

Substantial Start Determination Policy

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ISSUED BY:



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EAO

Environmental
Assessment Office

This document provides guidance to help environmental assessment participants and the public better understand British Columbia's environmental assessment process. It is not advice and does not replace requirements of the *Environmental Assessment Act* (2018) or its regulations, or bind any decision-maker.

Version Control History

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Substantially Started Policy

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ACRONYMS AND ABBREVIATIONS

Act	<i>Environmental Assessment Act (2018)</i>
BC	British Columbia
Determination	Substantial Start Determination
CEAO	Chief Executive Assessment Officer
EA	Environmental Assessment
EAC	Environmental Assessment Certificate
EAO	Environmental Assessment Office
EPIC	Electronic Project Information Centre

DEFINITIONS

Environmental Assessment Certificate or EAC: A legally binding authorization that identifies a project’s facilities and activities, and how the project must be carried out from start to finish. EACs also state how mitigation measures to avoid, minimize, restore, or offset a project’s effects must be implemented. The Holder of the EAC must design, build, operate and, if applicable, decommission the project as described. Once a project has an EAC, it can continue to other types of required permitting processes prior to construction and operation.

EPIC: EAO Project Information Centre

Former Act: Any Act in force before December 16, 2019 under which an EAC, or a document now deemed to be an EAC, was granted.

Holder: The holder of an EAC.

INTRODUCTION

Purpose

This document provides guidance for substantial start determinations pursuant to the [Environmental Assessment Act \(2018\)](#) (the Act), specifically [Section 31](#). The primary users of this guidance will be Holders of EACs, EAO staff and Indigenous nations. However, other participants in provincial EA processes, such as the public, may also use this policy to understand the roles, responsibilities, and process requirements for a determination.

Substantial start Determinations take place in the Post Certificate phase of the BC EA process. See [Figure 1](#) for an overview of the EA phases. This Policy is intended to be read and interpreted in conjunction with the Act.

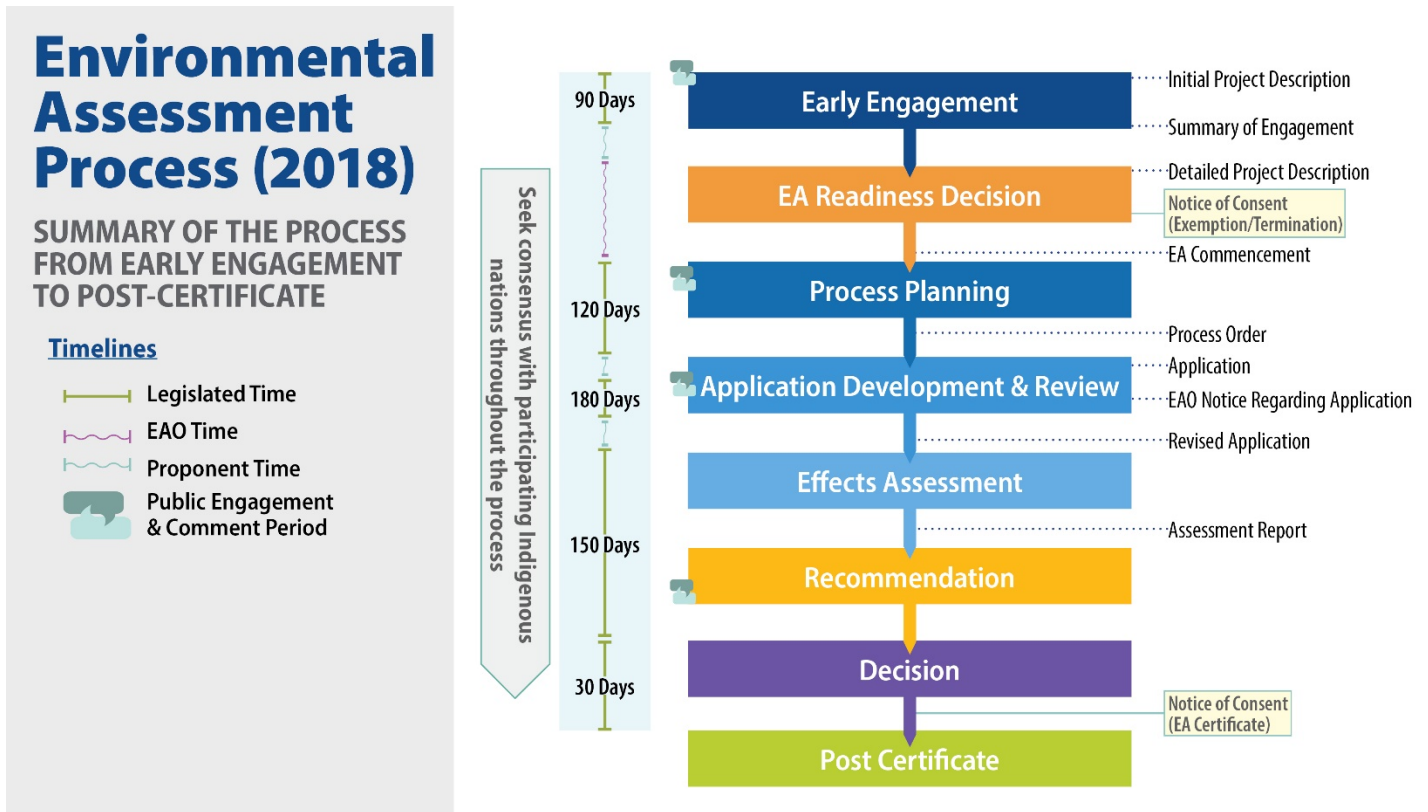


Figure 1. Overview of the EA process and identification of the Post Certificate phase within the process

Regulatory Background

Under [Section 31](#) of the Act, an EAC must specify a deadline, not more than ten years after the issue date of the EAC, by which the Holder of the EAC, in the reasonable opinion of the Minister¹, must have substantially started the project. The time limit is in place to ensure that the assessment used to inform the Ministers' decision to issue an EAC remains appropriately current. [Section 31\(2\)](#) of Act allows for a one-time-only extension of that deadline of no more than five years.² The limit of one extension applies to all projects, whether granted an EAC under the Act or a Former Act. For more information on EAC extensions, please see the [Certificate Extensions Policy](#) on the EAO's website.

If the project has been substantially started by the specified deadline, the EAC remains in effect for the life of the project, subject only to suspension or cancellation for the reasons listed under [Section 56](#) of the Act. If the project has not substantially started by the specified deadline, the EAC expires.

The term "substantially started" is not defined in the Act, but the courts have provided guidance on its meaning (see [Substantial Start Considerations](#) below). Ultimately the determination is made on a case-by-case basis considering all relevant facts related to the project. Determining whether a project is substantially started is often straightforward, but the determination may be more involved if a project is not operating or only partially constructed.

The EAO will consult with Indigenous nations, which includes seeking their views regarding whether the project is substantially started and requesting any information relevant to this consideration.

Fees

There are no fees associated with substantial start determinations.

Substantial Start Considerations

Only components described in the EAC certified project description are within the scope of physical works or activities that may be counted towards a substantial start since other works or activities are not part of the authorized project.

With the information provided (as described in [Step 2](#) below), the decision-maker will determine whether a project is substantially started. This task is supported by this document as well as relevant court decisions. Regarding the latter, the courts have noted that the requirement that a Holder substantially start a project within a certain time strikes a balance between the protection of the environment and proponents' desires to carry out their projects. [In *Glacier Resorts Ltd. v. British Columbia \(Minister of Environment\)*, 2019 BCCA 289](#), the BC Court of Appeal held:

¹ The Minister's power to formulate the opinion referred to in [Sections 31\(1\), 31\(6\) and 31\(7\)](#) of the Act have been delegated to the CEAO under [Section 72](#) of the Act. The CEAO may make the substantial start decision for a project, or the Minister may make the decision, as is appropriate to each individual determination.

² Extensions to an EAC cannot be granted once the substantial start deadline has passed and the project is not substantially started. In that situation, the EAC has expired so there is no EAC to extend.

Statutory Authority

Section 38(2) of the Act (Time Limits) states that S.38(1) does not apply to Section 31 of the Act. This means that the Minister or CEAO cannot alter the substantial start deadline of a project under this Section of the Act.

Consultation with Indigenous Nations

There is a legal obligation to consult with Indigenous nations whose interests could be affected by the outcome of a substantially started determination. This was confirmed in the decision of the BC Supreme Court, *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, in 2014.

- “The legislation itself balances proponents’ desires to build infrastructure and developments with the broader interests of the public in protecting the environment. It provides for intensive study of projects before a certificate is issued allowing them to go ahead. It protects proponents by allowing them to proceed with projects that have been “substantially started” within the deadline set by the certificate.”
- “The legislation, however, is also mindful of the fact that environmental science progresses. The perceived impact of a proposed project may change over time, not only due to changes in public attitudes, but also due to increasing knowledge of the harm caused by certain types of development. Further, the character of a development site may change substantially over time. Finally, advances in technology may result in more effective mitigation measures becoming available. It would be unwise to allow long-delayed projects to proceed based on reports and conditions that have become outdated.”

The BC Supreme Court in [*Taku River Tlingit First Nation v. British Columbia \(Minister of Environment\)*, 2014 BCSC 1278](#), stated:

- Based on the definition of “project” in the Act, the substantial start determination should address “primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not.”³
- “The decision-maker should focus less on the permits which have been granted and the money expended, and more on what has taken place physically at the site.”
- “Temporary structures at the site, if they will soon be removed followed by remediation, are less important to consider than structures which will be in place for the duration of the project.”
- To have been substantially started, the project needs to be started “in its essentials in a real and tangible way.”
- To be considered as part of the substantial start determination, activity must have occurred after the EAC was issued and before the expiry date in the EAC.

Although case law directs the decision-maker to focus less on the money expended and more on what has taken place physically on the site, there is some latitude to consider other factors, along with physical work.

In terms of considering the effort to substantially start and forces outside a Holder’s control, the BC Court of Appeal in [*Glacier Resorts Ltd. v. British Columbia \(Minister of Environment\)*, 2019 BCCA 289](#) stated:

“The fact is, however, that proponents may fail to commence a project through no fault of their own: they may fail to secure financing; encounter landowners who are unexpectedly reluctant to sell their land or yield necessary rights; face municipalities that are not cooperative in allowing rezoning; or simply face public hostility. While we might sympathize with a proponent that has tried its best but failed to make a substantial start on a project, it does not change the fact that the statutory test has not been met.”

The judgement also held that to focus on actual construction in determining whether the project had been “substantially started” was not unreasonable.

³ The *Environmental Assessment Act* (2002) defines “project” to mean any: (a) activity that has or may have adverse effects, or (b) construction, operation, modification, dismantling or abandonment of a physical work.

Planned EAC Expiry

If a Holder does not intend to substantially start its project, (for any reason), they can request that the EAC be cancelled pursuant to [Section 56\(4\)](#) of the Act. Once the CEAO receives a request in writing, this communication will be posted on the project page on [EPIC](#).

The CEAO will then consider the request and may issue an order cancelling the EAC. The CEAO may attach conditions to an order that they consider necessary (pursuant to [Section 56\(5\)](#) of the Act). The order will be posted on the project page on [EPIC](#).

SUBSTANTIAL START DETERMINATION PROCESS

Step 1: Initiate Substantial start determination

A determination as to whether a project is substantially started can be initiated in any one of the following ways:

1. A Holder can contact the EAO and request a determination. If a Holder is of the view that its project may not have substantially started, then the Holder should allow adequate time to apply for an extension to their substantial start expiry date, if applicable, and receive a decision in respect of that application.
2. The EAO initiates a determination as a result of EAO Compliance and Enforcement personnel, an EAO's natural resource sector partner, or other source reporting that the project is operational.
3. The EAO initiates a determination because the substantial start deadline has passed.

While the EAO may initiate a determination, the Holder is responsible for tracking and meeting its substantial start deadline, and if necessary, making an extension request prior to the expiry of its EAC.

All EACs will receive a substantial start determination but the timing of the determination will depend on how it is initiated and the individual circumstances of the project. Even if it seems obvious that a project is substantially started (i.e. the project is operational), it is still an important administrative step for the EAO to formally recognize that fact, which ensures predictability and transparency for all interested parties. Those determinations are a straightforward administrative procedure.

Step 1A – Holder requests determination

Holders are encouraged to contact the EAO to discuss the potential substantial start determination of their project well in advance of the deadline or at such time as they think their project may be substantially started.

If the Holder plans to request a determination, that request should be directed to the Executive Project Director responsible for the project (See the [Contact Us](#) page on the EAO's website). In instances when the EAC has not already been extended, Holders are encouraged to make a request for a determination well in advance (approximately 12 months) of EAC expiry, to allow enough time for consideration of an application to extend the EAC should the determination conclude that the project is not substantially started.

Information Requirements

Requests should be accompanied by factual information supporting the Holder's view that the project is substantially started. The Holder should list the key project elements identified in the EAC and then describe what physical improvements, works and activities have been undertaken to further each of these project elements.

When providing this information, the Holder should address the following factors that the EAO considers relevant to the determination:

- What time, effort, and resources have been invested to physically develop one or more main project elements?
- How have the activities undertaken to date contributed to the development of the overall project? For example, are the activities in relation to a significant or important step, or are they ancillary, secondary, or temporary?
- Is the activity or component identified in the CPD as part of the project?

The Holder should also consider including the following information in their request:

- Maps showing construction activity and comparisons from the beginning of construction to the current status;
- Photos showing current status of construction and/or operational activity;
- A list of all self compliance reports submitted to the EAO and the dates of submission;
- A list of any inspections of the project by EAO Compliance and Enforcement Officers;
- A list of any amendments to the EAC;
- A description of what construction still remains to be completed before the project can become operational;
- For individual elements of the project, a description of what percentage of construction is complete; and,
- A description of any engagement and input from Indigenous nations regarding the substantial start of the project.

Financial information can be provided in order to give an indication of scope of the construction and to assist in corroborating the significance of physical works. The EAO posts Holders' submissions on its website, so they should not provide any information they wish to remain confidential.

Similarly, although the focus is on what has physically taken place on the site, Holders may wish to include information on licenses, permits and studies that were prerequisites to physical construction.

Examples of previous submissions can be seen on [EPIC](#).

Step 1B: The EAO initiates a substantial start determination

The EAO may initiate a substantial start determination before the EAC expiry date if it is very clear a project is operational.

The EAO will initiate a substantial start determination if the EAC expiry date has passed and no determination has yet been made.

In both instances the EAO will notify the Holder and proceed to Step 2.

Step 2: Conduct Preliminary Assessment

Regardless of how the substantial start determination is initiated (by the Holder or by the EAO), the EAO's first step is to conduct a preliminary assessment of the status of the project. This preliminary assessment can be based on one or more of the following:

- The written submission of the Holder, if any;
- Observations made during an on-site inspection or inspections by EAO Compliance and Enforcement; or
- A review of secondary sources, such as Holder self-reports to the EAO or permitting agencies, corporate websites, securities filings, media, or other information.

It may be that a project is likely substantially started, and no further information gathering is required. If it is not clear whether the project is substantially started, staff may request additional information from the Holder to inform the preliminary determination.

The EAO will consult with Indigenous nations⁴, which includes seeking their views with regards to whether the project is substantially started and requesting any information relevant to this consideration. The Holder will have an opportunity to respond to any information provided by Indigenous nations.

The EAO will notify the Holder and Indigenous nations of its preliminary determination via email, which will include a letter providing reasons signed by the Project Lead. These letters will be posted on [EPIC](#).

Step 3: Obtain Additional Information

If the preliminary determination is that the project does not appear to be substantially started, the EAO may collect additional information to help inform the EAO's understanding of the works undertaken and authorizations provided. This may include conducting an inspection, requesting more information from the Holder, or engaging other government agencies (particularly permitting authorities) with knowledge of the project. The Holder may want to consider applying for an EAC extension if that is possible, rather than the EAO completing this Step and proceeding to [Step 4](#).

Step 4: Finalize Decision Document

The EAO will prepare a document for the decision-maker that summarizes all the relevant information received. The length of the document will vary, depending on the complexity of the factors relevant to the decision. The EAO may provide a draft document to the Holder and Indigenous nations for review.

Step 5: Make Determination

The substantial start determination will be made, and the Holder and Indigenous nations will be notified via email of the decision, which will include a letter providing reasons signed by the decision-maker, or a Reasons for Decision document.

These communications, as well as any submissions made by the Holder and Indigenous nations, will be posted on [EPIC](#). If a separate Reasons for Decision document was completed this will also be posted. In addition, the EAO will post a notice on the Activities and Updates page on [EPIC](#).

⁴ At a minimum the EAO will engage the Indigenous nations that were engaged during the project's EA process.