
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*), and as approved in the 2007-08 Internal Audit Plan, Government Audit Services has carried out an audit of the Yukon government's performance in meeting its responsibilities under that Act. The purpose of this audit is defined by section 39(2) which states: "*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.*" This definition excludes criteria such as "economy" and "effectiveness", the evaluation of which is regarded as standard procedure in most audits.

The scope of the audit officially covered the period from October 1, 2003 to September 30, 2006. In order to comment on the current status of initiatives, it was appropriate to extend our testing to January 2007. The audit tests were done on a sample basis and focused on those areas of the Act deemed to be significant in terms of degree of environmental and business risk. A representative sample of activities related to the government's environmental performance was also examined along with a follow-up of management's action plan from the previous audit report of 2005.

In our opinion the Act and its supporting regulations have been administered and enforced with an acceptable degree of efficiency and fairness except in two areas related to the currency of the Act and its consistent enforcement.

In terms of achieving efficiency we note that the Environment Act and its supporting regulations are in need of comprehensive review as parts of the Act have not kept pace with changes in Yukon, principally as a result of the devolution of the natural resource responsibilities to this government, and the enactment of the Yukon Environmental and Socio-economic Assessment Act. In addition, an activity may also be subject to more than one act such as the Environment Act and the Placer Mining Act. In such cases there is inefficiency in having overlapping and, potentially conflicting, standards for certain types of inspection and enforcement activities that are common to both acts.

In respect of fairness, the three different government departments administering activities that fall under the Environment Act have not yet reached the point where monitoring of compliance is consistent. Only when all enforcement agents are applying the same formal standards and methodology, with the same rigor, can we give assurance that the concept of *fairness* is not open to challenge.

In the detailed report which follows, we have shared our observations and assessments on whether there has been acceptable compliance with the Environment Act and its supporting regulations. We trust that our observations will add value by alternatively giving positive assurance, highlighting opportunities for improvement, or, in some cases, noting the areas where there remain some unknowns.

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 (*Fire Marshal's Office*); Executive Council Office (*Development Assessment Branch*) and Economic Development. We also received valuable insight from the Department of Justice and other stakeholder representatives. Their cooperation was crucial to the success of the audit project.

John Gunter
Director Government Audit Services

Whitehorse, Yukon
April 21, 2008

AUDIT SCOPE AND APPROACH

The provisions of Section 39(2) of the Environment Act generally identify the areas to be covered by the audit and the provisions of Section 39(3) establish a timeframe of every three years. The responsibility for conducting the audit rests with the Commissioner in Executive Council. This is the fourth audit commissioned by Yukon government since 1991.

Our examination covered the period from October 1, 2003 to September 30, 2006 and included some testing on current initiatives to January 2007. The Act and regulations that were included in the scope were:

- Environment Act

Regulations which create a permit system:

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

Regulations which do not have associated permits:

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

The audit sample was selected randomly from a listing of all permits issued under the regulations listed above during the period within the audit scope. In addition, activities under regulations which do not allow for permit were also tested.

Employees from the following departments were engaged to assist with the audit 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
- Department of Finance
- Executive Council Office (Development Assessment Unit)

The audit was conducted through interviews with staff from the departments identified above and through review of documents related to the Act and regulations. We also solicited input from two stakeholder representative bodies being the Yukon Fish and Wildlife Management Board, and the Yukon Conservation Society.

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.

Status of Previous Audit Recommendations

The discussion of the Yukon government's response to previous audit recommendations will, in some cases, overlap with observations made in the next section of this report. The findings presented here are meant to maintain the distinction between addressing the previous audit recommendations and meeting responsibilities under the Act.

Of the eleven audit recommendations given in the previous audit report, eight resulted in satisfactory action. The three remaining unresolved issues from the 2005 audit are identified below.

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. 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

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. The most recent version of the Yukon Conservation Strategy is dated May 1990. Under Section 45, the government has remained in default of the legal obligation to revise the strategy every three years.

In the 2005 audit the government commented that it would schedule discussions with the key stakeholders on the requirements for a revised Yukon Conservation Strategy in 2005. The government also acknowledged that it would remain non-compliant with Section 45 of the Act, until proposed amendments were made to the Act.

In the reporting on the Yukon State of the Environment, the Yukon Government has not met the targeted dates for tabling reports under Section 48(1) and the Act does not release the government from actually tabling each and every report.

The following table reflects the history and the current status:

State of the Environment Report	Legislative Session Tabled
Full three year report of 2002	Fall 2005
Interim report of 2003	Fall 2007
Interim report of 2004	Fall 2007
Full three year report of 2005	Spring 2008
Interim report of 2006	Not yet initiated

Management Comments

Department of Environment will meet legislated timelines for completing State of Environment Reports.

Yukon Conservation Strategy will be addressed through Environment Act review.

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 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 management response to our audit recommendation, Environment proposed to review the Environment Act in its entirety with the possibility of conducting public consultations in 2006-07.

Current Status

All pieces of legislation have a natural obsolescence, to a greater or lesser degree. In the case of the Environment Act, which was created before Devolution, the responsibility of the Yukon government has grown substantially. Since 2005 some preliminary notes were made on the potential changes to the Act, but the review process has not extended much beyond this initial step. The Act is in need of a complete review so that it regains its relevance and effectiveness.

Management Comments

The legislative agenda will be set by the government of the day. The Department of Environment will prepare a work plan for the Environment Act review.

Recommendation#B7 – Contaminated Sites Regulations

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.

This recommendation addresses three separate issues: the Department's policy on the designation of sites; the Department's responsibility to designate sites to prevent environmental harm; and the Department's responsibility with respect to freedom of information in relation to the public registry of contaminated sites.

With regard to the first issue, in 2005 the Department of Environment agreed that it would be changing its policy on designation of sites.

In so far as the second issue, Section 114(2) of the Act states that the Minister "may" designate sites as contaminated. 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 whether a site is contaminated on the basis of a site investigation, site assessment or other available information. Since 1998 the number of designated contaminated sites in the public registry has remained at five sites.

In 2005 we reported that the fairness criterion was not being met for two reasons to do with the government's maintenance of the public registry. Firstly, because the public might assume that since Environment has established a public registry it would contain all sites that meet the definition of a contaminated site. Secondly, because Environment provides information on sites which are not on the public registry the public might assume that the information provided in this manner would be the same as the information that would normally be made available under the public registry.

Current Status

The Department of Environment did change its policy for designating contaminated sites and has established a better framework of criteria as to what constitutes a

contaminated site. Thus, the first element of Recommendation B7 has been addressed.

However, while the upgrading of the policy was a positive step forward, it has not yet resulted in any additional designated contaminated sites being added to the public registry. Since our last audit the list of potential sites has grown from 104 to 167 sites.

The procedure for reaching a conclusion on whether or not a site should be recommended for designation is complex and time consuming. The difference between a site that is merely on the public registry and one that is designated a contaminated site is that the designated site is subjected to stricter controls over use of that land in the event that the proponent wishes to undertake a regulated activity at the designated site.

At the present time there may be up to four sites which meet the criteria in the designation policy and which could conceivably warrant the decision to place them under the stricter regulatory regime of designation. This cannot happen until the full analysis and negotiation process has run its course. The process is estimated to take a minimum of six months. An important mitigating factor, however, is that the department can still use an Environmental Protection Order to deal with an immediate threat or a situation warranting immediate action.

The fundamental purpose behind a public registry of contaminated sites is the idea that it should contain information on every site that has been identified as contaminated under Section 2 of the Contaminated Sites Regulation, and for which an evaluation or inspection has been performed, regardless of whether the site undergoes a comprehensive analysis leading to a specific designation, Ministerial review or mediation. The question that arises when we consider the fairness principle is whether it is in the public interest to include all these in the public registry, but with a categorization system to indicate the severity level.

A public registry must also be easily accessible to the Canadian public in an efficient and convenient manner. Presently, reference to the public registry can only be found under the Contaminated Sites Regulation, where information, if requested by the public, can only be obtained through contact with the Environmental Programs Branch. Although the department is compliant with the regulations by making the public registry available to the public during normal working hours, this accessibility can no longer be viewed as efficient and convenient when compared to today's technology and web-based access to public information.

Management Comments

The Department is in the process of making changes to the public registry to include all sites (contaminated and designated) on one consolidated list that will be available on the department's website. This would include specifying the process by which sites are determined to be contaminated and listing the information that will be included in the public registry. In addition to this, the department is also undertaking a review of all contaminated sites files to determine which sites meet the definition of a contaminated site, preparatory to listing these sites on the updated public registry in accordance with the new procedures.

As noted in the audit, the designation of new sites is a lengthy and complex process. The department will consider designation where circumstances warrant and resources are available to undertake the work.

Current Findings and Recommendations

This section of the report deals with the current view of the Yukon government's performance relating to the enforcement of certain regulations under the Environment Act and sections of the Act where issues of efficiency and fairness were identified during the audit. As this audit is repeated in three-yearly cycles, we are in a position to assess the progress since the previous audit. We note the following examples of progress which reflect management's success in achieving continuous improvement:

- The initiative to harmonize inspection activities with the Department of Energy Mines and Resources with a formal memorandum of agreement between the two departments.
- Addressing the climate change challenges
- Upgrade of the database which is an essential tool used to manage the activities carried out under the Act.
- Environmental and energy stewardship initiative.
- Two positions created to deal with Yukon government contaminated sites.
- Increasing success with special waste collection and household hazardous waste events evidenced by significant increases in tonnages collected.
- Environmental liabilities program.
- Progress in negotiating a contribution agreement with the Federal government for the remediation of the Marwell Tar Pit.

Our findings and recommendations with respect to opportunities for future improvement to the Environment Act and regulations are summarized below:

SECTION 151(1) INSPECTION OF REGULATED ACTIVITIES

Section 151(1) identifies the duties or actions that can be performed by Environmental Protection Officers when conducting an inspection under Part 13 of the Environment Act. Three government departments have assigned roles in the enforcement aspect of the Act:

- Environment Department, which takes the lead role.
- Energy, Mines and Resources, which shares responsibility for enforcement and compliance with Environment Act in the resource development sector.

- Community Services, which through the Fire Marshal's Office, covers the Storage Tank Regulations.

In terms of applying the principle of fairness for the monitoring and inspection activity we note that the common approach to enforcement is to apply a three-stage philosophy of “*Educate, Encourage, and Enforce.*” This approach is designed to win the confidence of the clients and secure their commitment and buy-in, rather than take an uncompromising attitude towards enforcement. This strategy certainly embraces the quality of “fairness” and management believes that it is a contributing factor to the success achieved.

In terms of achieving efficiency there have been significant steps forward, but also some areas that require further attention. The biggest challenge is to apply the Environment Act in the resource development sectors namely: mining; forestry; lands; oil and gas and agriculture. With Devolution the responsibility of the Yukon government was increased dramatically. Prior to Devolution mining operations were regulated pursuant to either the Yukon Quartz or Placer Mining Acts and would have required a Mining Land Use Permit as well as possibly a Water Licence and Fisheries authorization. There has been no change in the requirement for these regulatory approvals post devolution, however, these activities along with all other resource based activities may also require an Environment Act permit, where applicable.

In order to meet the added responsibilities in the most efficient manner, the strategy is to entrust Energy, Mines and Resources with the task of applying the Environment Act in the resource development sectors. This is reflected in a Memorandum of Agreement (MOA) signed by representatives of the Departments of Environment and Energy, Mines and Resources in 2006. The reason why this MOU is a significant step forward in meeting the responsibilities under the Environment Act with efficiency is that it:

- integrates enforcement and compliance monitoring programs under the Environment Act with those administered by Energy, Mines and Resources; and
- minimizes the duplication of services.

It is our assessment that the MOA is a noteworthy progression in the Yukon government's objective of applying the Environment Act throughout the territory in a way that is efficient in the use of resources.

We do note, however, that there are aspects of the monitoring and inspection function that require further attention. Our observation is that none of three inspection authorities achieved the inspection coverage, specifically of activities

regulated under the Environment Act that they had either planned to achieve in 2007 or that they would set as a target, given the ability to do so. It is from the monitoring and inspection function that the Yukon government in part gets its assurance of whether there is acceptable compliance with the regulations and whether the threats to the environment are controlled to an acceptable degree.

When seeking assurance that there is adequate inspection coverage we relied on documented results of inspection activities, and in particular we seek evidence of inspections that specifically checked compliance with regulations under the Environment Act. In the list of inspections completed in 2007 Environment fell behind in its planned schedule of inspections, but not to the extent that would be of major concern to us. However, only one inspection was carried out by Energy, Mines and Resources. In the absence of auditable evidence we could not give assurance that there had been sufficient overall inspection coverage under the Act.

It is, however, important to clarify that there is regular, planned inspection of clients in the resource development sectors. The reason why we could not get appropriate audit evidence from this control function is that it was primarily targeting the requirements under the mining land use permit and the testing of compliance with the Environment Act was a secondary purpose. The inspection plan of Energy, Mines and Resources and the reporting that is generated is not geared towards the Environment Act.

In order to reach the desired standard for inspection of activities under the Environment Act and to achieve a fair and consistent standard across all sectors of the Yukon economy, we recommend the following opportunities for improvement be considered:

Recommendation #1

The Department's 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 has been decided on a risk-based approach. In other words, 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. Some permit categories may even be so low-risk that they do not get audited. This risk based approach is common practice in most audit functions and it is essential if one is to be efficient.

The next step, which Environment has already put forward for future consideration, is to formalize the risk based approach to inspection coverage. We concur that it would be a worthwhile step forward to document the risk based strategy for generating the sample of permits that are to be put on the inspection plan for the

next year. The following are some advantages of turning the risk based selection into a formal process:

- Senior management gains further understanding about the inspection universe and is thus better positioned to identify resource requirements.
- In the unfortunate event of a disaster occurring, and the resulting questioning of why the inspection process missed the warning signs, the formal risk management strategy demonstrates due diligence and thus protects the enforcement team.

Management Comments

Agreed. The Department of Environment is evaluating risk based criteria for inspections.

Recommendation #2

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

In developing an inspection process, Energy, Mines and Resources first needs to establish an inventory of all activities within the resource development sectors that would be regulated under the Environment Act. Without this kind of information, it would become very difficult for the department to design the right inspection strategy. Once there is a list of those clients that should have permits issued under one of the Environment Act regulations, it would then be 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.

Management Comments

Energy, Mines and Resources' (EMR) inspection processes are well developed for those areas in which it has direct regulatory authority. An inventory of those resource based activities which may require permitting under the Environment Act is the lead responsibility of the Department of Environment. However, EMR is developing lists for its clients outlining all the permits they require for their operations. EMR's inspection programs are all based on a risk assessment model that has been in place since prior to devolution. This systematic risk assessment achieves what the audit report speaks to: it helps determine the inspection program required to reduce or prevent risk and it serves as a demonstration of due diligence for both the inspections that are conducted as well in those situations where inspections may not be conducted due to budgetary constraints.

Storage Tank Regulations

The responsibility for issuing Storage Tank Permits has always been with the Fire Marshal's Office in the Department of Community Services. This office has been hampered by staff changes, inadequate resources and has not had assistance with designing a proper database or tracking system for the administration and monitoring of storage tank permits. Another factor that detracted from the ability to run the Storage Tank Permits to the minimum required standards was the added burden of checking residential heating fuel tanks for insurance purposes. The end result was that the Storage Tank Regulations were not applied with the desired consistency.

We observed the following areas of concern:

- There was no follow-up investigation for those cases where an existing permit expired, but the client failed to submit a renewal request. Without verifying the reason for a non-renewal, there was no assurance that all who should have permits, do indeed have current permits.
- A gas station was closed and the tanks removed without the right permit.
- Another gas station stopped operating, but failed to notify the government as stipulated in the permit.
- New (renewed) permits are not consistently mailed out promptly to the permit holders.
- The administration and filing systems were not efficient and consequently not conducive to easy retrieval and self-auditing.
- Before the change to a combined installation/operation permit, it appears that some parties got their installation permit, but then failed to apply for the second permit, being the operating permit.

In addressing these concerns, some alternatives would need to be considered such as:

- allocating more resources to the Fire Marshall's Office;
- changing the approach to achieving the objective; or
- reassigning responsibility (together with added resources) to an authority better positioned to do the task.

Recommendation #3

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.

Management Comments

Agreed. The Department of Environment will review the existing regulations to determine whether amendments are required and will examine current processes to ensure consistent application.

Purchasing policies

Section 39(1) (c) reads: “Ensure that standards for conservation of the environment and sustainable development are incorporated in the purchasing policies and practices of the Government of the Yukon.” The policy documents that might be appropriate places to describe the standards for conservation of the environment and sustainable development could conceivably include the Yukon government’s Purchasing Policy, Contracting Directive, Acquisition Card Policy, Project Planning and Implementation Directive and Financial Administration Manual.

We could not find wording in these documents that we would consider being a clear demonstration of conformance with Section 39(1). There were no specific provisions related to the “environment” in these documents that could directly affect the purchase of goods. Goods purchases are made on behalf of client departments who determine their needs and set the specifications for the goods to be acquired. Departmental programs may, or may not, have provisions which take the “environment” into account when deciding what to purchase and according to what specifications the purchase is to be made.

Recommendation #4

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

Management Comments

Agreed. The Yukon government can continue to enhance its existing programming in this area, building on examples like the recent improvements to the fuel efficiency of our fleet vehicle program. In addition, the Yukon government will create a green procurement policy.

Yukon Council on the Economy and the Environment (YCEE)

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.”

The advisory body that was created twenty years ago ceased to function during the period of audit examination. The YCEE has not met since 2005. We understand that the YCEE lost its momentum mainly because there were no significant issues put before it.

A review is underway to decide whether to resurrect this body and this is expected to culminate in an options paper. No further action is recommended at this time.

Recycling

Every year, the Department of Finance has prepared a financial statement to reflect the transactions of the Recycling Fund. Attached to this is an annual report prepared by the Department of the Environment. Both of these documents are created by virtue of Section 3 of the Recycling Fund Regulations, which states that “*The Minister shall cause to be prepared an annual financial statement and report on the activities of the Fund*”. Although the regulation does not specify the obligation to table the annual report, it is accepted practice that all reports on government incomes and expenditures are first seen by the Legislature before being released to the public.

In the past, these financial statements and reports on activities have been tabled in the Legislative Assembly; the last such tabling was for the year ended March 2004.

Recommendation #5

To promote greater accountability and transparency with respect to the financial reporting on the activities of the Recycling fund, the Yukon government should resume the practice of tabling these annual statements and reports in the Legislative Assembly.

Management Comments

The requirement in the regulations is that the Recycling Fund Report be publicly available. The department's practice is to make the annual reports available on request.