
Report on the Yukon Government's Performance under the Environment Act

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AUDITOR'S REPORT

As required by Section 39 of the Yukon Environment Act (the *Act*), Government Audit Services carried out an audit of the Government of Yukon's performance in meeting its responsibilities under this Act. The requirement for this audit is stated in section 39(2) which reads: "*The performance of the Government of the Yukon in meeting its responsibilities under this Act shall be subject to an audit with respect to its efficiency and fairness.*"

The scope of this audit covered the three year period from October 1, 2006 to September 30, 2009. We included a follow-up of points raised in the previous audit report issued in 2008 and, where applicable, we took into consideration the developments up to February 2010. The audit tests were done on a sample basis and focused on those aspects of the legislation that created a specific performance expectation and were deemed to be significant in terms of environmental and business risk.

Our audit objective was to give an opinion on whether the Act and its supporting regulations had been administered and enforced with an acceptable degree of efficiency and fairness. As expressed in our previous report, the Environment Act has lost a certain degree of its original relevance. The conditions in which the Environment Act was created are different from current conditions where other Yukon acts are taking a lead over certain responsibilities and regulatory activities originally governed by the Environment Act. The reality is that developments subsequent to the creation of the Act, such as devolution of the natural resource responsibilities to this government and the enactment of the Yukon Environmental and Socio-economic Assessment Act, have changed some priorities over the management of the environment and made certain parts of the Environment Act redundant. Consequently, we do not believe that an overall conclusion on whether the Act was administered and enforced with an acceptable degree of efficiency and fairness would be meaningful, and we therefore withhold an overall opinion.

Notwithstanding the fundamental limitation of outdated legislation, there remained unresolved deficiencies that detracted from the principles of efficiency and fairness. In respect of efficiency, we noted examples of resource limitations and inadequate systems that resulted in permitting and inspection activities which were not within a tolerable standard of efficiency, accuracy, consistency and completeness. In respect of fairness, we observed the government had not yet reached the point where the monitoring and permitting standards were consistent across the board. For the period under review we observed differences in permit requirements within the resource-based sector and the rest of the economy.

Under a Memorandum of Understanding between the Departments of Environment, and Energy, Mines and Resources, responsibility for the enforcement of the Environment Act within the resource-based sector is shared with Energy, Mines and Resources. Energy, Mines and Resources also has responsibilities for inspection and permitting under the Quartz Mining Act and Placer Mining Act. In some cases, the regulatory requirements under these two acts overlap with those of the Environment Act, and its regulations. Where the overlapping did occur for the period under review, we were unable to determine whether the permitting and enforcement activities under the Quartz Mining and Placer Mining Acts gave equal treatment to the same regulatory requirements under the Environment Act. In other words, we were unable to validate whether a client would have had the same obligations or be subjected to the same inspection, no matter whether the client operated in the resource-based sector or anywhere else. A specific case in point is that there were no storage tank permits issued to operators in the resource-based sector and operators of storage tanks in this sector were, therefore, not included in the public register of storage tank permits. The responsibility for the issuance of these permits presently lies with the Department of Community Services.

Despite our above mentioned reservations about the fairness criterion, the concerns we have with “fairness” are not about the treatment of individuals, but rather about the consistency or uniformity of practice across the three departments that administer the regulations. The strategy of employing enforcement agents from different departments within the resource-based sector presents a challenge and, at the time of our audit, the harmonization and coordination of enforcement effort was being worked on, but still had a way to go.

The issues raised in this report are all matters that were reported previously. For this reason we have not repeated the recommendations, nor solicited comments from management.

We would like to recognize the high level of cooperation provided by the staff and management of the Departments of: Environment; Energy Mines and Resources; Community Services; Executive Council Office and Economic Development. We also received valuable counsel from the Department of Justice and useful insight from other stakeholder representatives. Their cooperation was crucial to the success of the audit project.

John Gunter
Director Government Audit Services

PREFACE

This is the fifth audit commissioned by Yukon government since 1991. The audit is a legislated audit under Section 39(2) of the Environment Act. It is conducted on a three-year cycle as specified under section 39(3). For this audit the three-year period of review was October 1, 2006 to September 30, 2009.

The Act calls for an audit of the government's performance in respect of the criteria of efficiency and fairness. As in the previous audit, we defined efficiency in terms of how well resources were used to accomplish goals, including productivity and competence. Fairness was defined as to whether there was just, unbiased, equal treatment of people's concerns according to due process and legitimate rules.

The Environment Act is supported by regulations and the audit testing includes appropriate coverage of the regulations. The following are the regulations which create a permit system:

- Air Emission Regulations
- Beverage Container Regulation
- Contaminated Sites Regulation
- Designated Materials Regulations
- Ozone Depleting Substances and other Halocarbons Regulation
- Pesticides Regulations
- Solid Waste Regulations
- Special Waste Regulations
- Storage Tank Regulations

The remaining regulations listed below do not have permits associated with them:

- Administrative Regulations
- Recycling Fund Regulation
- Spills Regulations
- Yukon Council on the Economy and the Environment Regulations

It is important to note that there is shared responsibility for the administration of the Environment Act. In respect of the Storage Tank Regulations, the shared responsibility lies between the Department of Environment and the Office of the Fire Marshal (*Department of Community Services*).

In the resource-based sector the shared responsibility is between the Department of Environment and the Department of Energy, Mines and Resources. In the current period the responsibility for the Recycling Fund was transferred to the Department of the Environment. As would be expected, when responsibility for enforcement is disbursed, there are challenges to be overcome with regards to achieving consistency of practices.

We engaged employees from the following departments because they either dealt with the Act and regulations or had valuable insight to share:

- Department of Environment
- Department of Energy, Mines and Resources
- Department of Community Services
- Department of Justice
- Department of Economic Development
- Executive Council Office (Development Assessment Branch, Land Claims and Implementation Secretariat and Governance Liaison/Capacity Development)

To get a perspective from representatives of various stakeholders we also solicited input from:

- Yukon Fish and Wildlife Management Board
- Yukon Conservation Society
- Environmental Education Association of the Yukon
- Canadian Parks and Wilderness Society.

CONCLUSIONS ON THE APPLICATION AND ENFORCEMENT OF REGULATIONS

The regulations under the Environment Act are integral to its application and enforcement. We tested each regulation under the Act against criteria for efficiency and fairness such as:

- the extent to which planned inspections had been achieved;
- the extent to which there was prompt and systematic follow-up of outstanding issues;
- progress in improving known deficiencies;
- development of tools, systems, processes and standardized practices that promote efficiency, consistency and economy of resources;
- the extent to which there was an audit trail that would stand up to public scrutiny as evidence of fair, well-planned, well-organized and well-monitored activities;
- whether all parties, no matter what their circumstances, were subject to the same regulatory requirements and conditions;
- whether enforcement actions and disputes were handled in a fair and professional manner; and
- whether the rules remained relevant and enforceable allowing for fair and efficient enforcement.

For all regulations, our observation was that individuals were accorded a service that was fair and professional. In this respect the “fairness” principle was consistently upheld.

For the following two regulations our conclusion was that the Government of Yukon was meeting its regulatory responsibilities in an efficient and fair manner:

- Administrative Regulations
- Spills Regulations

For the remaining regulations our tests revealed shortcomings against the criteria for efficiency or fairness, as listed above. Our assessment of efficiency and fairness is summarized in the table below:

Regulation	Issues Identified on Efficiency	Issues Identified on Fairness
	Yes/No	Yes/No
Air Emission Regulations	Yes	Yes
Beverage Container Regulations	Yes	No
Contaminated Sites Regulation	No	Yes
Designated Materials Regulations	Yes	No
Ozone Depleting Substances and other Halocarbons Regulation	Yes	No
Pesticides Regulations	Yes	No
Recycling Fund Regulation	Yes	No
Solid Waste Regulations	No	Yes
Special Waste Regulations	Yes	No
Storage Tank Regulations	Yes	Yes
Yukon Council on the Economy and the Environment Regulations	Yes	Yes

As mentioned above, the concerns we have with “fairness” are not about the treatment of individuals, but rather about the consistency or uniformity of practice across the three departments that administer the regulations. We acknowledge that this audit is a review of a particular three year period, and we take note that the Client Services and Inspections Branch of the Department of Energy, Mines and Resources had initiated improvements towards the end of this three year period, and subsequent to the cut-off date of our testing.

STATUS OF PREVIOUS AUDIT RECOMMENDATIONS

In our 2008 report we identified eight audit recommendations, of which three were carry-forwards from our 2005 report, and five were presented as new recommendations. In this report, the three 2005 recommendations continue to be outstanding, as well as, four of the five new recommendations reported in 2008. The current status of these outstanding recommendations is shown below:

2005 Audit Recommendations

Recommendation#B1 – Reports to the Legislative Assembly

The Department of Environment should ensure that it meets the legislated timelines for the Yukon Conservation Strategy and the Yukon State of the Environment Report.

Section 45(2) of the Environment Act requires that the Minister present a revision to the Yukon Conservation Strategy to the Legislative Assembly every three years after the presentation of the first revision. The purpose of the Yukon Conservation Strategy is to provide a comprehensive long-term guide for the policies and practices of the Government of Yukon in relation to the environment, and to set out the commitments and recommendations of the government with respect to conservation of the environment and sustainable development.

Section 48(1) of the Environment Act requires that the Minister submit to the Legislative Assembly a Yukon State of the Environment Report within three years of the date of the previous report.

Current Status – Yukon Conservation Strategy

The most recent version of the Yukon Conservation Strategy is dated May 1990. The government has accepted that it will remain in default of the requirement to revise the strategy every three years, in anticipation of proposed amendments to the Act.

Current Status – Yukon State of the Environment Report

In the reporting on the Yukon State of the Environment, the Yukon government has not met the targeted date for tabling the full three year report as required under Section 48(1) and the Act does not release the government of this obligation. The previous report was tabled on December 14, 2004. The next full report should have been presented to the Legislative Assembly on or before December 14, 2007, but was tabled on May 12, 2008.

Recommendation#B2 - Parts 5 and 6 of the Environment Act

The Yukon Government should review the Environment Act in light of the substantial governance changes since 1991.

In 2005 and 2008 we reported that critical parts of the Environment Act such as Part 5 and Part 6 are no longer being used by the Yukon government as the processes that were covered under these Parts are now covered under other legislation. In their 2005 management response to our audit recommendation, the Department of Environment proposed to review the Environment Act in its entirety with the possibility of conducting public consultations in 2006-07. Some preliminary notes were made on the potential changes to the Act, but the review process did not extend beyond this initial step. In 2008, the management response indicated that the schedule for reviewing the Act would be set by the government of the day, but that it would prepare a work plan in anticipation of this event.

Current Status

The status remains the same with no review of the Act. There was, however, some progress when, in March 2009, the Department of Environment commissioned a third party evaluation of the impact of legislative and administrative changes on the Environment Act. Following this, the Department has committed to developing a work plan outlining the suggested steps for undergoing an official review and revision of the Act in the future.

Recommendation#B7 – Contaminated Sites Regulation

The Department of Environment should review its policy for designating contaminated sites to ensure that it complies with the Contaminated Sites Regulation, and is meeting the fairness criterion and the government's responsibilities with respect to prevention of environmental harm and freedom of information.

Section 114(2) of the Environment Act allows the Minister to formally designate a site as being contaminated. The purpose of designation is to impose a stricter control system over activity on that land. Before deciding whether to designate a contaminated site under this section, the Minister may use the determination procedure as specified under Section 4(2) of the Contaminated Sites Regulation. This is the procedure that helps determine the extent of contamination on the basis of a site investigation, sample test results or other available information. Since the proclamation of the Contaminated Sites Regulation in 1997 only five sites have been designated by the Minister.

In 2008 we reported that the Department of Environment did change its policy for designating contaminated sites, establishing a better framework of criteria as to

what constitutes a contaminated site; however, the change in policy had not yet resulted in further contaminated sites being assessed as over the threshold, and thus justifying either designation by the Minister and/or inclusion on the public registry. The department agreed that the concept of a public registry of contaminated sites should not necessarily be restricted to those sites that were formally designated by the Minister, but that it was in the public interest to list additional sites that had substantial contamination.

Current Status

The public register remains with only the five original designated sites. The department has done a large amount of work on the records of contaminated sites, to the point where the number of files for contaminated sites now totals around 500. The intention remains to identify from this large number those sites which warrant designation by the Minister, or, at least, warrant disclosure in the public registry.

2008 Audit Recommendations

Recommendation#1 - Section 151(1) Inspection of Regulated Activities

The Department of Environment and Energy, Mines and Resources should formalize a risk based approach to inspection coverage.

The annual coverage plan of what permits to inspect each year should be decided on a risk-based approach. Because it is not practical and not efficient to inspect all activities under a permit, there must be a logical prioritisation process whereby those activities that have a high inherent risk of more significant problems would be chosen for inspection ahead of those activities deemed to be low risk.

In 2008 the Department of Environment agreed that they would put for future consideration a risk-based approach to inspection coverage. The Department of Energy, Mines and Resources noted that it did apply a risk-based approach.

Current Status

Although we confirmed that the inspection planning in Energy, Mines and Resources was risk-based, our concern is that the factors selected as benchmarks for risk were appropriate for inspections under mining legislation, but these were not necessarily geared towards the Environment Act and its regulations. For this reason, we are unable to express an opinion as to whether the inspection processes in the resource based-sector are risk-based in so far as the Environment Act is concerned.

With respect to Environment's inspection processes, we found that, for the period under review, the inspection coverage plan was not based on a formal risk profiling exercise where points were allocated according to selected risk factors. Although there was an effort in 2010 to apply the principles of risk management, the approach taken, in our view, was fairly basic. Further refinement, which must include a formally agreed expression of risk tolerance, is required so that the government can rationalise and defend the extent of its inspections. The question is often raised about how many inspectors are required. Unless there is a reasonably sophisticated risk model in place, it is difficult to determine the minimum resources required to reduce the risk to the predetermined risk tolerance threshold.

Recommendation#2 Permitting and Enforcement in the Resource-based Sector

Energy, Mines and Resources should develop an inspection process in the resource development sectors that would meet the requirements of the Environment Act.

In 2008 we reported that Energy, Mines and Resources needed to develop an inspection process that would help establish an inventory of all activities within the resource development sectors that would be regulated under the Environment Act. We suggested the department develop a list of those clients that should have permits issued under one of the Environment Act regulations making it possible to follow up on those operators who are operating without the required permit. The identification of this inventory would then lead to a risk-based inspection program that is geared towards testing compliance with the Environment Act.

Current Status

There remain a number of gaps that prevent us from giving positive assurance that the Environment Act and its Regulations were applied equally and consistently in the resource-based sector as they were in the rest of the economy. We noted that a review had been initiated to identify the legislative gaps between the permit requirements and inspection strategies administered by Energy, Mines and Resources with the practices outside of the resource-based sector, but this exercise had not been concluded at the time of audit. There had not yet been a formal agreement that mining regulatory requirements were equivalent to environmental regulatory requirements and that the land use permits issued to resource-based clients could take the place of Environment Act permits. The other outstanding issues that detract from the principle of consistent practices and standards include:

- There was insufficient standardisation of documents, reports and inspection methodology to give an independent observer assurance of consistency across the board. Our benchmark was that the records should stand up to the test of public scrutiny, and demonstrate beyond doubt that in the resource-based

sector environmental aspects were not overlooked and not given a lesser priority.

- There remained some outstanding training for officers in Energy, Mines and Resources.
- There needed to be clear communication to the resource-based clients on their obligations in order to prevent any misconceptions that the standards dictated by the Environment Act may be overlooked or lowered.
- As long as there is a requirement to provide public registers of permit holders, then the resource-based operators should be included on the common public registers, along with other permit holders.

Recommendation #3 – Storage Tank Regulations

The Yukon government should develop options to better administer the issuance and monitoring of storage tank permits to ensure that it complies with the Storage Tank Regulations.

Since 1994 the responsibility for issuing Storage Tank Permits has been with the Fire Marshal's Office in the Department of Community Services. In 2008 we reported that this office had been hampered by staff changes, inadequate resources, an unreliable system for tracking and monitoring storage tank permits and the added burden of dealing with insurance requirements for heating fuel tanks. We concluded that the Storage Tank Regulations were not applied with the desired consistency. The Department of Environment agreed to review the existing regulations and to examine current processes to ensure consistent application of the regulation.

Current Status

There was no tangible change or improvement to the administration of the Storage Tank Regulations from our last audit. During the review period the Storage Tank Regulations were not administered to the minimum standards of efficiency. In terms of the "fairness" criterion we noted that there were no storage tank permits issued to operators in the resource-based sector and that operators of storage tanks in this sector were, therefore, not included in the public register of storage tank permits. Under these circumstances our conclusion is that the administration of the Storage Tank Regulations was deficient, both from the perspective of "efficiency" and also that of "fairness".

Recommendation #4 – Purchasing Policies

The Yukon government should take the necessary steps to more visibly, or overtly, demonstrate compliance with Section 39 of the Environment Act.

Section 39(1)(c) calls for standards for conservation of the environment and sustainable development to be incorporated in the Government of Yukon's purchasing policies. Such policies could conceivably include the Yukon government's Purchasing Policy, Contracting Directive, Acquisition Card Policy, Project Planning and Implementation Directive and Financial Administration Manual.

In our 2008 audit we were unable to find any specific references to “*standards for conservation of the environment and sustainable development*” in the policy documents referred to above.

Current Status

In our current review of the government's purchasing policies we could not find any references or sections within the policies that we would consider being a clear demonstration of conformance with Section 39(1). Although we were given numerous examples where the government has advanced the philosophy of “green procurement” we are not yet in a position to verify that this section of the Act has been complied with.

It should be noted that the Yukon government did issue under authority of Cabinet a Green Procurement policy in May 2010.

CLOSING COMMENT

In 1988 the Yukon Government established the Yukon Council on the Economy and the Environment (YCEE) and entrenched it in the *Environment Act* in 1989 and in the *Economic Development Act* in 1992. These acts and regulations establish some required activities for YCEE. The legislated purpose of YCEE is to “encourage sustainable development in the Yukon.” In 2005 the YCEE ceased to function as an advisory body to the government.

In 2008 the Department of Environment stated that a review was underway to determine whether the body should be resurrected and that this review would culminate in an opinions paper. Having been informed of this and because the YCEE folded during the late period of our audit examination, we opted not to raise an audit recommendation on this matter in our 2008 report

The YCEE continues to be non-operational. As a result, the government is not able to satisfy the requirements of Section 22 and 49 of the Act, in that, the Yukon State of the Environment report and complaints cannot be submitted to the Council as required. Two of four external stakeholders we contacted believe the YCEE serves a worthy function as a primary source of advice to the government and should be maintained.