</sup> Canadian Environmental Assessment Agency Statistical Summary Reports for fiscal years 2005 through 2009, available at <http://www.ceaa.gc.ca/default.asp?lang=En&n=4F451DCA-1>. Going further back, see also David Boyd, *Unnatural Law*, UBC Press 2003 at p.151.

**Lack of independence and political interference.** The design and scope of environmental assessments in BC is completely up to the discretion of the Executive Director of the BC Environmental Assessment Office, or the Minister of the Environment. There is no certainty as to exactly how the process will unfold, or what factors might be included in the assessment of any given project. This allows the government to limit the effectiveness of environmental assessments if it so chooses.

BC's *EAA* allows the government to step in and instruct that an assessment of a project's environmental effects must reflect government policies that apply to that type of project.<sup>5</sup> For example, the proposed *Clean Energy Act* introduced by the government in April 2010 sets the policy objectives that BC must achieve energy self-sufficiency, that it must have an electricity surplus of 3000 gigawatt hours by the year 2020, and that it will become a net exporter of electricity. A provincial environmental assessment, instead of making a recommendation about a project based purely on the project's merits weighed against the potential environmental impacts, would likely have to make its decision through the filter of these policies which lean definitively in favour of building the Site C Dam. Similarly, the government's stated goal of promoting an expansion of natural gas extraction operations in the northeast of the province could also be "reflected" in the environmental assessment, which again, would tend to favour an approval of the Site C Dam.

This political interference issue is further complicated by the fact that the current *EAA* contains no principles or objectives to guide its application. The previous version of the law, repealed in 2002, contained a purpose section that provided independent guidance to the Environmental Assessment Office on how to conduct its work.<sup>6</sup> The new *EAA* contains no independent principles. Rather, as discussed above, it enables the government to intervene and ensure that its current policy objectives are satisfied in the environmental assessment process. There is no independent environmental protection objective that is to be satisfied in this new process.

**First Nations are marginalized in the BC environmental assessment process.** The EA process is not designed to meet the requirements of the Crown's duty to consult and accommodate the First Nations. The EA legislation was changed in 2002 to remove provisions mandating the participation of First Nations and requiring cultural effects to be considered by the assessment process.<sup>7</sup> First Nations have no formal involvement at all in the BC environmental assessment process. They are treated akin to stakeholders, and have no legislated involvement in the scoping or design of the environmental assessment, the design of the First Nations consultation process, or in making the ultimate decision.<sup>8</sup> There is no requirement for environmental assessments to consider the impacts of a project on Aboriginal and Treaty Rights, although most project terms of reference do require proponents to gather information about anticipated impacts on Aboriginal interests. This information is then analysed by the Environmental Assessment Office without any input from or participation by First Nations, and the analysis is done from a non-First Nations perspective. There is also minimal funding available for First Nations to participate meaningfully

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<sup>5</sup> *Environmental Assessment Act*, SBC 2002, c. 43, s. 11(3).

<sup>6</sup> These included: to promote sustainability by protecting the environment and fostering a sound economy and social well being, to provide thorough and timely assessments, to mitigate adverse effects of projects, to provide an open, accountable and neutral process, and to provide for participation by the public and other levels of government in the conduct of the environmental assessment.

<sup>7</sup> *Kwikwetlem v. British Columbia (Utilities Commission)*, 2009 BCCA 68, paragraphs 50 to 53

<sup>8</sup> First Nations are generally consulted on the scope of environmental assessment as set out in Section 11 orders under the *Environmental Assessment Act*, as well as on the draft Application Information Requirements which specify the information that must be contained in the proponent's Application for an Environmental Assessment Certificate. However, First Nations consultation at this stage has been insufficient in many cases to satisfy the Crown's duty, from the perspective of First Nations. This failure to appropriately consult is unsurprising given that the *Act* does not require First Nations be consulted on these items or specify how First Nations must be involved in the process, in spite of the Crown's duty to consult First Nations.

in the process (which is often given with conditions attached that may conflict with the First Nation's interests).<sup>9</sup>

**Lack of meaningful public participation.** The provincial environmental assessment process does not require public hearings into the Site C Dam, and does not guarantee that the public will have meaningful opportunities to participate in the environmental assessment. BC Hydro has stated that it will conduct local government liaison, property holder consultation, and pre-design consultation through open houses, stakeholder meetings, print and online feedback forms, local consultation offices, and written submissions. It is unclear how much detailed project information will be publicly available, as the Environmental Assessment Office is not required to provide all project documents to the public. The Office is simply asked to follow general policies concerning document disclosure, which do not contain any clearly mandated requirements.<sup>10</sup> Unlike the federal environmental assessment process, there is no participant funding available for individuals or community groups.

**No requirement to assess cumulative environmental effects.** Provincial environmental assessments are not required to consider the cumulative, spin-off environmental effects of electricity projects. For Site C, these could include a huge expansion of the gas and mining industries made possible by the additional electricity, with all of the environmental impacts that go with them. These could also include the combination of Site C's effects on fish with the effects of the two previous dams' disturbances of the Peace River. While proponents do conduct cumulative effects assessments in many cases – and may do so in this case – there has been much criticism of the way in which they are carried out. For example, in certain cases the Environmental Assessment Office has permitted companies to use an oversized geographic area for the study, favouring a conclusion that the effects of the project are not significant when compared to other environmental impacts in the wide study area. In some cases, companies are allowed to consider only the incremental impacts of their project rather than the impacts of the project combined with other projects in the region.<sup>11</sup>

### **Federal environmental assessment process is better than provincial, but is under threat**

The federal government will have to make a number of decisions for the Site C Dam project to proceed, including approvals under the *Fisheries Act* (authorization for the destruction of fish and the harmful alteration, disruption or destruction of fish habitat), the *Navigable Waters Protection Act* (approval for work placed across a navigable waterway), and possibly under other legislation such as the *Migratory Birds Convention Act* (permit for the disturbance or destruction of a migratory bird or its nest). Under the current law, these decisions trigger a federal environmental assessment under the *Canadian Environmental Assessment Act*.

While the federal environmental assessment process is more rigorous than the provincial process (for example, it requires an assessment of cumulative environmental impacts, and an evaluation of alternatives to major projects being assessed), it does not guarantee an outcome that protects the environment. Given that over 99 percent of projects submitted to CEAA are approved, it seems clear that the CEAA process fails to effectively answer the question of “if” a project should proceed, focusing instead on “how” a project should be built. Moreover, the federal government is currently pursuing legislation that will dramatically weaken federal environmental assessment,

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<sup>9</sup> Carrier Sekani Tribal Council, *Critique of the BC Environmental Assessment Process from a First Nations Perspective*, p. 5, accessed at <http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf>.

<sup>10</sup> See *Public Consultation Policy Regulation*, BC Reg. 373/2002.

<sup>11</sup> Carrier Sekani Tribal Council at p. 8.

and may move soon to completely eliminate the requirement for a federal assessment of the Site C Dam.

**The Site C Dam should have a review panel – the most thorough federal environmental assessment process available.** There are three different kinds of environmental assessment process available under the *Canadian Environmental Assessment Act*. The most rigorous of these is a review panel, which includes a public hearing process and which must consider whether there are potential alternatives to the project, rather than simply assuming that the project will be built and simply attempting to mitigate the environmental impacts. For a massive project of the landscape-altering magnitude of the Site C Dam, a review panel would be the most appropriate form of federal review. In addition, as provincial environmental assessment does not require formal public hearings, a review panel may be the only way to ensure that the public and community groups have the opportunity to formally participate in the decision-making process. Even if the law changes to allow the federal government to substitute provincial environmental assessment instead of a federal assessment (as described below), a review panel would remain the most comprehensive and desirable option available for a project with environmental impacts as significant and lasting as the Site C Dam. Even with a review panel in place, there would be a need for a distinct First Nations government-to-government process to address impacts on constitutionally-protected Aboriginal and Treaty Rights, which are beyond the jurisdiction of an environmental assessment review panel (as explained below).

**First Nations consultation and federal environmental assessment.** The federal Crown owes Treaty 8 First Nations a duty of honourable consultation and accommodation in respect of the potential negative impacts of the Site C Dam on their Aboriginal and Treaty Rights. It should be noted, however, that a review panel does not have the authority to conduct First Nations consultation<sup>12</sup> or to fully assess potential impacts on Aboriginal and Treaty Rights. The *Canadian Environmental Assessment Act (CEA Act)* limits environmental assessment to impacts on *current* First Nations land uses and cultural heritage (excluding future uses),<sup>13</sup> not the full scope of potentially affected Aboriginal and Treaty Rights. The courts have held that there is a “duty to focus on the relevant issues” in consultation with First Nations.<sup>14</sup> A review panel does not have the mandate to do so with respect to Aboriginal and Treaty Rights. As a result, the federal government would need to establish, with Treaty 8 First Nations, an appropriate and meaningful process for consultation and accommodation outside of the environmental assessment process. The Crown’s duty may also require it to consult with First Nations at a high level of strategic decision-making for the utilisation of resources such as the Peace River’s waters, before it can begin a project-specific regulatory and environmental review under the *CEA Act*.<sup>15</sup> The federal government must consult First Nations on its decision as to the form of its environmental assessment and regulatory process, and certainly, on any decision to narrow the scope of its assessment or eliminate it all together as described above.

**The federal government is currently passing legislation to weaken environmental assessment.** The 2010 federal Budget (currently awaiting passage by Parliament) includes changes that significantly weaken federal environmental assessment, and that could affect the assessment of the Site C Dam. The changes allow the Minister of the Environment to avoid doing detailed environmental assessments on large projects by breaking the projects up into smaller

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<sup>12</sup> *Canada (Environment) v. Dene Tha’ First Nation*, 2006 FC 1354 at para. 35, affirmed 2008 FCA 20.

<sup>13</sup> The *CEA Act* defines “environmental effect” as including effects of changes to “physical and cultural heritage” and “the current use of lands and resources for traditional purposes by aboriginal persons.”

<sup>14</sup> *Ke-Kin-Is-Uqs v. BC (Minister of Forests)*, 2008 BCSC 1505, at para. 250.

<sup>15</sup> *Haida*, at para. 76.

pieces<sup>16</sup> – in a major move that undoes the Supreme Court of Canada’s recent decision that this is illegal under the current legislation.<sup>17</sup> This legislation is widely expected to pass, and it is unclear whether the changes will be reversed during the time in which the Site C Dam will undergo environmental assessment. In the case of the Site C Dam, it could mean that the federal environmental assessment might be limited to examining the impacts of just one part of the project, such as any new roads that might be required, ignoring the dam as a whole.

Conducting environmental assessment solely on one smaller part of a major project means, in effect, that environmental assessment will operate on the assumption that the project is going ahead. The practice of considering project purposes as well as alternative means of carrying out the project – one of the key strengths of federal environmental assessment – would be eliminated. A leaked 2009 federal government document suggests the government intends to make this change.<sup>18</sup> Consideration of alternatives and purposes has evolved over time to be one of the hallmarks of a good environmental assessment process. If the federal government decides to abandon consideration of these factors in its environmental assessment process, this will set back Canadian environmental assessment practice by decades.

**There may be no federal environmental assessment at all.** BC Hydro has indicated that “[i]t is anticipated that the project will be subject to independent federal and provincial environmental assessment processes delivered by the B.C. Environmental Assessment Office (BCEAO) and the Canadian Environmental Assessment Agency (CEAA).”<sup>19</sup> In the most recent BC Throne Speech, however, the province asked for an agreement with Ottawa to “do away” with separate federal and provincial reviews of the same project.<sup>20</sup> Since both federal and provincial processes are *required* under current law, BC Hydro’s statement that both processes are merely “anticipated” for the Site C Dam may signal that, in fact, only a provincial environmental assessment process is expected and that federal legislative change to eliminate an independent federal review is planned in response to BC’s request to Ottawa.

In addition, there are indications from the federal government that it intends to eliminate the current system in which environmental assessment is automatically triggered, in favour of a system in which it is completely up to the government’s discretion to determine whether a given project will receive an environmental assessment. Government officials could decide that no environmental assessment was needed if they deem that a project will have no significant adverse environmental effects – making a pre-judgment of the very issue that environmental assessment is designed to determine.<sup>21</sup>

If the federal Parliament passes legislation to eliminate the requirement for an independent federal environmental assessment, the federal government could then decide to accept a provincial assessment as a substitute for the Site C Dam. In short, there may be no federal environmental assessment of Site C.

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<sup>16</sup> Bill C-9, *Jobs and Economic Growth Act*, s. 2155, amending s. 15 of the *Canadian Environmental Assessment Act*.

<sup>17</sup> *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.

<sup>18</sup> A leaked Canadian Environmental Assessment Agency PowerPoint presentation from January 21, 2009 states that the “project to be assessed will be the development proposal.” This clearly signals there will be no consideration of alternatives or purposes of the project; instead, the project must be assessed as proposed.

<sup>19</sup> BC Hydro, *Fact Sheet – Stage 3 Public and Stakeholder Consultation (Site C Dam)*, available online at [http://www.bchydro.com/planning\\_regulatory/site\\_c.html](http://www.bchydro.com/planning_regulatory/site_c.html).

<sup>20</sup> British Columbia, *Speech from the Throne*, February 9, 2010, accessed at <http://www.leg.bc.ca/39th2nd/4-8-39-2.htm>.

<sup>21</sup> The leaked CEAA January 21, 2009 PowerPoint presentation states the government anticipates conducting only 200-300 EAs per year under its new regime. This can be contrasted with more than 4000 per year being conducted currently – meaning an enormous decrease in the scale of environmental oversight in Canada.

## CLEAN ENERGY ACT

The BC government has introduced a new *Clean Energy Act* that, once passed, will change the way that decisions are made about the Site C Dam.

**Planning process is not aimed at building low-impact generation.** The *Clean Energy Act* bill sets out high level requirements for a new provincial-scale “Integrated Resource Plan”, to be developed by BC Hydro, for the development of renewable power generation, conservation, and demand-reduction measures to ensure energy self-sufficiency and meet other energy objectives. Among the objectives set out in the *Act* which the new Integrated Resource Plan for renewable electricity will have to take into account are greenhouse gas emissions reductions, energy conservation, fostering technological development, and job creation. However, the *Act* does not require the Integrated Resource Plan to consider placing limitations on new power projects to address anticipated environmental or social impacts such as the effects on water flows, fish, and wildlife or on areas of high conservation value outside of existing protected areas. On the face of it, it appears as though the *Act* creates the potential for planning decisions to give short shrift to the imperative of ensuring that renewable electricity development is as low-impact as possible (which is not a required consideration), in favour of the other required objectives. None of the details of how planning will be conducted or how the public and First Nations will be involved have yet been made clear by the government of BC Hydro.

It is questionable whether this planning process will be able to deal with the Site C Dam in a meaningful way, given that the government has made clear that it intends to proceed with the project. A truly credible renewable electricity plan would consider BC’s needs (and any potential desire for export capacity) alongside viable demand-side management and energy efficiency potential, and then decide whether or not a major generation project like the Site C Dam should have a role in BC’s electricity future.

**Elimination of BCUC oversight and a politically-driven review process.** The *Act* will also eliminate the British Columbia Utilities Commission’s (BCUC) independent oversight of the Site C Dam (as well as other major projects such as the Northwest (highway 37) Transmission Line and all the Independent run-of-river projects in the 2008 Clean Power Call). The Utilities Commission has played a key role by independently evaluating BC Hydro's plans to ensure that they are truly in the public interest, in a process that is open to public participation. By exempting the Site C Dam from this oversight, and potentially excluding it from consideration in the Integrated Resource Planning process, the *Act* will trade independent review of BC's electricity planning for a politically-driven approval process.

As noted above, the energy objectives set out in the *Clean Energy Act* such as the objective of pursuing electricity exports and having a provincial electricity surplus of 3,000 gigawatt hours by 2020 may be identified by the government as goals that the environmental assessment of Site C must reflect. This fact further raises concerns about the political influence on the approval process for the dam.

This backgrounder was prepared by the West Coast Environmental Law Association, 200-2006 West 10<sup>th</sup> Ave., Vancouver, BC V6J 2B3 for education purposes only. If you require advice about the specifics of your legal situation, please contact one of West Coast’s lawyers: 1.800.330.9235.