



Environmental
Assessment Office

Guide to Substantially Started Determinations

March 2019



Version Control

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| February 2019 | 8 | Text changed: Assistant Deputy Minister removed as a decision-maker. |
| February 2019 | 6 | Text added: Even if it is obvious that a project has been substantially started, it is still an important administrative step for EAO to formally recognize that fact, which ensures predictability and transparency for all interested parties. Those substantial start determinations are straightforward and do not require the proponent to undertake any onerous activities. |
| February 2019 | 7 | Text changed: If the EAO initiates a substantial start determination, staff conduct a preliminary assessment as noted below, starting with a review of secondary sources and the results of any on-site inspections. They may request additional information from the certificate holder if it is not clear whether the project has been substantially started. |
| February 2019 | 8 | Text added: This may include conducting a site visit or requesting more information from the certificate holder. |
| February 2019 | 8 | Text changed: The EAO will contact First Nations and seek their views or any evidence they have on whether the project has been substantially started. The certificate holder will have an opportunity to respond to any information provided by First Nations. |

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| February 2019 | 8 | <p>Text added:</p> <p>The EAO will notify the certificate holder and First Nations of its preliminary determination and post these letters on the EAO’s website.</p> |
| February 2019 | 9 | <p>Text added:</p> <p>These communications will be posted on the EAO’s website as well as any submissions made by the certificate holder and First Nations. If a Reasons for Decision document was completed this will also be posted online.</p> |

TABLE OF CONTENTS

| | |
|---|---|
| Table of Contents | 4 |
| Introduction | 5 |
| Background and Purpose | 5 |
| Fees | 5 |
| Substantial Start Determination process..... | 6 |
| Step 1: Initiate Substantially Started Determination..... | 6 |
| STEP 1A – Proponent requests determination | 6 |
| STEP 1B: The EAO initiates a substantial start determination..... | 7 |
| Step 2: Conduct Preliminary Assessment | 8 |
| Step 3: Obtain Additional Information | 8 |
| Step 4: Finalize Decision Document..... | 8 |
| Step 5: Make Determination..... | 8 |
| Contact Information for the Environmental Assessment Office | 9 |

INTRODUCTION

BACKGROUND AND PURPOSE

Under Section 18 of the *Environmental Assessment Act* (the Act), an environmental assessment (EA) certificate (certificate) must specify a deadline of at least three years and not more than five years after the issue date, by which time the project, in the reasonable opinion of the Minister, must have been “substantially started.” The Act allows for a one-time-only extension of that deadline of no more than five years. If the project is deemed to have been substantially started, the certificate remains in effect for the life of the project. If the project has not been substantially started, the certificate expires. It is the certificate holder’s responsibility to ensure that their project is substantially started by the deadline.

The term “substantially started” is not defined in the Act but the courts have provided guidance on its meaning (see page 7). Ultimately the determination is made on a case-by-case basis in light of all relevant facts related to the project. Determining whether a project is substantially started is usually straightforward, but the determination may be more involved if a project is not operating or not well into its construction phase.

The Environmental Assessment Office (EAO) engages First Nations on whether they have relevant information related to whether the project has been substantially started. In most cases this involves engaging the First Nations that were consulted during the original EA.

This document explains how the EAO makes substantially started determinations. It also describes a certificate holder’s roles and responsibilities in the process. The guide is intended for use by certificate holders who may be contemplating requesting a determination.

FEES

There are no fees associated with substantially started determinations.

Statutory Authority

Under Section 18(1) of the *Environmental Assessment Act*, an environmental assessment certificate must specify a deadline, at least three years and not more than five years after which time the holder of the certificate, in the reasonable opinion of the minister, must have substantially started the project.

SUBSTANTIAL START DETERMINATION PROCESS

STEP 1: INITIATE SUBSTANTIALLY STARTED DETERMINATION

A determination as to whether a project has been substantially started can be initiated in any one of the following ways.

- A certificate holder can contact the EAO and request a determination.
- Compliance and enforcement personnel from the EAO (or the EAO's natural resource sector partners) can recommend that a substantially started determination be initiated as a result of a routine inspection of the project.
- The EAO identifies that the project has a certificate that has already been extended is due to expire within a year if substantial start is not achieved.

Even if it seems obvious that a project has been substantially started, it is still an important administrative step for EAO to formally recognize that fact, which ensures predictability and transparency for all interested parties. Those substantial start determinations are straightforward and do not require the proponent to undertake any onerous activities.

STEP 1A – PROPONENT REQUESTS DETERMINATION

If the certificate holder plans to request a substantially started determination, that request should be directed to the Executive Project Director responsible for the project (see <https://projects.eao.gov.bc.ca/> for Project Lead contact information). In instances when the certificate has not already been extended, it is recommended that determination requests be made well in advance (i.e. at least 12 months) of certificate expiry, to allow enough time for consideration of an application to extend the certificate should the determination conclude that the project has not been substantially started. Note that Section 5(1) of the [Environmental Assessment Fee Regulation](#) requires that an application for an extension of the deadline must be made no later than nine months before the certificate expires.

Requests should be accompanied by factual information supporting the certificate holder's contention that the project has been substantially started. A certificate holder should list the key project elements identified in the certificate and then describe what physical improvements, works and other activities have been undertaken to further each of these project elements.

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

- Has there been a significant investment of time, effort, and resources to physically develop one or more main project elements?

- Does the activity amount to a significant or important step to develop the overall project, or is the activity considered ancillary, secondary, or temporary?
- Would the proponent have undertaken the activity regardless of the project?

Additional guidance, provided by the BC Supreme Court in *Taku River Tlingit First Nation v. British Columbia (Minister of Environment) 2014*, includes:

- Based on the definition of “project” in the Act, the substantially started determination should address “primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not.”¹
- “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 substantially started determination, activity must have occurred after the certificate was issued and before the expiry date in the certificate.

Although the case law directs the decision maker to focus less on the money expended and more on what has taken place physically on the site, financial information can be provided in order to give a rough indication of scope of the construction and to assist in corroborating the significance of physical works. The EAO posts such submissions on its website, so certificate holders should not provide any financial information they wish to remain confidential.

Similarly, although the focus is on what has physically taken place on the site, certificate 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 the [Kitsault Mine](#), [Tulsequah Chief Mine](#), [Jumbo Glacier Resort](#), [Pacific Trail Pipelines](#) and [Kitimat LNG Terminal](#) Project pages on the EAO’s website.

STEP 1B: THE EAO INITIATES A SUBSTANTIAL START DETERMINATION

If the EAO initiates a substantial start determination, staff conduct a preliminary assessment as noted in Step 2, starting with a review of secondary sources and the results of any on-site inspections.

¹ The Act 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.

STEP 2: CONDUCT PRELIMINARY ASSESSMENT

Regardless of how the substantially started 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 certificate holder, if any;
- the result of the findings of an on-site inspection; or
- a review of secondary sources (certificate holder self-reports to the EAO or permitting agencies, corporate websites, securities filings, newspaper clippings or other information).

It may be clear from the proponent's website or an existing inspection record that a project is substantially started, and no further information gathering is required. If it is not clear whether the project has been substantially started, staff may request additional information from the certificate holder to inform the determination.

The EAO will contact First Nations and seek their views or any evidence they have on whether the project has been substantially started. The certificate holder will have an opportunity to respond to any information provided by First Nations

The EAO will notify the certificate holder and First Nations of its preliminary determination and post these letters on the EAO's website.

STEP 3: OBTAIN ADDITIONAL INFORMATION

If it is not clear that the project has been substantially started, the EAO may collect additional information to assist in the determination. This may include conducting a site visit or requesting more information from the certificate holder.

STEP 4: FINALIZE DECISION DOCUMENT

The EAO will prepare a decision document for the decision maker that summarizes all the relevant information received from the certificate holder and First Nations on the determination. For complex decisions, a substantially started determination report may be provided to the decision maker.

STEP 5: MAKE DETERMINATION

Determinations can be made by the Minister or the Associate Deputy Minister of the EAO. Typically the Minister will make determinations where the project is in the early stages of construction or there is dispute as to the status of the project. Otherwise, the determination will be made by the Associate Deputy Minister. The certificate holder and First Nations will be notified via email notification of the decision with reasons.

These communications will be posted on the EAO's website as well as any submissions made by the certificate holder and First Nations. If a Reasons for Decision document was completed this will also be posted online.

CONTACT INFORMATION FOR THE ENVIRONMENTAL ASSESSMENT OFFICE

If you have any questions about substantially started determinations or would like additional information about the environmental assessment process, please contact us at:

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Victoria BC V8W 9V1

Email: eaoinfo@gov.bc.ca
<http://www.eao.gov.bc.ca/>