

YESAB

Yukon Environmental and
Socio-economic Assessment Board

INFORMATION BULLETIN

CONFORMITY CHECK PROCESSES UNDER YESAA

December 2022



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Preface

This Information Bulletin (Bulletin) identifies the requirements under the Yukon Environmental and Socio-economic Assessment Act (YESAA) regarding conformity checks for projects in regions where a regional land use plan is in effect, and describes the status quo in this regard.

The Bulletin also identifies the implications of the current approach of discontinuing the commissions after the regional plan has been approved. The absence of a conformity check from the applicable commission means the conformity check process set out under s.44 of YESAA is inoperable.

Disclaimer:

This Bulletin is not intended to provide legal advice or direction. It is for information purposes only, and should not be used as a substitute for the Act or its associated regulations and rules. In the event of a discrepancy, the Act, regulations, and rules prevail. YESAB retains the discretion to deviate from the procedures described in this Bulletin where appropriate.

Legislative Context and Status Quo

The Umbrella Final Agreement (“UFA”) and the Yukon Environmental and Socio-economic Assessment Act (“YESAA” or the Act) set out and provide for processes aimed at integrating regional land use plan considerations into the assessment processes conducted under YESAA. The processes applicable to projects in regions for which a regional land use plan is in effect are set out under s.44 of the Act. This section states:

44 (1) If a regional land use plan is in effect in a planning region established under a final agreement, a designated office, the executive committee or a panel of the Board shall, when conducting an assessment of a project proposed in the planning region, request the planning commission established under the final agreement to advise it as to whether the project is in conformity with the regional land use plan, unless such a request has already been made in relation to the project.

- (2)** A designated office, the executive committee or a panel of the Board shall, if advised by the planning commission for a planning region, before or during its assessment of a project, that the project is not in conformity with the regional land use plan, consider the regional land use plan and invite the planning commission to make representations to it with respect to the project.
- (3)** Where a designated office, the executive committee or a panel of the Board recommends that a project referred to in subsection (2) be allowed to proceed, it shall, to the extent possible, recommend terms and conditions that will bring the project into conformity with the regional land use plan [emphasis added].

Section 44(1) of YESAA implements and gives effect to sections 12.17.1 and 12.17.3 of the UFA.

For reference, those sections of the UFA state:

12.17.1 Where YDAB or a Designated Office receives a Project application in a region where a regional land use plan is in effect, YDAB or the Designated Office, as the case may be, shall request that the Regional Land Use Planning Commission for the planning region determine whether or not the Project is in conformity with the approved regional land use plan.

12.17.3 Where a panel is reviewing a Project and a Regional Land Use Planning Commission has determined pursuant to 12.17.1 that the Project does not conform with an approved regional land use plan, the panel shall consider the regional land use plan in its review, invite the relevant Regional Land Use Planning Commission to make representations to the panel and make recommendations to the Decision Body that conform so far as possible to the approved regional plan [emphasis added]

Going Forward

Recent assessments, and in particular correspondence clarifying the YLUPC's lack of authority to conduct the conformity checks contemplated under YESAA, have brought to light gaps in the current approach. Specifically, it has highlighted the impossibility of fulfilling the conformity check processes contemplated under the Act if the applicable commission is discontinued after the plan is approved. In short, the conformity check process set out and provided for under s.44 of the Act/s.12.17.1 and 12.17.3 of the UFA is inoperable if the applicable commission is discontinued after plan approval.

The YLUPC cannot simply be substituted for a commission. The YLUPC is a distinct entity, and unless or until action is taken by the parties to legally empower the Council to do so, an opinion by the Council cannot be equated with the conformity check which both the UFA and YESAA state the commission must perform. If the YLUPC is willing

to provide an opinion to the assessor as to whether a proposed project does or does not conform with the applicable regional land use plan, the assessor will consider that input. Assessors consider all input provided to them during the assessment. However, this input or opinion from the YLUPC cannot be equated with a conformity check performed by the applicable commission pursuant to s.44(1) of the Act/s.12.17.1 and 12.17.3 of the UFA.

Furthermore, the gap created by the status quo effectively negates or renders inoperable the stand-alone basis, under s.44(3) of the Act, for assessors to recommend terms and conditions aimed at bringing otherwise non-conforming projects into conformity with regional land use plans. Specifically, while assessors can still recommend terms and conditions in accordance with s.56(1)(b)/58(1)(b)/72(4)(b) of the Act, assessors' powers and responsibilities under s.44(2) and (3) of the Act cannot be engaged without a conformity check conducted by the applicable commission. ■

