

Annex

MABC Detailed Response

BC Environmental Assessment Revitalization Discussion Paper and Recommendations

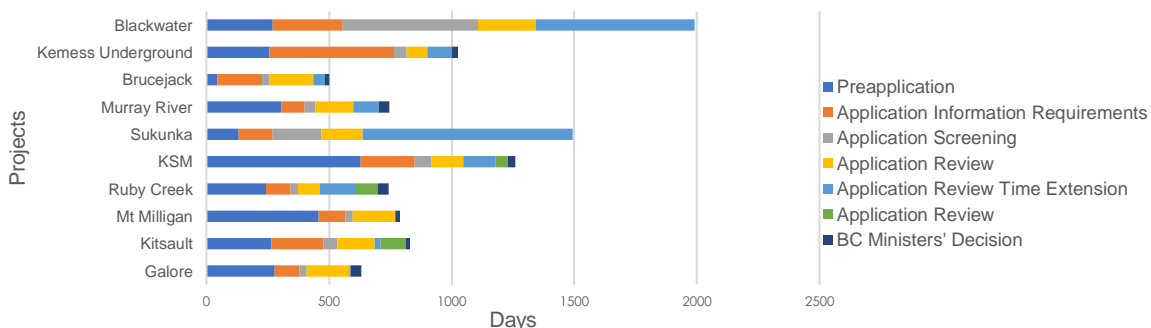
MABC respectfully offers the following comments and recommendations on key elements of the EA revitalization which our members have identified as being critical to minimizing the ambiguity and incremental risk associated with the proposed EA. Our comments are based upon the concepts presented in the EA Revitalization Discussion Paper, and are augmented by our direct engagement with EAO.

Overview of Metal Mine Project Environmental Assessments

All new major mines in British Columbia are subject to an EA under British Columbia's *Environmental Assessment Act (Act)* and represent the single largest private industry sector that is subject to project reviews under British Columbia's Act. On average, metal mine projects take over two years to undergo an environmental assessment, with many extending well beyond this time frame. It is only after this that the subsequent permitting process commences that spans multiple ministries.

Projects Submitted for Review¹:	83
Projects Not Requiring Certificate: (including 6 pre-EA Act Projects):	9
Projects Withdrawn from Review:	20
Assessments in Progress:	13
Assessments Terminated:	4
Further Assessment Required:	1
Expired:	1
Certificates Issued:	31
Certificates Refused:	4
Mine Expansions and New Mines Built:	9

**BC Environmental Assessment Timelines for Metal Mine Projects
(2004 - 2018)**



¹ Based on data collected on April 26, 2018 from <https://www.projects.eao.gov.bc.ca/project> . Data reflects all mining projects listed on from July 24,1992 to present.

Strategic Pause to Support Integrated Legislative Planning

MABC fully supports the Province's efforts to ensure British Columbians understand and have confidence in the decision-making and oversight of natural resource projects.

There is widespread agreement amongst the diverse range of stakeholders that have committed their time and energies to the EA revitalization that the objectives of advancing reconciliation and augmenting public confidence would be best served with more time. The overly ambitious timeline does not provide time for adequate consultation followed by consideration of what was heard during consultation. This concern was also expressed by the members of the Advisory Committee in the Advisory Committee's May 2018 report.

MABC therefore expresses ongoing unease with the timeframe that is allocated to the revitalization of British Columbia's EA process. Not only is it out of step with the province's Federal partner, it has prevented the clear identification of the specific issues of public confidence that require attention. As a result, EAO has been mandated to accelerate the advancement of a solution that may not be fit for purpose, nor in crucial alignment with other Provincial and Federal legislative and policy initiatives.

British Columbia's existing EA process is widely recognized as an exemplary project assessment mechanism for its rigorous, transparent, inclusive, time-bound and measured evaluation of multiple impacts, and its diligent application, monitoring and enforcement of project conditions. This is affirmed in British Columbia EAO's cooperation with other jurisdictions, notably the substitution that British Columbia's EA process currently enables under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

In its introduction, the Discussion Paper references that the EA is part of a broader provincial regulatory continuum that assesses and permits the undertaking of certain projects on the land base. In addition to Federal governance, the review and permitting of all mining projects in British Columbia involves a complex regulatory continuum that spans the Ministry of Environment and Climate Change Strategy, the Ministry of Energy, Mines and Petroleum Resources and the Ministry of Forests, Lands, Natural Resource Operations and Rural Development. Each of these ministries is pursuing inter-dependant initiatives that, if thoughtfully planned and sequenced, will serve many of the objectives sought by the EA Revitalization. Of particular relevance are the anticipated recommendations of British Columbia's Mining Jobs Task Force which should inform the EA Revitalization.

MABC remains confident that a broad understanding of the existing EA process and related permitting processes would augment public confidence in the quality and transparency of the Province's natural resource decision-making and oversight framework. This public education should be a priority before undertaking changes to the current system. MABC notes that many of the public documents released during the EA revitalization process have added to the public's confusion regarding the current EA system.

Recommendation 1

MABC strongly recommends pausing the Revitalization in order to properly sequence the myriad inter-related Provincial and Federal initiatives to ensure that they are all successful. This will enable the government to demonstrate its strategic approach to serving the interests of the voting public by achieving the following objectives:

1. To allow the interdependent Federal legislation, which is further advanced than the Provincial process, to conclude. There are essential linkages between the Provincial EA legislation and the Federal legislation that, as currently contemplated, would place the Province out of step with its Federal partner, to the detriment of the Province and its proponents.
2. To allow the Provincial government to finalize its Draft Principles to Guide B.C. Public Service on Relationship with Indigenous Peoples
3. To enable improved planning and alignment of initiatives across ministries that would enable the successful implementation of the EA legislation and related processes. In addition to the 'Ten Principles' noted above, this includes Land Use Planning, Professional Reliance, and Species at Risk legislation.
4. To support the refinement of the regulatory continuum, and the interface between the assessment and permitting and oversight functions. This will serve to reduce the duplication of processes, optimize efficiency and jurisdictional clarity for the public and government staff on assessment, permitting, compliance and enforcement, and reclamation of mining projects in the Province.

MABC continues to encourage EAO and the Ministry of Environment to engage fully with each of their regulatory counterparts in other Ministries to share the objectives of the revitalization, the outcomes of their consultations that pertain to public confidence, the proposed methodologies and approaches to the revitalization, and the implementation of the concepts set out in the Conceptual Model.

MABC understands that concerns regarding Indigenous participation in the permitting process were expressed through the consultation process. In keeping with the separation of assessment from permitting, MABC reminds the Province to ensure that these concerns are suitably directed to be remedied in the permitting process, and are not incorporated into the EA process. This will avoid duplication and the unintentional misplacement of regulatory jurisdiction.

Consent vs. Consensus [Based] Decision Making

MABC acknowledges the mandate given by Premier Horgan to each of his Ministers to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). MABC further recognizes the formation of the Reconciliation Transformation and Strategies Division within the Ministry of Indigenous Relations and Reconciliation to establish and implement a clear, cross government vision for the implementation of UNDRIP. As leaders in advancing reconciliation with Indigenous peoples through innovative partnerships and

collaboration, BC's mining sector continues to demonstrate its support for the principles set out in UNDRIP.

As MABC expressed earlier in the Revitalization process, we encourage the Province to quickly finalize and openly share their over-arching strategy and principles for implementing UNDRIP prior to advancing an important legislative or regulatory agenda that is intrinsically linked to the implementation of UNDRIP.

Amidst the changing context within which the province is addressing resource-based tenures, this is a critical and time-sensitive priority that must be addressed prior to finalizing mechanisms that relate to the permitting of uses of those tenures. This fundamental sequencing of legislative priorities will allow the province to demonstrate its planning and sound management of the province's rich resource endowment within the framework of UNDRIP.

This will also provide all Ministries with the necessary framework within which to conceive and articulate program or policy changes, to enable a transparent and informed engagement by stakeholders, provide clarity regarding the role of Indigenous groups and communities in the Province's legislative and regulatory processes, and crucially – to provide a framework within which statutory decisions can be made.

Misaligned expectations regarding participation, decision making, co-administration and the potential for non-project related disputes to be embedded early into the regulatory processes are detrimental to the functioning process that is being sought by Indigenous communities, the public and proponents alike.

In recent months there have been shifts in British Columbia regarding the understanding and expectations of Indigenous consent; in particular, in relation to resource development in British Columbia. Of particular concern to MABC is the shift toward consent as a requirement to enter the permitting process, as has been articulated within the fish farm tenure requirements. While agreement with Indigenous communities on proposed projects should be the intended outcome at all stages of the EA process, including at the Readiness Gate, we offer caution that the objective of 'seeking' consent is now outpaced by the expectations of agreement and consent. If left unchecked for any longer, it will not only compromise the objectives of this Revitalization initiative, it will result in further jurisdictional challenges within the Province and between the Provincial government and Canada.

Recommendation 2

To provide a measure of stability to the proposed legislation, the Province must clearly articulate its definitions of the following concepts which are widely referenced within the Discussion Paper:

- Consent
- Consensus decision
- Consensus-based decision making
- Co-administration

Consent can be 'the absence of objection', or at the opposite end of the spectrum it can be 'approval' (or conversely, a veto). MABC has understood from EAO representatives that

consensus-based decision making is being interpreted as the 'seeking' of consent. This process should also be articulated as the objective at the key decision gates: Readiness, Process Planning and Final Decision.

Recommendation 3

Further, the determinations of who is authorized to offer consent on behalf of parties to the process could be set out in the Government to Government agreements that form part of Building Blocks to the process. To support the objective of clarity and predictability, it should be stated that consent, as defined and given, would be irrevocable.

Recommendation 4

To ensure clarity for all parties to the EA process, and more broadly to other regulatory and assessment frameworks, these definitions should be articulated in British Columbia's overarching principles, and consistently applied across all ministries. There should be no variance in definitions and decision-making based on resource sector, as Indigenous rights span many ministries. As we are seeing currently, it is perilous to allow various initiatives to get out ahead of the Province's overarching strategy.

Clearly Articulated Decision Making Framework for All Parties

Intertwined with the definition of consent is the need for the legislation to set the basic architecture, or framework for decision making at pivotal points in the EA process. The framework will set the general process, criteria, actions and timeframes that the public and proponent can expect from each party to the EA process. Notably, this will include the framework for 'seeking' consent at these crucial decision points in the EA process, as well as the role of the Minister(s) as the ultimate decision maker at key junctures:

- Readiness Gate
- Process Planning
- Recommendation/Decision

While establishing this broad framework is important for each of these key thresholds, it is particularly important to provide procedural clarity as well as specific information requirements at the newly-established Readiness Gate stage, where the perception of added procedural risk and ambiguity is acute. MABC recognizes that certain elements of the framework should be articulated within the legislation, and that other elements will be best addressed in regulation.

To provide clarity for proponents and their investors, and all other parties to the process, MABC also wishes to emphasize the importance of legislative clarity in the definitions of the parties who are to be involved in the decision making, and confirmation that their decisions will stand throughout the duration of the EA process, and into the permitting stage of a project.

Recommendation 5

Government to Government agreements proposed within the Building Blocks of the EA should set out the authority between EAO and Indigenous nations who are party to the project's EA process. This clarity regarding authority for each party to act on behalf of their jurisdiction will

enable the durability of consensus decisions under the Act, as well as efforts to seek consensus. Importantly, it will assist in the administration of the process to resolve potential divergences of viewpoints or disputes amongst decision makers at key points in the EA process.

Recommendation 6

In determining the scope of what is being assessed under the revitalized Act, consideration should be given to a practical set of decision making criteria that balances flexibility and clarity. A lengthy list of factors could be inadvertently detrimental to the goal of clarity and an efficient, time-bound process. In addition to the factors that are being considered, due attention needs to be paid to the process for making decisions.

Recommendation 7

While elements of the EA process offer clarity, our members are very concerned about the potential for a project to be prohibited from proceeding through the EA process, as determined at the Readiness Test stage. Albeit used under exceptional situations, it obscures procedural fairness and it creates uncertainty that is a detriment to capital investment in highly prospective and beneficial exploration and mining projects in British Columbia.

With the understanding that the decision to exclude a project would be taken rarely, it would appear to be of minimal impact to adapt this provision to allow for greater fairness. Often, a proponent has the opportunity to remedy a concern raised through a change in project design or execution. The proponent should not be denied the opportunity to consider the potential issues raised at this stage and should be allowed to resume the process at this stage once they have demonstrated their consideration of the concern raised. Alternatively, the proponent should be allowed to proceed through the process, with the knowledge that the likelihood of approval may be reduced, based on clearly articulated provisions that define such an exceptionally unfavorable project. This option would align with the approach being considered under the federal *Impact Assessment Act*.

Recommendation 8

Should the province retain the ability to prevent a project from proceeding through the EA process, MABC supports the Minister(s)' assumption of responsibility for this decision, and that the reasons for decision would be clearly based on factors that are identified as being of obvious and significant detriment to British Columbians. The Minister's decision should be detailed and be posted publicly. MABC further encourages provisions to allow for appeal of the Minister's decision.

A Time-Bound Alternative Dispute Resolution (ADR) Mechanism

MABC is pleased to see the inclusion of an ADR provision within the revitalized EA process. Further, we are encouraged by indications from EAO that this process would be time-bound and consistently applied throughout the EA process, notably at key decision gates and thresholds.

Our members are also encouraged by a mechanism that would facilitate the resolution of EA-related divergences amongst Nations, as well as between the Province and Nations.

MABC understands that this provision will be enabled by the legislation and additional engagement will be undertaken to solidify the mechanism through which alternative dispute resolution will be undertaken.

MABC has further understood from our engagements with EAO that the ADR mechanism will be a mediated or negotiated process that would inform the Minister(s)'s ultimate decision at the Readiness Gate and Final Decision stages of the EA process. We are supportive of this approach which would not prejudice a proponent's ability to advance their project through the process in the absence of consensus. We strongly suggest that the legislation clearly articulate this approach in order to avoid any misperception that the ADR mechanism is an arbitration or binding arbitration process.

MABC is also concerned that the proposed process is exclusively bilateral, and does not appear to include a provision for the proponent to initiate or participate fully in the process, beyond the provision of data. The absence of procedural redress for the proponent infers that remedy is only available to proponents through legal means, which is not the preferred approach for any proponent.

Recommendation 9

MABC is encouraged by the 30-45 day timeframe for ADR that is being contemplated by EAO, and we recommend that this timeframe be legislated.

Recommendation 10

MABC recommends that the legislation articulate clearly that the ADR mechanism will be a mediation approach to issue resolution, which we are supportive of. In doing so, it will clearly define Ministerial authority and avoid any misperception that the ADR mechanism is an arbitration or binding arbitration process.

Recommendation 11

MABC recommends that the delivery mechanism that will exist to enable ADR be clearly articulated. We are open to considerations of a panel, but seek assurance that the mechanism will be established in advance of the EA process, and not on an as-needed basis which would result in delays and excessive hardship to all parties to the dispute.

Recommendation 12

MABC also recommends that a framework within the time-bound ADR process enables greater proponent access and participation.

Information Requirements, Review and Management

MABC supports the Province in its goal to incorporate scientific data with Indigenous traditional knowledge (ITK) that has been provided as the basis for project assessments. This would

include assessments undertaken by EAO in collaboration with Indigenous Nations, as well as assessments undertaken by Indigenous Nations independently. Efficient access to all information by each party to the process should be enabled by the EA process, with respect for the confidential nature of ITK.

MABC appreciates that confidence in the data is foundational, as is confidence in the analysis and interpretation of the data. In relation to scientific data gathering and interpretation, British Columbia has an established framework to certify and monitor registered and qualified professionals to ensure that appropriate rigor is applied to their work, findings and recommendations. MABC respects the Province's objective to improve Indigenous and public confidence in its processes, to ensure that its decisions are defensible, and to avoid the perception of potential bias. MABC therefore supports mechanisms that can bolster public confidence in the data being utilized in the EA process, the analysis of that data, and the recommendations that are made.

An increasingly important factor for the success of our members is their pursuit of innovative approaches to addressing the socio-ecological and operating challenges associated with their proposed and existing ventures. In order to ensure that this innovation can be enabled within the context of the EA process, there should be no constraints on the generation of new methodologies, ideas or approaches – provided they are in put forward within the context of qualified professionals' expertise and codes of practice.

Recommendation 13

In support of transparency, MABC recommends that the EA process enable the proponent, each Indigenous Nation, practitioners and EAO staff to refer to the same dataset in undertaking their project review and assessment – be it in collaboration with, or independent of BC EAO. This recommendation is offered with full respect for the care and discretion needed for sensitive information.

Where possible, MABC also encourages the usage of this dataset for post-Certificate project-related permitting. This reinforces the efficient functioning of the regulatory continuum, and could enable project permitting in parallel with the assessment process, where practical.

Recommendation 14

Consistent with the objectives of innovation that a free-market allows, MABC discourages the establishment of a network of 'sanctioned' or 'pre-qualified' professionals as it would inadvertently undermine the public's interest and expectation of evolving and innovative methodologies.

Recommendation 15

MABC recommends advance consideration of situations where there may be a divergence in the findings of parties to the EA process, which could include variances in findings between Indigenous knowledge or science based methodologies. This could be addressed in part through the ADR provisions at the Readiness Gate and Recommendations/Final Decision

stage, however the opportunity to avert the embedding of these divergences throughout the process would be beneficial.

The Importance of Legislated Timelines

Predictable timelines and a transparent process are foundational elements of assessing project viability and capital investment decision-making, particularly in the highly competitive global mining sector. MABC is pleased to see notation of proposed timelines in the Paper, as well as EAO's commitment to legislate timelines for key components of the EA process, including decision making and alternative dispute resolution.

Additionally, legislated timelines support the appropriate allocation and deployment of government resources to support the assessment process. Further, timelines allow for EAO to measure its performance against these timelines, as well as other objectives, as a marker of its success and of the efficiency of the EA process.

Broad alignment with Canada's impact assessment timelines would bolster the continuation of Substitution under the IAA, and the aspiration of 'one project, one assessment'.

Recommendation 16

MABC appreciates the approach that BC EAO has taken to the administration of timelines, which allows for flexibility for the proponent and EAO to suspend or extend the timelines under agreed-upon circumstances. MABC recommends the continuation of this methodology, with authority residing with EAO to make this administrative determination with transparency and based on clear criteria.

MABC also acknowledges that legislated timelines enable the removal of projects from the process, subject to appropriate notice, where these timelines have not been upheld by the proponent.

Supporting BC's Competitiveness with a Fair and Predictable EA Fee Structure

At a time when jurisdictional competitiveness is a high priority elsewhere in Canada and globally, proponents seeking to advance projects in British Columbia are facing increased scrutiny as they compete for capital. Amidst the mounting legislative and regulatory uncertainty facing proponents in British Columbia is serious concern about the direct and indirect costs associated with these multiple public policy shifts.

While MABC understands that engaging Indigenous nations and the public who express interest in the EA process are factors in advancing reconciliation and improving public confidence, our members express universal concern about the cost implications of this broad-reaching engagement. Adding to this concern is the likelihood that funding obligations will extend to include independent assessments by multiple Indigenous nations that have demonstrated interest in the project, as well as the potential for third party verification of the proponent's studies to be required.

MABC understands from EAO staff that the existing fee structure captures less than 10% of EAO's costs associated with the current EA process. Therefore the additional process requirements of proponents, coupled with the need to bolster the capacity within EAO, raises concerns regarding British Columbia's competitiveness as a jurisdiction to invest in large capital projects.

Recommendation 17

MABC recognizes that discussions regarding revisions to the fee structure associated with EA's in British Columbia requires more detailed investigation, as well as Treasury Board review. MABC welcomes the opportunity to support the development of a practical fee structure that the sector can sustain while also supporting the Province's objectives of transparency and public trust.

We recommend the EAO undertake a jurisdictional scan to optimally position British Columbia as a competitive jurisdiction, and that any fee structure also be approved by the Mining Jobs Task Force prior to implementation to ensure sectoral competitiveness.

Redefining Early Engagement

MABC is broadly supportive of the introduction of the Early Engagement phase within the Conceptual Model, which is aligned with the proposed Federal IAA process. Proactive engagement with Indigenous peoples and stakeholders allows for improved understanding of interests, values and potential issues relating to a proposed project, and the refinement of a project plan to incorporate these interests, values and mitigation measures. Not only is this an industry best-practice, it is important to a timely assessment process that builds public trust.

MABC's members undertake proactive and inclusive engagement with Indigenous peoples and stakeholders in British Columbia, commencing at the earliest stages of exploration through to the EA stage. As practitioners of early engagement, we are supportive of the concepts being suggested in the Early Engagement portion of the Conceptual Model.

Given the nature of proposed mining projects, which most often include decades of progressive engagement throughout the course of exploration, as well as extensive feasibility studies, it is challenging for MABC's members to properly place the objectives of Early Engagement at the front end of the EA process. In reality, years of engagement have already been undertaken, so this phase offers the opportunity to refine the engagement to identify lingering issues and priorities. In some cases, this phase may be the validation of existing engagement already undertaken by the proponent.

Recommendation 18

Given the pivotal nature of this phase of the Conceptual Model in determining whether a project is 'ready' to enter the EA process, it is crucial to clearly define the components of Early Engagement, the objectives of this phase, its information requirements, and the deliverables required to determine the conclusion of this phase of the proposed process.

These objectives, their sequence, and who is responsible to undertake each component, must also be clear to all participants – the proponent, Indigenous communities and the public. Similarly, what will initiate, define and measure the completion of this phase should be determined. In particular, the definition of the Initial Project Description and the Detailed Project Description will help determine the completion of this stage.

Recommendation 19

Unlike other sectors, recognition should be given to mining proponents for their extensive engagement undertaken throughout the exploration phase of a project, coupled with the engagement associated with the studies needed to assess the economic and technical feasibility of a mining project prior to it achieving shareholder approval and reaching the EA stage.

While there remains the ability to adapt a project to address emerging Indigenous considerations or stakeholder comments at this stage, the nature of a proposed mining project requires extensive Indigenous and stakeholder engagement, technical, economic, social and environmental evaluation throughout its conceptual stage. MABC suggests that this stage be reframed to offer the option for the engagement activities and associated outcomes of mining projects to be ‘screened’ or ‘reviewed’ in a manner consistent with the evaluation criteria of this phase.

A Clear and Predictable Transition

It is of high importance to clearly articulate the transition provisions during this coming into force period in order to provide crucial certainty for the sector, Indigenous nations and the public.

MABC has understood from the EAO website and staff that ‘Environmental Assessments that are already underway will continue under the current process – rules and processes will not change. The revitalized EA process will be prospective, not retrospective.’². More specifically, we have understood that any project that has received a Section 11 order under the current legislation will proceed through the current process.

Recommendation 20

MABC wishes to emphasize the importance of upholding the commitment that projects that have received a Section 11 order prior to the implementation of the revitalized legislation will continue under the current process. The revitalized Act will only apply to projects that enter the EA process upon its coming into force. This will avoid critical uncertainty for the proponent and will prevent ambiguity for Indigenous groups and the public.

MABC would support consideration of provisions for a proponent to opt-in to the revitalized process, as is being contemplated under the proposed federal *Impact Assessment Act*.

² <http://www.eao.gov.bc.ca/revitalization/index.html>

Recommendation 21

To further support procedural clarity, MABC recommends that EAO formalize its position that projects undergoing assessment, under the current or revitalized process, will not be delayed or procedurally prejudiced in the absence of a functioning cumulative effects assessment framework, regional assessments or strategic assessments.

Recommendation 22

MABC recommends consideration of the handling of amendments to existing Certificates, as well as the renewal of Certificates – albeit outside of the scope of the Proposed EA Model. This will provide the procedural clarity needed while the transition is underway and may provide the opportunity to optimize the effectiveness of these processes.