

Engaging with CEAA in the BC Context

Tony Pearce

Smithers

March 27 2009

Topics covered

- EA - why it matters & what it needs to be?
- Practice of EA in BC & role of CEAA
- Deficiencies in the BCEAA & CEAA & strategies to address these
- Two case studies (Ruby Creek Moly & Tulsequah Chief), with particular reference to role of FNs

EA - Why is it Important?

Contemplated land-use decisions, to be politically responsible, require answers to questions such as:

- Can the proposed project or activity contribute to overall sustainability of the region in which it is located?
- Is the project harmful to existing natural, socio-economic and cultural environments in which it is located?
- Can the adverse effects or risks be minimized to the point where the project is acceptable?
- Can changes in project design be made to achieve gains in acceptability?

EA is one rational tool that can address these questions.

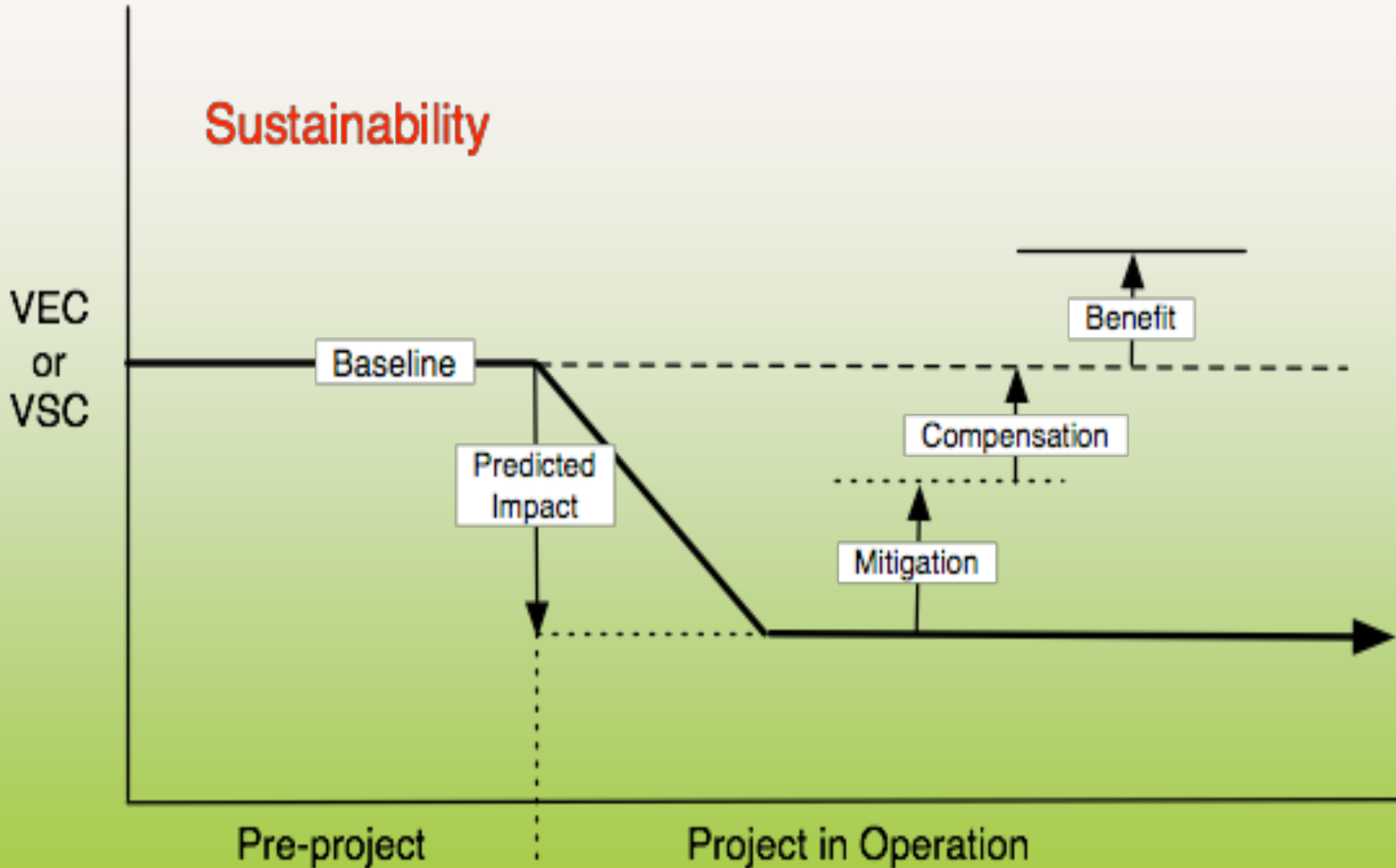
What is EA?

- logical, technically defensible process of identifying and evaluating all potential significant adverse effects of a proposed land use activity or project + identifying effective means to mitigate such effects
- fact-finding; not decision-making
- forward-looking; allows design changes
- integrates many variables
- produces a comprehensive result
- focuses attention on dimensions of the project neglected by proponents and decision-makers.

What features does EA need to be effective?

- collaborative (affected parties meaningfully engaged) & mutually agreed process
- encourages effective public input
- should be independent, objective, transparent, neutrally administered;
- has to be able to say 'no'
- results have to be credible and seen to be credible
- needs to go beyond concept of 'minimizing impacts' to 'contributing to local sustainability'

Sustainability



CEAA in BC

- applies via harmonization agreement
- policy is to rely on BCEAA to conduct the assessment; then add specific components not provided by BCEAA (e.g., cumulative effects)
- RA then writes Screening Report or Comprehensive Study Report which relies in large part on BCEAA results
- therefore, if the BC process is defective the CEAA process will necessarily result in a deficient result
- one exception has been Kemess North Joint Review Panel

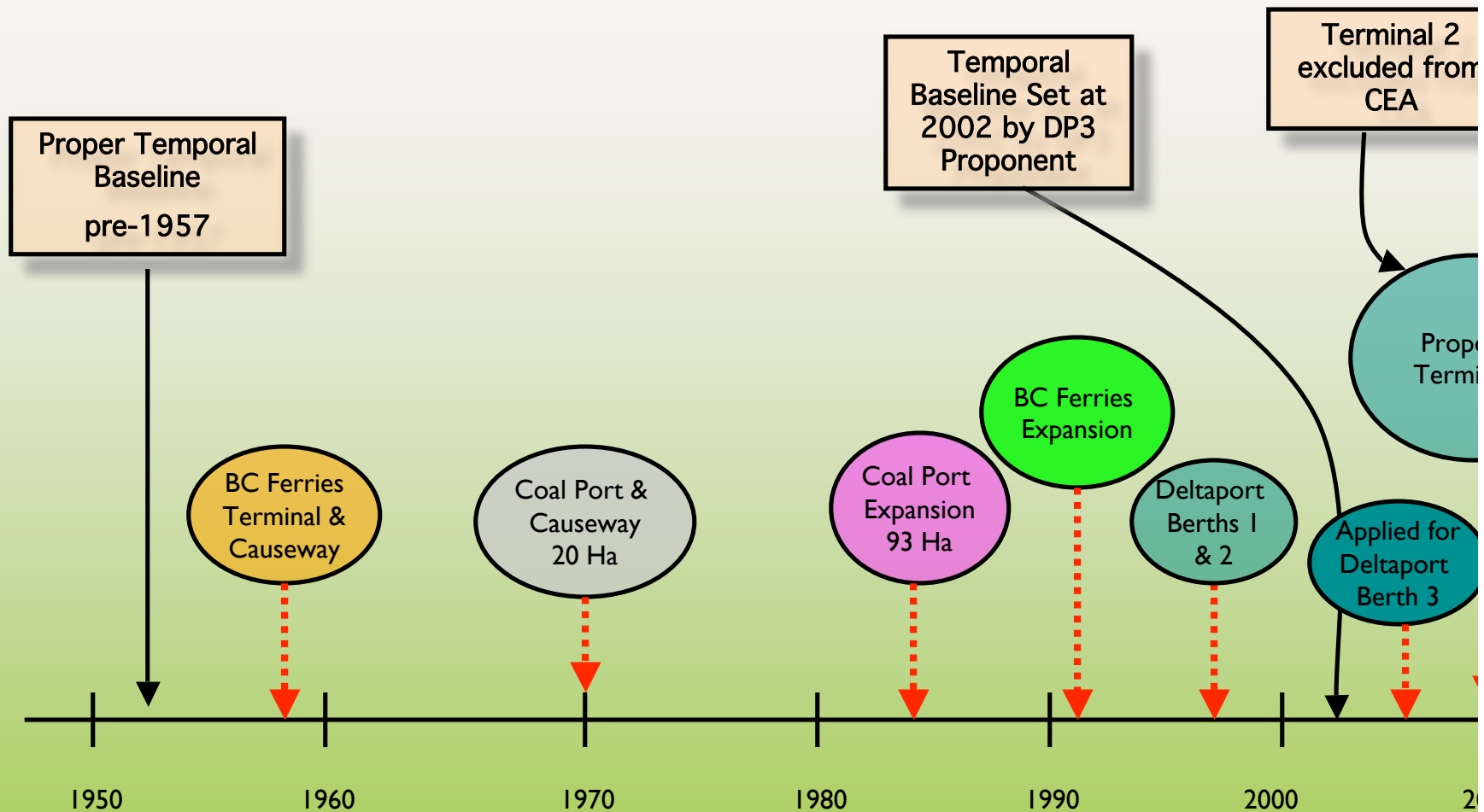
What CEAA adds

- Scope of 'project' is determined by RA on basis of a trigger; not the same as 'project' defined by proponent or project being reviewed by BCEAA
- cumulative effects assessment
- alternatives to the project
- alternative means of doing the project
- effect of project on the environment

Problems with CEAA in Harmonized Screening or Comprehensive Study

- RAs do not conduct independent analysis; adopt EAO's findings & recommendations w/o rationalization
- minimalist approach
- Added components done very simplistically; no guidelines or established methods applied

Setting Temporal Boundaries for CEA

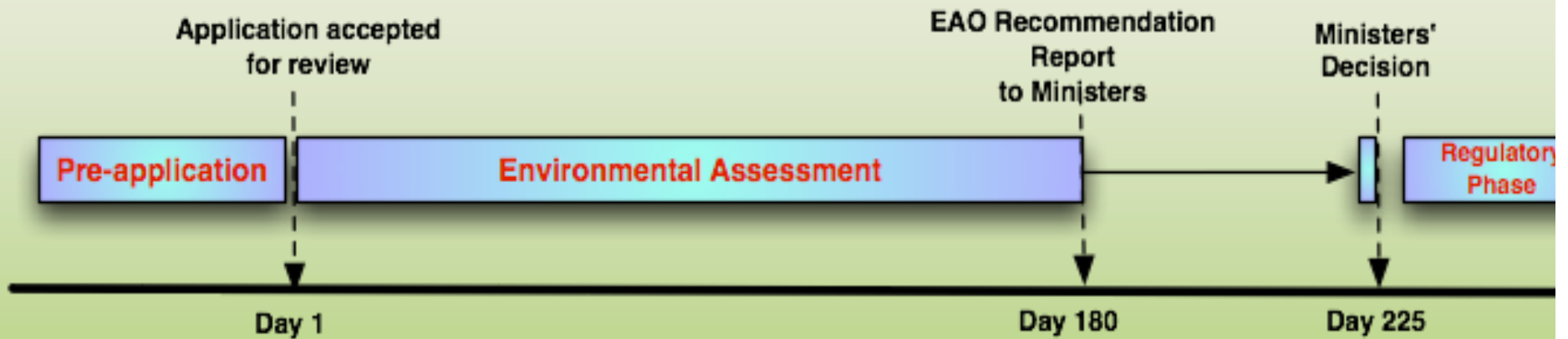


Deltaport Third Berth - Roberts Bank

2002 BCEAA - What the Act Says

- establishes Env Assessment Office, reporting to Minister of Environment, to conduct EAs;
- project director first determines whether or not a project is likely to have significant environmental, economic social, heritage or health effects in order to trigger an EA (none of these are defined, no criteria or procedural guidelines specified)
- provides for project directors to conduct project assessments in almost any manner they want;
- provides for ministerial direction at several places in the process
- requires the assessment results to be consistent with gov't policy;
- process starts with filing of application for environmental certificate by proponent & acceptance by project director of application for review.

Current BC EA Process



2002 BCEAA - What the Practice Is

- practice is for project director to use *ad hoc* working group of regulators & FN reps to do the EA;
- regulators individually review application documents; identify information deficiencies; several group meetings held to review progress
- proponent supplies requested information
- when all deficiencies answered, EA is deemed complete
- project director drafts the report + recommendations; review by working group; finalized by EAO and sent to ministers

2002 BCEAA - Problems with the Practice #1

- there are no procedures or standards for doing the EA; procedures are *ad hoc*, inconsistent and non-rigorous
- those doing the assessment are not qualified EA practitioners, but regulators who see the world through permitting glasses; not trained for strategic level assessment; geared to licensing conditions
- there is no independent, integrated analysis of project
- the EAO conducts no analysis; merely sees that the proponent satisfies info requests

2002 BCEAA - Problems with the Practice #2

- much evidence of political interference with process and decisions made by the EAO (e.g., Tulsequah, Prosperity)
- there is no test for environmental acceptability or sustainability; so no way to arrive at a recommendation to reject a project
- legally an option, rejection of a project is not a naturally observed phenomenon

2002 BCEAA - Problems with the Practice #3

- BCEAA provides only token measures for public input (public houses, written input, issues dealt with by proponent responses on issues tracking table)
- written public comment has no effect on outcome of the BC process; EAO trivializes public comment issues and answers accordingly

BCEAA/CEAA - Strategies for ENGO Engagement

- because of FN role in EA, making alliances where interests align may be the single most effective way to engage in the process
- EAO relatively impervious to public pressure; but has flexibility to include public organizations & to modify the process
- where CEAA is triggered, organize public support for a panel review

Case Studies

- RUBY CREEK MOLY MINE - A success story
- TULSEQUAH CHIEF AIR CUSHION BARGE -
A Failure

First Nations - Unique Role in EA

Legal requirements to be satisfied

- aboriginal rights must be considered
- honour of the Crown
- duty to consultation & accommodate

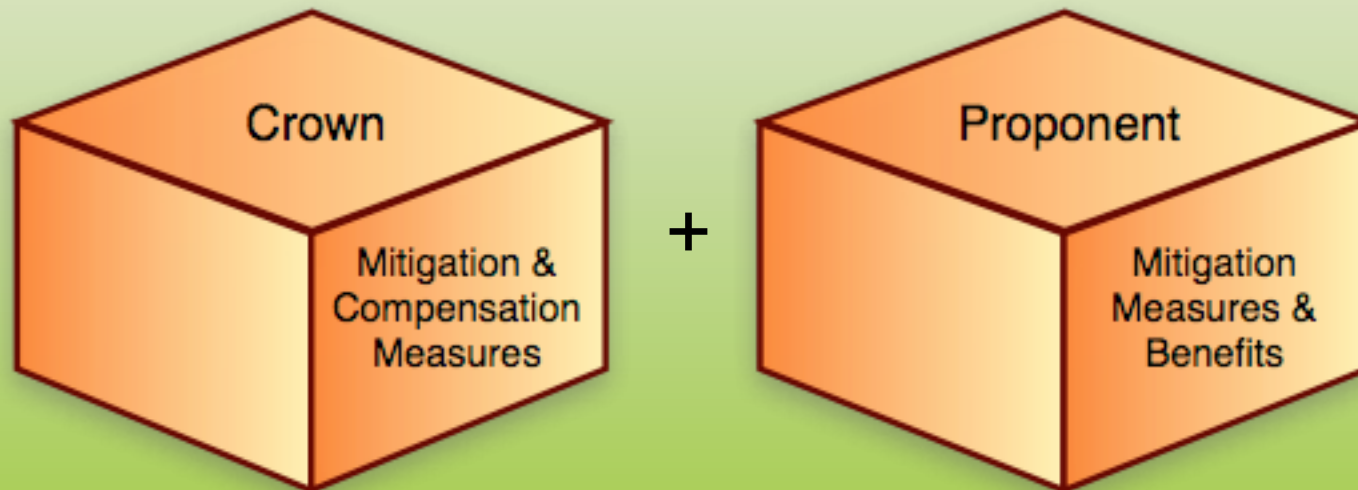
Putting the EA Process in Context

- Decision about the project needs to be made by both Crown and FN
- EA process designed to inform Crown decision; not designed inform FN decision-makers
- Crown has the power to authorize the project; First Nation does not
- EA alone cannot deal with all issues, or provide complete accommodation--another consultative process is required
- Thus consultation should lead to accommodation--a reconciliation of the interests of the two parties.

First Nation Basis for Decision

Key Question: “Will the proposed project contribute to the sustainability of the affected first nation?”

In order to make a responsible decision FN needs certainty about the contents of two “boxes”:



Limitations of BCEAA Process for FN

- Current EA process does not allow First Nation to reach informed decision --consultation not completed
- EA = first step in consultation, but does not constitute the complete process
- process is unilaterally imposed, not mutually agreed to;
- no formal mechanism for dealing with FNs in process; (FNs need to negotiate way into the process)

EA Limitations cont'd

- EA output \longrightarrow recommendation to Minister
- Minister not bound by recommendations, no certainty for FNs;
- Ministers' output \longrightarrow *Certificate*
- binds proponent on environmental mitigation and management (including some actions to protect FN interests)
- no process or mechanism for compelling the Crown to deliver on those issues for which Crown has responsibility;
- BC position \longrightarrow FN will be accommodated **after** project certification

Ruby Creek Molybdenum Project

Highlights

- proposed open pit molybdenum mine approx 30 km from Atlin; established access; heavily disturbed landscape from placer mining;
- potential impacts included wildlife habitat loss & displacement of Tlingit land users from valuable resource harvesting area
- proponent supportive of Tlingit engagement
- EA was successful; impacts & mitigation needs effectively identified--some as proponent requirements, some as Crown actions

Ruby Creek Molybdenum Project

EA Process

- BC EA process; driven significantly by Tlingits
- no public concern, so public role minimal
- project had potential appeal to local community without perceived major obstacles
- no potential for cumulative effects
- CEAA piggy-backed on BCEAA; scoped project narrowly to tailings impoundment only; conducted its review as a screening; minimal role; no independent analysis.

Ruby Creek Molybdenum Project

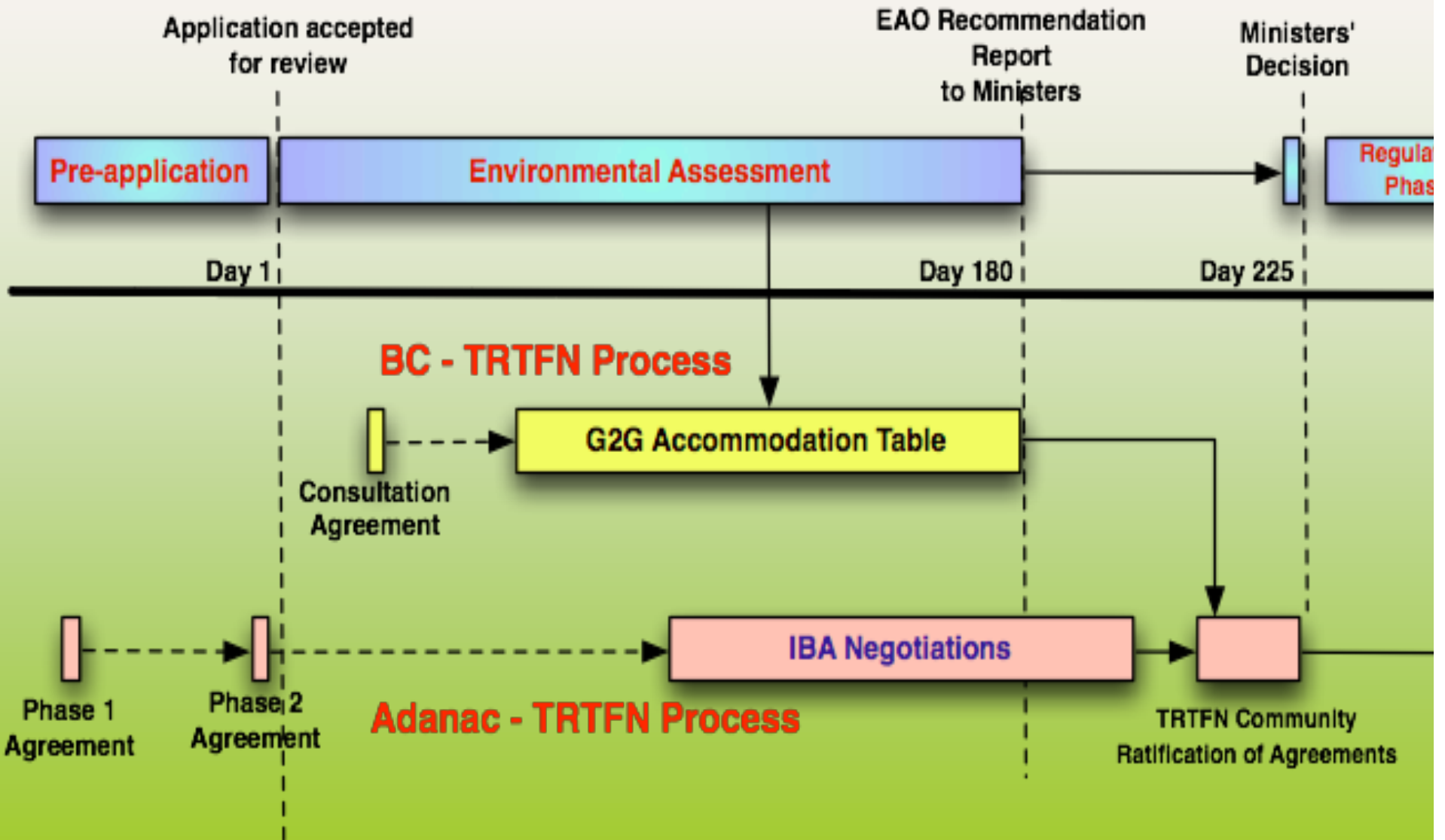
Consultation Process - Novel Addition

- Tlingits recognized at outset that EAO consultative inadequate to address issues
- proposed accommodation process harmonized with EA so that processes concluded concurrently, prior to ministers' decision
- long struggle with EAO to establish this
- separate agreement was reached; established government-to-government table to attempt accommodation on a number of issues posed by the project & not resolved in EA

TRTFN's Approach - Harmonizing EA with Crown's Accommodation Duty

- Establish separate government-to-government process to provide for consultation + accommodation prior to Ministers' approval; written agreement to do this
- Use the EA 225-day window to conduct “Accommodation talks” between BC & TRTFN.
- Use EA process to provide the technical information for Accommodation talks.
- Harmonizing can be done **without** extending the regulated EA timeline (as long as BC is motivated)

Harmonized Ruby Creek Process



Tulsequah ACB

EA Overview

- Project consisted of 12 km mine road + operation of a hoverbarge down Taku to Juneau. Ice-covered season ACB towed by tracked vehicles; open-water ACB towed by shallow draft tug
- BCEAA process; CEAA screening; working group format
- Impacts to fish, wildlife and river hydrology predicted to be insignificant, altho' high level of uncertainty assoc'd w/ ACB (novel technology, dynamic environment)
- Environmental monitoring key to document actual effects & ensure ACB performance
- EA process did produce detailed operational monitoring programs

Tulsequah ACB

Unresolved Issues from EA

- ACB activity would displace 500 hours Tlingit commercial and food fishing in river, an approx 10% loss of fishing opportunity each season
- EAO unilaterally determined this an 'insignificant' adverse impact, and would not consider mitigation or compensation despite Tlingits' recommendations
- ACB requires no provincial or federal permits to operate; therefore no regulatory oversight available; no way to ensure compliance with monitoring programs or adjustments to operation if req'd
- Tlingits proposed independent monitoring body to provide the oversight; EAO refused to consider it because proponent stated it would not pay for it (est \$80k/year)

Tulsequah Chief ACB CEAA Screening - Failure I

- project scope not produced until end of EA process;
- RA concluded that since public had an opportunity to comment on the proposed project through the BC EA public comment period, no public consultation process under CEAA was required; therefore,
- neither project scope nor scope of factors to be considered was posted on CEAA registry; therefore,
- RA did not have to consider public comments in taking any subsequent action.

Tulsequah Chief ACB CEAA Screening - Failure 2

RA concluded (without any independent analysis) that proposed mitigation measures would work so that a follow-up program not necessary

Reality = Mitigation measure effectiveness highly uncertain; generally agreed that environmental oversight of proponent's mitigation & monitoring programs would be required. RA made no requirement for oversight.

Tulsequah Chief ACB CEAA Screening - Failure 3

RA concluded that mitigation programs will be monitored under approvals or permits from regulatory authorities; also that site inspections and reporting would be done by proponent and provided to regulators.

Reality = Operation of the ACB on the river is not caught under any regulatory regime on BC side of border; there is no regulatory inspection or enforcement capability to ensure mitigation is effective or monitoring is properly done. Also, not wise to rely on self-regulation as RA is doing.

Tulsequah Chief ACB CEAA Screening - Failure 4

Screening report states that following factors were considered in its assessment:

- env effects of project as scoped, including cumulative effects;
- significance of effects
- comments from the public rec'd in accordance w/ CEAA provisions;
- measures technically & economically feasible to mitigate effects;
- need for any follow-up program in respect of scoped project.

Reality = None of these rec'd independent analysis by RA

Tulsequah Chief ACB CEAA Screening - Failure 5

Screening report states the following impacts relating to potential accidents were considered:

- mechanical failure of the barge
- mechanical failure of amphibious tractors
- mechanical failure of shallow draft tug or marine tug
- capsize of barge
- vessel collisions
- incidents resulting in the release of toxic/hazardous materials to Taku River

Reality: None of this done by either EAO or RA

Tulsequah Chief ACB CEAA Screening - Failure 6

Screening report states the alternatives to the project were considered, and identifies the following points:

- ACB route is shorter than Atlin road alternative
- unit transportation costs of ACB are lower

Reality: No discussion of relative environmental impacts is provided; items above are irrelevant to EA

Tulsequah Chief ACB CEAA Screening - Failure 7

Screening report states that effects to current aboriginal land use were looked at, and that Tlingits conducted a traditional land use study

Reality: No identification or treatment of the land use issues raised by the Tlingits is provided.