Understanding the Environmental Assessment Process for Energy and Mining Projects: A toolkit for First Nations communities

Disclaimer:
This toolkit is intended to assist First Nation communities in understanding the federal, provincial, and/or First Nation environmental assessment regime processes as they relate to energy and mining development in British Columbia, and should serve as reference only. The information presented in this toolkit is not intended to influence decision-making nor should it be relied on as a final legal interpretation of any law, regulation, or policy. The information provided is not intended to reflect the opinions of the authors.

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ABORIGINAL FISHERY – fish that is harvested by Aboriginal organizations or any of its members for the purpose of using the fish for food, for social, or ceremonial purposes or for the purposes set out in land claims agreements.

ABORIGINAL RIGHTS – the inherent, collective rights of First Nation, Inuit, and Metis that flow from the original occupation of the land. These rights are protected under Section 35 of the *Constitution Act, 1982.*

ABORIGINAL TITLE – the inherent, collective right to a group's ancestral or traditional territory, and unless surrendered, negotiated, or extinguished through treaty, the group retains ownership and jurisdiction over this territory.

ACID MINE DRAINAGE – drainage from surface mining, deep mining, or coal refuse piles, usually highly acidic with large concentrations of dissolved metals.

ADAPTIVE MANAGEMENT – a process that involves exploring alternative actions and making forecasts about their outcomes, designing monitoring programs to provide reliable feedback and understanding of the reasons underlying actual outcomes, and then adjusting actions based on these outcomes.

ADVERSE EFFECTS – direct effects that have the potential to cause long-term, irreversible, or undesirable environmental change.

AREA OF MINE OPERATIONS – means the area at ground level occupied by any open pit or underground workings, mill complex or storage area for overburden, waste rock, tailings or ore.

BASELINE CONDITION – a description of the pre-project environment, which is inclusive of the cumulative effects of previous activities, and the future environment in the absence of the proposed project.

GLOSSARY OF COMMON ENVIRONMENTAL ASSESSMENT TERMS

BASELINE STUDY – description of the biophysical and socio-economic state of the environment at a given time that can later be used for the comparison of environmental change over time.

BIOPHYSICAL ENVIRONMENT – the air, water, land, rocks, minerals, plants, animals, and the interacting components of ecosystems.

COMMERCIAL FISHERY – fish that are harvested under the authority of a license for the purpose of sale, trade, or barter.

CUMULATIVE EFFECT – a change in the environment caused by multiple interactions among human activities and natural processes that accumulate across space and time.

ENVIRONMENT – in terms of environmental impact assessment, includes the biophysical, social and economic components potentially affected by a proposed activity.

ENVIRONMENTAL EFFECT – the difference in the condition of an environmental parameter with as opposed to without a proposed development activity.

ENVIRONMENTAL IMPACT – an environmental effect that has an estimated societal value placed on it.

ENVIRONMENTAL ASSESSMENT – a systematic process to identify, predict, and propose management measures concerning the possible implications that a proposed project's actions may have for the environment.

ENVIRONMENTAL IMPACT STATEMENT – the formal documentation produced from the EIA process that provides a non-technical summary of major findings, statement of assessment purpose, detailed description of the proposed action, impacts, alternatives, and mitigation measures.

FISH HABITAT – means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.

HUMAN ENVIRONMENT – aspects of the environment that are non-biophysical, the social, economic, and cultural environments.

IMPACT AND BENEFITS AGREEMENTS – agreements between Aboriginal groups and industry that provide the Aboriginal community a stake in profits or economic benefits and provides for the participation in some aspects of the environmental assessment, monitoring, mitigation, and follow-up activities of the undertaking in exchange for some restrictions on the exercise of traditional rights and title and access to land.

INTERVENOR - a person to whom the NEB has granted broad participation rights and obligations (including the right to submit evidence, ask questions, and submit a final argument).

MARINE TERMINAL – an area normally used for berthing ships and includes wharves, bulkheads, quays, piers, docks, submerged lands, and areas, structures and equipment that are connected with the movement of goods between ships and shore and their associated storage areas, including areas, structures and equipment used for the receiving, handling, holding, consolidating, loading or unloading of waterborne shipments, or used for the receiving, holding, regrouping, embarkation or landing of waterborne passengers, and any area adjacent to the areas, structures, and equipment referred to above that is used for their maintenance.

MITIGATION - a means to reduce or eliminate the predicted adverse impacts of the project.

MONITORING – a systematic process of data collection or observations used to identify the cause and nature of environmental change.

NAVIGABLE WATERS - Since 2014, the *Navigation Protection Act,* which replaced the Navigable Waters Act, defines water bodies according to "scheduled" and "non-scheduled" navigable waters. Non-scheduled navigable waters are not listed in the Act and are not subject to the same obligations for protection.

OIL AND GAS PIPELINE – a pipeline that is used, or is to be used, for the transmission of hydrocarbons alone or with any other commodity.

PIPELINE – means a line that is used or to be used for the transmission of oil, gas, or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area. A pipeline includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressor, loading facilities, interstation communications by telephone, telegraph, or radio and real and personal property, or immovable and movable, and works connected to them, but does not include a sewer or water pipeline that is used or is proposed to be used solely for municipal purposes.

REGIONAL CUMULATIVE EFFECTS ASSESSMENT – a systematic process that identifies and assesses the accumulative pressures on a region from multiple developments and natural processes in the past, present, and into the future.

SCENARIO ANALYSIS – an approach used to identify hypothetical actions or situations and potential outcomes.

SCOPING – an early component of environmental assessment used to identify important issues and parameters that should be included in the assessment.

SCREENING – the selection process used to determine which projects need to undergo an environmental assessment and to what extent.

SPATIAL – the geographic scale used to define the boundaries of the environmental impact assessment.

STRATEGIC ENVIRONMENTAL ASSESSMENT – the environmental assessment of initiatives, programs, policies, and plans and their alternatives.

TEMPORAL – the time scale used to define the parameters of the environmental impact assessment.

TRADITIONAL ECOLOGICAL KNOWLEDGE – the cumulative body of knowledge, beliefs, and practices handed down through the generations that concerns the relationships of all beings (human and non-human) with their environment. There are usually no guarantees that TEK will be incorporated into the assessment process.

TREATY RIGHTS - includes rights that now exist by way of historical treaties or modern-day land claims agreements or may be so acquired.

VALUED ECOSYSTEM COMPONENTS (VEC) – components of the physical and human environment that are considered important and require evaluation in environmental assessment.

INTRODUCTION

The First Nations Energy and Mining Council (FNEMC) was established in 2006 by BC First Nation leaders. The Chiefs of the First Nations Summit (FNS), Union of BC Indian Chiefs (UBCIC) and BC Assembly of First Nations (BCAFN) passed resolutions to develop a BC First Nations Energy Action Plan (2007) and BC First Nations Mineral Exploration and Mining Action Plan (2008) (see Memory Stick for Energy-Action-Plan.pdf and Final_Mining_Action_Plan.pdf). Both action plans involved the input and feedback from over 200 BC First Nations leaders and delegates to provide direction on the creation of the action plans and role of the FNEMC. (Read more about the FNEMC at http://www.fnemc.ca/about-us/). Many different initiatives are underway in British Columbia that have direct impacts on First Nations and many First Nations themselves are either pursuing ventures individually or in partnership with business interests.

Mission

FNEMC operates under the authority of First Nations to support and facilitate their efforts to manage and develop energy and mineral resources in ways that protect and sustain the environment forever while enhancing the social, cultural, economic and political well-being of First Nations in BC.

Vision

First Nations in BC, through the exercise of title and rights over the lands and resources in their traditional territories, will be full participants in the decision making, management processes, and economic benefits associated with the sustainable development of energy and mineral resources in BC.

Online Resources

The FNEMC provides resources to First Nations that examine issues ranging from Environmental Assessment and its potential reform in BC, the State of Mineral Exploration and Mining in BC (2008), Protocol and Agreement templates, Impact Benefit Agreement

Toolkit, and mining policies of the Taku River Tlingit First Nation Mining Policy (2007) (see http://www.fnemc.ca/publications-and-reports/templates-resources/). Resources and materials are provided on a CD or memory stick that can be requested by contacting Joanna Prince (email: joanna.prince@fnemc.ca).

Funding for **"Understanding the Environmental Assessment Process for Energy and Mining Projects: A toolkit for First Nations communities"** has been provided by the FNEMC.

Background

This toolkit was developed for the First Nations Energy and Mining Council (FNEMC) with the purpose of assisting First Nations in BC whose Aboriginal rights and title and treaty rights may be affected by a project or by resource development. The information in the toolkit can help First Nation understand when an EA is required and how First Nation communities can be effectively involved in the process. The toolkit is designed primarily for First Nation leadership, employees and community members and is meant to deliver information and practical advice that will help to provide ideas for decision-making processes that will engage community members so that people can understand the impacts and mitigation strategies of development proposals. By providing a step-by-step guide to the EA process and key strategies to consider mitigation of risks, the toolkit and video will aid First Nations in understanding the important role of EAs in resource development.

The goal of this toolkit is to assist parties to understand:

- The Basics of EA
- How First Nation can be more effectively involved in the EA Process?
- Consultation
- EA Regimes under Treaty Agreements, Self-Government, and the First Nations Lands Management Act
- Regulatory Processes for Pipelines, Mining, and Liquified Natural Gas (LNG) Projects

This work was developed by doing a review of the literature and existing work regarding EAs in BC and Canada. A useful existing toolkit that was referenced was the First Nations Environmental Assessments Toolkit, which was prepared by the First Nations Environmental Assessment Technical Working Group in 2004.

PURPOSE OF THE TOOLKIT?

The purpose of the toolkit is to assist First Nations in British Columbia to understand the Environmental Assessment process that accompanies some proposed mining and energy projects or developments. This toolkit was designed for First Nations leadership, employees, and community members. With this information, First Nations can understand when an EA process must be initiated and how they can effectively be involved in the process.

Scope of the Toolkit

This toolkit uses recent case studies from First Nations in BC and other regions in Canada to explain the basics of the EA process. It provides opportunities for participation and guidance for interacting effectively with project proponents and regulatory agencies.

This toolkit is not meant to provide an exhaustive description of potential environmental, impacts of energy and mining projects on First Nations communities and their lands. It also is not meant to provide all relevant information about the EA process, but instead was developed to build capacity to participate and to guide users to know what questions to ask and where to go for additional information and help.

The writers of the toolkit sought to communicate in a neutral voice with respect to the issues of energy and mining project development. First Nations communities have Rights and Title to make decisions about how their lands and territories are used based on the needs and desires of their community leaders and members. This toolkit seeks to arm people with information to make sound, transparent decisions that they, and their communities, can support.

Checking out the tide pools at Kehan village.
- Photo by Katie Turner

ENVIRONMENTAL ASSESSMENT ROLES AND RESPONSIBILITIES

Background

The International Association of Impact Assessment (IAIA) defines Environmental Impact Assessment (EIA) as:

> *The process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made (IAIA, 2009).*

Under this definition, the environment can be considered the biophysical environment (air, water, land, plants, and animals) and the human environment (social, economic, culture, health, community, sustainability, employment, financial benefits).

In 1992, the Government of Canada enacted the *Canadian Environmental Assessment Act* (CEAA) with the intention of achieving sustainable development by identifying, evaluating and mitigating adverse environmental effects which may be caused by projects under federal jurisdiction. British Columbia's *Environmental Assessment Act* provides guidance for projects to review potential impacts associated with projects under provincial jurisdiction. However, in 2012, the Government of Canada repealed CEAA and replaced it with a new CEAA 2012 which applies to a smaller set of projects and expands Ministerial discretion to approve or decline a project, regardless of the EA findings. It also narrows the scope of the federal EA obligations, but is intended to avoid Provincial EA overlap.

First Nations in British Columbia (BC) are making it are making it increasingly clear that they expect to be consulted on any development projects in their territories, especially after the Supreme Court of Canada rendered its decision in June 2014, in the *Tsilhqot'in* case, in which the court reiterated that Aboriginal title confers a special type of interest in lands, including the right to determine how it is used, to enjoy its economic benefits, and the right to pro-actively manage it. The Court made it clear that Aboriginal title imposes significant restrictions on what Aboriginal groups can do with the land, that it cannot be alienated except to the Crown, or encumbered or developed in ways that would prevent enjoyment and use by future generations, and, that any infringement of an established Aboriginal title by the federal or provincial government must be preceded by appropriate consultation and accommodation with the Aboriginal group and must be justified under s. 35 of the *Constitution Act, 1982*.

The Court warned that governments and others who seek to develop or use lands which are subject to Aboriginal title must obtain the consent of the Aboriginal title holders and stressed the potentially serious consequences that failing to obtain such consent can have on both completed or pending projects.

WHAT DOES AN EA TELL US?

- Is there a risk that the proposed project will negatively impact the environment or nearby communities? If so, where?
- Is the proposed project the safest alternative for resource development?
- How significant are potential impacts?
- How much uncertainty exists about project impacts?
- Has the proponent considered mitigation actions?

WHAT KINDS OF PROJECTS REQUIRE FEDERAL EAs?

- Any project regulated under the *Canadian Environmental Assessment Act,* 2012, or projects regulated by the National Energy Board or the Canadian Nuclear Safety Commission.
- Projects occurring on federal lands.
- Projects causing environmental effects on fish and fish habitat, aquatic species, or migratory birds, or other component of the environment set out in Schedule 2 to CEAA 2012 (Schedule 2 not defined as of this date).
- Projects with effects crossing provincial and international boundaries.
- Projects which may cause effects on Aboriginal health and socio-economic conditions, physical and cultural heritage, land and resource use, and on historical, archaeological, paleontological, or architectural structures or sites of significance.
- Projects with changes to the environment that are directly linked to or necessarily incidental to any federal decisions about a project.

Basics of the EA process – Federal Jurisdiction

A project proponent must provide the Federal agency with a description of their proposed project, depending on the jurisdiction that it is likely to fall under.

Upon receipt of the project description, the Agency has 45 days to determine if a federal EA will be required. The Agency issues a Notice of Determination (NOD) and discusses cooperation with the province if an EA is required. To avoid duplication with provincial law, or laws established under a First Nation EA regime, the CEAA 2012 allows:

1. Delegation - The federal Responsible Authority (RA) may delegate the carrying out of the EA and writing of the report to another jurisdiction, but not the final decision-making.

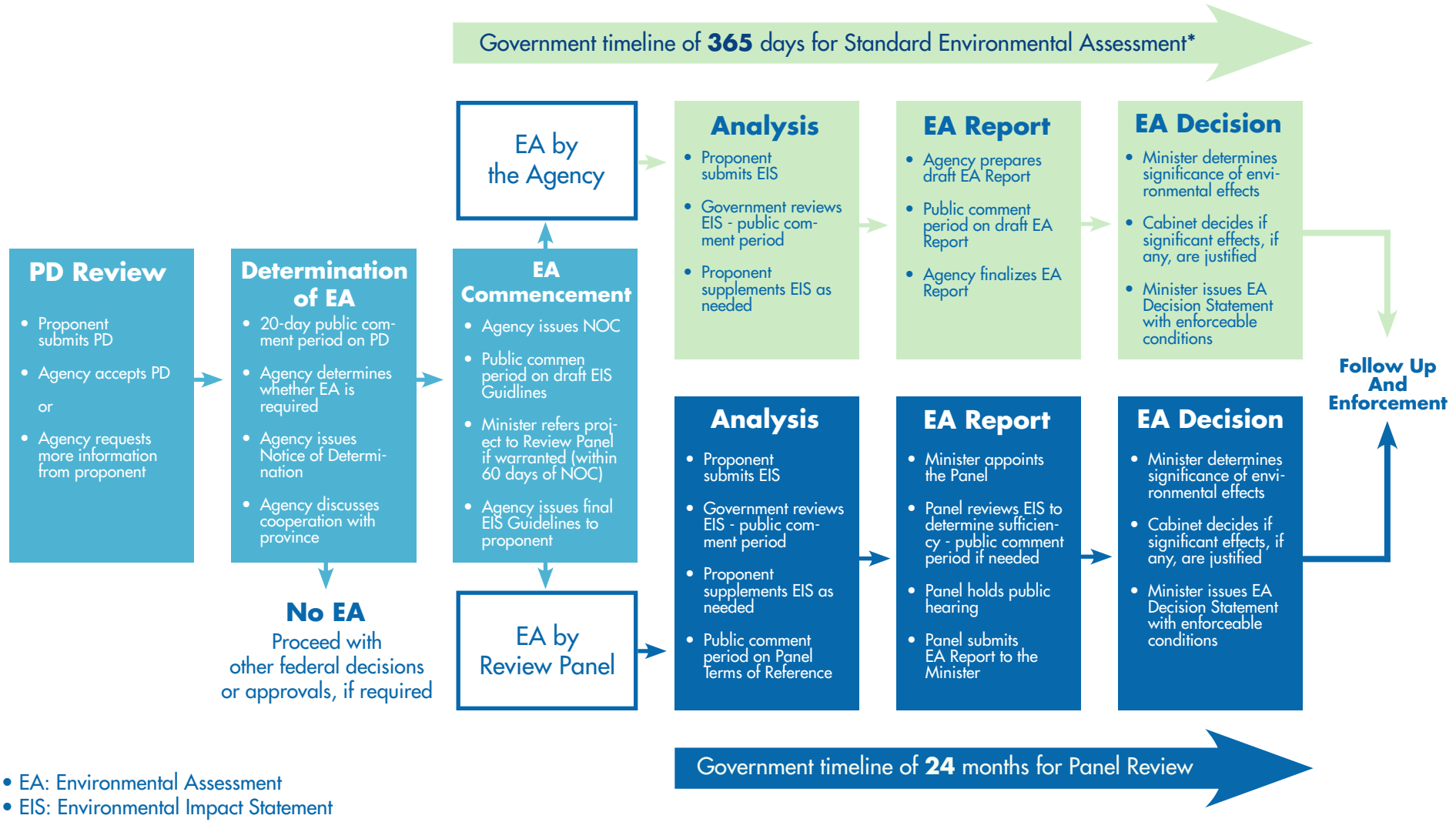
2. Substitution - A province can request the federal EA process to substitute its process, or an Aboriginal EA process may be substituted for a federal process, however, the final decision is left at the federal level.

3. Equivalency – if a provincial process is deemed appropriate, the Governor-In-Council (GIC) may exempt a designated project from the application of CEAA 2012, when certain conditions are met. The province then carries out the EA and makes the final decision subject to the stipulated mitigation measures, including measures to protect components of the environment under federal authority, such as fisheries.

For energy and mining projects, RAs can be the Agency or the National Energy Board (NEB). Federal department and agencies with specific expertise are required to provide information and advice that support the conduct of EAs by RAs. If an EA is required, the Agency issues a Notice of Commencement (NOC).

Under CEAA 2012, there are two levels of EA if the Minister of Environment determines that a federal EA is required. These are Standard Environmental Assessment or Panel Review. Once a project description has been submitted, it will be listed on the Canadian

Environmental Assessment Process Managed By The Agency



- EA: Environmental Assessment
- EIS: Environmental Impact Statement
- PD: Project Description
- NOC: Notice of Commencement

* With possibility of extension
Timelines do not include time required by the proponent to provide information

WHICH AGENCY IS RESPONSIBLE FOR THE FEDERAL EAs?

- For nuclear projects, the Canadian Nuclear Safety Commission;
- For international and interprovincial pipelines and transmission lines, the National Energy Board;
- For all other designated projects, the Canadian Environmental Assessment Agency.

Environmental Registry website (see http://www.ceaa-acee.gc.ca/050/index-eng.cfm) which facilitates public access to notices of potential or current EAs. The registry also includes draft/final Environmental Impact Statements (EIS) and Guidelines, public comments, draft/final EA Reports, Aboriginal consultation documents, and the decision statement.

The Standard Environmental Assessment is the default level of assessment (see Diagram - Environmental Assessment Process Managed by the Agency). However, within 60 days of an EA commencement, the Minister can refer the designated project to a Panel Review (Panel) but will only do so if he/she believes that the designated project may cause significant adverse environmental effects and will generate public interest in those effects. The Minister is limited in his power to refer a designated project to a Panel by the CEAA, 2012 definition of environmental effects (see above). If the NEB is the RA, the designated project may not be referred to a Panel. The Panel is made up of one or more unbiased and knowledgeable or experienced persons.

A Panel is required to hold public hearings which allow for interested parties **who are directly** affected or who have relevant information or expertise to participate. The Agency provides funding for the affected public to comment on the draft environmental assessment report. The review panel submits its report and recommendations to the Minister of the Environment. The Minister makes a decision. (see Diagram - Environmental Assessment Process Managed by the Agency on previous page)

All Standard EAs must be completed, and a decision made, within **365 days**. All Panel Reviews must be concluded within **24 months**.

How are First Nations involved in the federal process?

First Nations have two opportunities to review an EA:

- In the same manner as any other member of the public, or

- The Federal Government has the duty to consult with First Nations if it contemplates that a project will adversely impact established or potential Aboriginal and Treaty Rights and Title, or may impact health and socio-economic conditions, physical and cultural heritage, current land use and resources used for traditional purposes, or historical, archeological, paleontological, and architectural structures or sites of First Nations. The Agency makes funding available through its Participant Funding Program to support First Nation engagement in the EA process.

Basics of the EA process – Provincial Jurisdiction

BC is the only jurisdiction in Canada that has a dedicated Environmental Assessment Office (EAO), which conducts environmental assessments and makes recommendations to government whether a project should proceed or not, and what conditions will be attached to an approval. Since about two-thirds of reviewable projects in BC require both federal and provincial EAs, BC and Canada have signed agreements to allow harmonized reviews. A single cooperative assessment process which allows each party to meet their respective legal obligations while maintaining their existing roles and responsibilities.

The *BC Environmental Assessment Act* allows the government to enter into an agreement with another jurisdiction to conduct an EA as equivalent to its own. BC uses this power to enter into agreements with the Federal Government on port expansion projects or interprovincial pipeline projects, and with local governments on quarry projects.

WHAT KINDS OF PROJECTS REQUIRE A PROVINCIAL EA?

- Projects which occur on Provincial lands.
- Industrial projects such as chemical manufacturing, primary metal and forest project industries.
- Energy projects within a single province, such as power plants, electric transmission lines, natural gas processing or storage plants, and transmission pipelines.
- Water management projects such as water diversions, dams, dykes, groundwater extraction.
- Waste disposal projects, such as special waste facilities, local government solid and liquid waste management facilities.
- Mine projects, such as coal and mineral mines, sand and gravel pits, placer mineral mines, construction stone and industrial mineral quarries.
- Food processing projects.
- Transportation projects such as highways, railways, ferry terminals.
- Tourism destination resordt projects, such as large golf or ski hill resorts.

The legal framework for EAs in BC includes:

• *Environmental Assessment Act* (2002) focuses on the issuance of an environmental assessment certificate (Certificate);

• The regulations under the *Environmental Assessment Act*, which include the:

- *Reviewable Projects Regulation* identifies the types of projects that trigger an EA;

- *Prescribed Time Limits Regulation* requiring time limits on stages of the EA;

- *Public Consultation Policy Regulation* guides how public consultation should occur;

- *Concurrent Approval Regulation* allows the proponent to apply to have other agencies consider their applications for permits and authorizations while the EA is being conducted, in order that approvals can be obtained with 60 days of the issuance of a Certificate;

- *Transition Regulation* applied for projects in the system when the *Environmental Assessment Act* came into force in 2002.

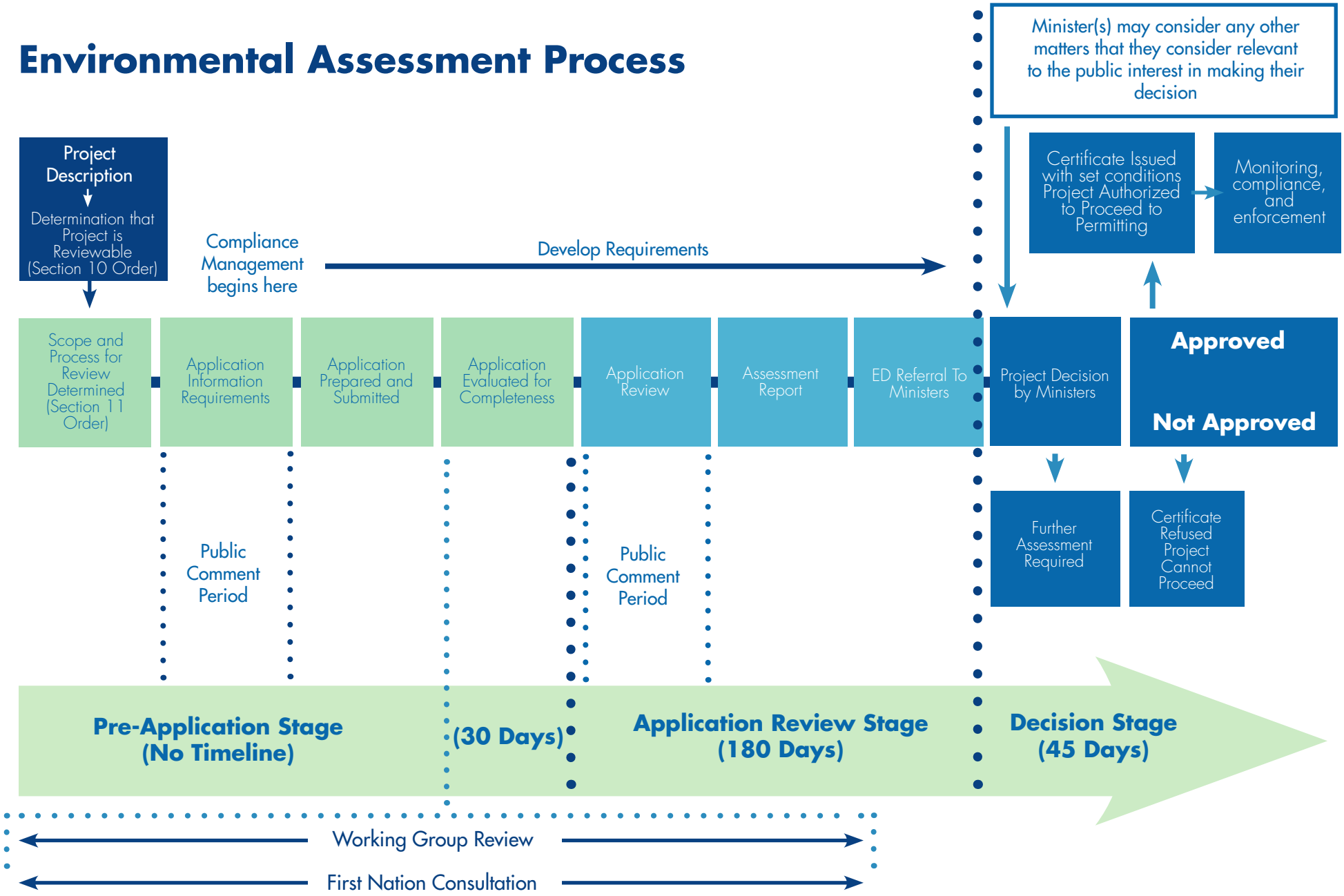
• Common law refers to case law developed through court decisions, which is considerable as a result of the Crown/First Nation relationships in BC, and the constitutional recognition of Aboriginal and treaty rights and Aboriginal title which has important implications for the Crown duty to consult. Key cases include:

- *Haida Nation v. British Columbia*

- *Taku River Tlingit First Nation v. British Columbia*

- And more recently, *Tsilhqot'in Nation v. British Columbia*

Environmental Assessment Process



There are three stages in the Provincial assessment: pre-application, application review and the decision stages.

1 **Pre-application Stage:** A proponent submits a project description to the Provincial Environmental Assessment Office (EAO). The EAO determines if a project requires an EA and allows for a public comment period. If an EA is required, the application is prepared and submitted and the application is evaluated for completeness.

2 **Application Review Stage:** Within 180 days, the application is reviewed and provided for public comment. An assessment report is developed and it is then referred to the Minister for a decision..

3 **Decision stage:** Within 45 days, a project decision is made by ministers. If the project is approved, a certificate is issued with a set of conditions. A monitoring, compliance and enforcement plan will be instituted. A project may be referred back for further assessment. If a project is not approved, the certificate is not issued and the project may not proceed.

A typical Provincial EA takes **16 to 20** months to complete. Each project goes through a pre-application and an application review stage.

Responsible Minister Order

Under the *BC Environmental Assessment Act*, two Ministers are responsible for making the decision on whether or not to issue an Environmental Assessment Certificate for a project undergoing an environmental assessment. The first is always the Minister of Environment; the second is the Minister responsible for the activities in a sector. Where the organization proposing a project is a provincial Ministry, an alternate responsible Minister is designated.

Category of Reviewable Projects	Responsible Minister	Alternate Responsible Minister
Energy projects – electricity	Minister of Energy and Mines and Minister Responsible for Core Review	Minister of Forests, Lands and Natural Resource Operations
Energy projects – petroleum and natural gas	Minister of Natural Gas Development and Minister Responsible for Housing and Deputy Premier	Minister of Forests, Lands and Natural Resource Operations
Food processing	Minister of Agriculture	Minister of Forests, Lands and Natural Resource Operations
Industrial	Minister of Forests, Lands and Natural Resource Operations	Minister of Jobs, Tourism and Skills Training and Minister Responsible for Labour
Mining	Minister of Energy and Mines and Minister Responsible for Core Review	Minister of Forests, Lands and Natural Resource Operations
Tourist destination resort	Minister of Forests, Lands and Natural Resource Operations	Minister of Community, Sport and Cultural Development
Transportation	Minister of Transportation and Infrastructure	Minister of Community, Sport and Cultural Development
Waste disposal	Minister of Community, Sport and Cultural Development	Minister of Forests, Lands and Natural Resource Operations
Water management	Minister of Community, Sport and Cultural Development	Minister of Forests, Lands and Natural Resource Operations

What was the impact of Bill C-38 (*Jobs, Growth and Long-term Prosperity Act*, SC-2012) & C-45 (*Jobs and Growth Act*, 2012)?

Under the Canadian Economic Action Plan, 2012 the federal government committed to support more than 500 major natural resource sector projects representing over $500 billion in new investment over the next decade. The introduction of Bills C-38 and C-45 were deemed as necessary for resource development and is based on four themes:

- making the Environmental Assessment (EA) review process for major projects more predictable and timely;
- reducing duplication in the review process;
- strengthening environmental protection; and
- enhancing consultation with Aboriginal Peoples.

These bills have resulted in the following:

Canadian Environmental Assessment Act 2012

- Narrowed the broad definition of biophysical aspects to federally mandated aspects occurring on federal lands, effects on fish and fish habitat, aquatic species, or migratory birds, transboundary aspects, or that affect Aboriginal communities.

- All projects previously required EAs unless they fell under the Exclusion List Regulations. Now, no projects require an EA unless they are on the Inclusion List Regulations, thereby reducing the number of projects requiring an EA by 95%.

- Public participation was at discrete points in EAs pre 2012. However, with the reduced number of EAs under CEAA 2012, there is reduced opportunity for Aboriginal communities to participate

• There are reduced timelines (2 years) and limited access to the more rigorous Panel Reviews. Panels have the responsibility to determine who is an interested party (a person who is directly affected by the carrying out of the project, or a person who has relevant information or expertise)

• The CEAA 2012 process starts when a project is registered. By this stage, the government official is depending on a description produced by the proponent to determine if an EA is required.

• Federal screenings and comprehensive studies have been combined into a one-size-fits-all EA process with a much narrower scope.

• To accommodate inter-jurisdictional harmonization through federal EA substitution to the Provincial government, if a project triggers both federal and provincial EAs, it is possible that only the provincial jurisdiction is involved in the EA process. The provincial agency may not have the capacity to fully assess impacts that previously fell under federal jurisdiction. The federal Minister of Environment makes this decision.

• The placing of significant burdens on self-governing regimes that, under the process substitution for project approvals within their jurisdictional areas, will shoulder the burden of ensuring proper EA processes are in place without adequate financial support.

Fisheries Act amendments

• The CEAA 1992 previously prohibited harmful alteration, disruption, or destruction (HADD) of fish habitat or the depositing of deleterious substances in waters frequented by fish. The CEAA 2012 now prohibits only serious harm to commercial, recreational and Aboriginal fisheries (Bill C-38 focused only on fishing for ceremonial purpose; Bill C-45 included fishing for the purposes set out in land claim agreements, instead of the habitat).

Species at Risk Act

• The CEAA 1992 had previous time limitations of 3 years for permits and agreement

that allowed activities that affected species at risk (SAR), or 5 years for those that affected habitat. The CEAA 2012 now has no time limitations on projects that effect SAR species or habitat.

• The CEAA 2012 exempts the National Energy Board from having to consider and seek to minimize impacts on habitats when reviewing all pipeline projects at the federal level.

Navigable Waters Protection Act 1985 now called the Navigation Protection Act

• Changes to the Act make it clear the focus is on the protection of navigation as opposed to the protection of the waters.

• Previously, all Canadian waterways were protected (approx. 40,000 lakes and more than 2 million rivers). Since 2012, the new list of protected waterways includes only 94 lakes and 62 rivers (as well as the 3 oceans) (See memory stick - British Columbia's protected waterways). This has significant implications for Aboriginal communities since waterways and water-bodies are the lifeblood of culture and identity.

Indian Act

• Previously, Band Councils needed support of majority of community members to surrender reserve lands or partially surrender them to enter into lease agreements. Now, Band Councils require only a simple majority of those who vote, regardless of how many show up for the vote.

CEAA 2012 in general

• Pipeline projects are exempt from considering and minimizing impacts on the habitat of species at risk.

• The Navigation Protection Act severely limits the protection of water ways and water bodies by only considering impacts on "scheduled" waters (those which are listed).

• Development projects can benefit from the changes within CEAA 2012 which facilitate

the surrender of reserve lands for resource development purposes.

• The CEAA 2012 helps projects get approval by weakening the habitat protection provisions in the Fisheries Act and reducing the number of projects that require EA.

• CEAA 2012 reduces federal involvement in EA. This makes it more difficult to fulfill the Canadian government's legal duty to consult with Aboriginal communities.

• By reducing federal involvement in EA, there is less opportunity to access participant funding. Given that BC has limited participant funding, this is a significant issue for Aboriginal communities who already have inadequate resources to participate in decision-making processes.

• As fewer projects require federal EA, cumulative effects for these projects are not taken into consideration. The BC provincial EA process does not consider cumulative effects.

• Relying only on the BC EA process removes the possibility of 'bumping-up' the EA to a more detailed and rigorous EA processes available through the federal EA process.

Any potential for filling the gaps left by Bills C-38 and Bill C-45 will depend on requirements under provincial or Aboriginal assessment processes, and what leverage can be achieved under the duty of the Crown to consult.

FIRST NATIONS RIGHTS AND RESPONSIBILITIES IN EA

First Nations in British Columbia (BC) have Aboriginal and Treaty Rights and Title that EA's must consider. Furthermore, government agencies have a duty to consult with First Nations about projects that may impact them or their territories. These rights are entrenched in international and national laws and policies.

For instance, the United Nations Declaration on the Rights of Indigenous Peoples, which Canada supports, requires the state to recognize the rights of Indigenous people to participate with free, prior and informed consent, in decisions about impacts to their traditional lands and livelihoods (UNDRIP, 2007). However, Canada has expressed concerns that this cannot be interpreted as providing a veto to Aboriginal groups. Instead, Canada maintains that the constitutional obligations for consultation and, where appropriate, accommodation, recognize First Nations' rights and the interests of Canadians as a whole (GoC 2014).

Under the Canadian *Constitution Act, 1982*, Section 35(1) recognizes the existence of Aboriginal and treaty rights by stating:

35. (1) The existing **Aboriginal** and **treaty rights** of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Under the Act, the following definitions are relevant:

- Aboriginal peoples of Canada include "the Indian, Inuit and Métis peoples of Canada".

- Treaty Rights include "rights that now exist by way of land claims agreements or may be so acquired".

- Aboriginal rights are the "rights of Aboriginal people to carry on practices, customs and traditions that are a distinctive part of their culture and pre-date European contact, and includes things like hunting, fishing, gathering, ceremonial rights, but also right to self-government and rights to land".

• Treaty rights are the "rights of Aboriginal Peoples that stem from agreements with the Crown, whether historic or modern day".

How do First Nations secure a role in an EA process currently?

The role that First Nations have in the Environmental Assessment process can come about in a number of ways, including:

- It can be negotiated under the BC Treaty Negotiation Process,
- It can be stated in Self-Government Agreements,
- It can be mandated through the First Nations Lands Management process,
- It can be part of benefits accruing as a result of Strategic Engagement Agreements,
- It can be stated in Economic and Community Development Agreements,
- It can be stated in Natural Gas Pipeline Benefits Agreements,
- It is mandated in several aspects of the Environmental Assessment (EA).

A British Columbia First Nations Environmental Assessment Process

BC First Nations are calling for the reform of the BC environmental assessment process and are making it clear that they expect to be fully engaged in discussions around impacts that affect their communities and their traditional lands (see file on memory stick - Proposal for Reform (FNEMC)). Recent court decisions make this reform more urgent, particularly after the *Tsilhqot'in Nation v. British Columbia* Supreme Court of Canada decision, which granted Aboriginal title to the traditional territory of Tsilhqot'in Nation, and which granted the Tsilhqot'in the rights to use, enjoy and profit from the economic development of its lands. More importantly, the Court determined that once title is established, if the Crown begins a project without adequate consultation prior to title being established, it may be required to cancel the project if continuation of the project infringes on title.

First Nations who participate in the EA process are having difficulty getting their voices heard and issues addressed and frustrations grow as governments push ahead with min-

ing, pipeline, and LNG proposals without adequately consulting and accommodating First Nations affected by these decisions. A state of crisis has arisen.

Problems with the existing BC *Environmental Assessment Act*:

- Silent on First Nation involvement in process, objectives, standards, and principles for the delivery of the EA process or methodologies for the conduct of reviews

- Discretionary powers of the Executive Director of the BC Environmental Assessment Office, which leaves opportunity for political interference

- First Nations not given the opportunity to determine the scope of EAs, or establish Terms of Reference for the process

- Consultation Process is inadequate

The process envisioned by the BC First Nations may include:

- Major projects undergo assessment by an independent 4-team panel jointly selected by First Nations and the BC government

- Jointly established Terms of reference for:
  - Appointment of the 4-member assessment team
  - Conduct of the EA
  - Conduct of Consultation Process
  - Funding for First Nation participation in EA and Consultation processes

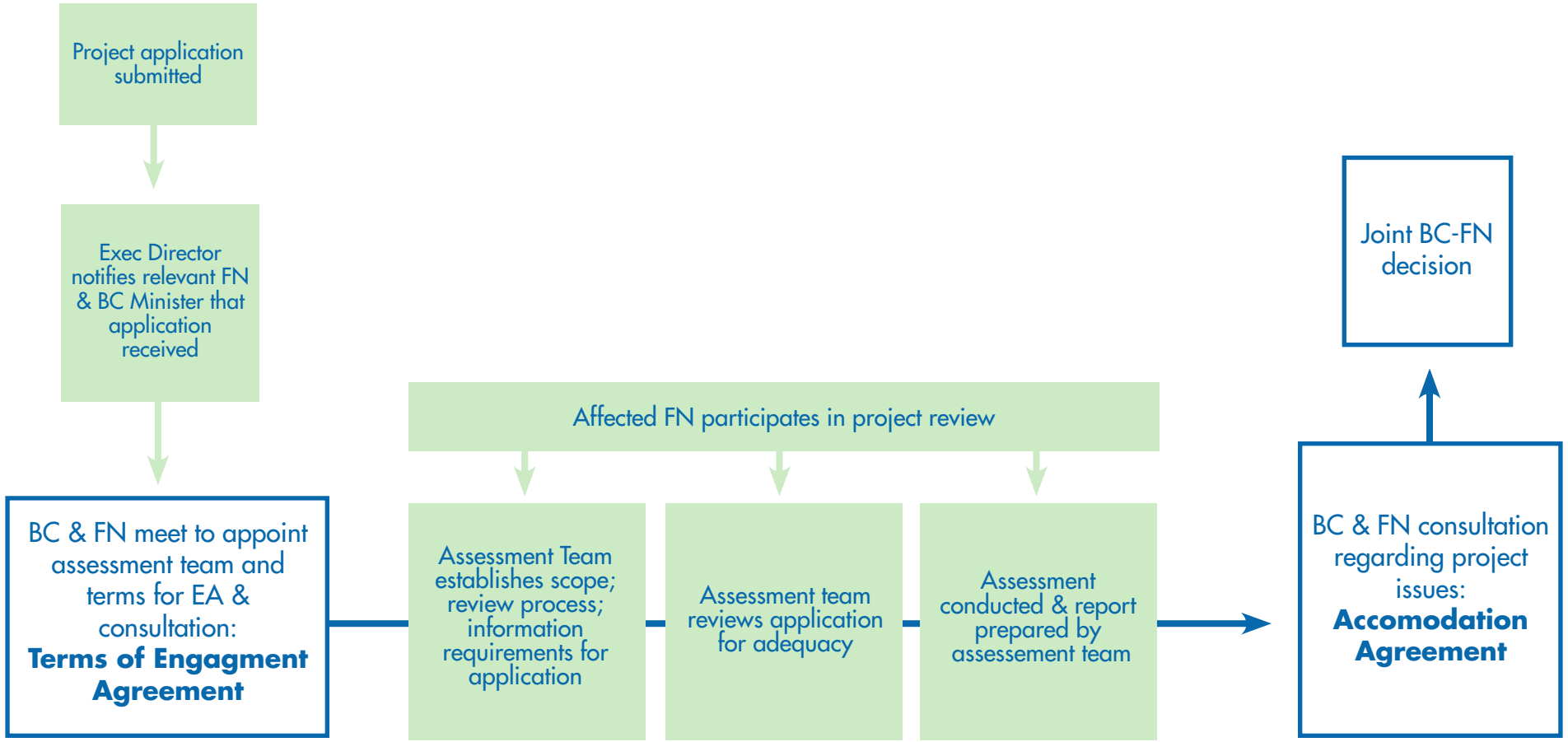
- Replacement of the Environmental Assessment Office with new environmental assessment authority, directed to:
  - Establish guidelines for First Nations participation in a new EA process
  - Serve as watchdog over new process and make binding decisions

- End in an accommodation agreement to provide certainty of the process and render a project approval decision.

- Development of the provincial level consultation protocol, a framework that establishes operating guidelines for government certainty in the process
(See http://mikmaqrights.com/uploads/TORdocument.pdf for an example of a protocol in place in Nova Scotia)

(For more information on this see file on memory stick – Backgrounder and Environmental Assessment and First Nations in BC: Proposals for Reform)

Proposed BC EA Process



Working Group on Natural Resource Development

The Working Group on Natural Resource Development, in its March 3, 2015 report entitled"First Nations and Natural Resource Development: Advancing Positive, Impact change" recommends the following:

• First Nations develop long-term and multi-generational Vision Statements and Strategic Plans for resource development

• Industry needs to engage early on in the EA process to learn if, and how, resource development can proceed in a territory, involving First Nations from the pre-planning stage of projects, before the regulatory processes are underway.

• Industry and government support the development of community owned and controlled baseline and land use data for cumulative impact assessment and mitigation.

• Efforts to support the development of financial literacy for First Nation community members can facilitate discussion on resource development.

• Industry and government support First Nations to develop the capacity to engage in due diligence studies.

• Government support the development of trade and international business relations between First Nations and industry.

We have included a copy of this document on the Memory Stick. - see Natural_Resource_Development_Report.pdf)

Social Impact Assessment

Social impact assessment (SIA) is typically conducted by the project proponent as a component of the EA and as part of the regulatory requirement for project approval. SIA seeks to predict effects of project activities on people (the social, economic, and cultural impacts as opposed to the biophysical environment), and propose ways of intervening to avoid or mitigate negative effects, while maximizing the positive effects that the project is expected to create. SIA may include monitoring effects and designing adaptive intervention strategies to respond to monitoring outcomes that may have changed from original predictions.

Given that the proponent is motivated by a quick approval and seeks to avoid the imposition of conditions that affect the project's economics, the proponent is likely to minimize social impacts in order to secure approvals. In an environment where governments are driven by a resource development agenda (as both the BC and federal government are), public input into an SIA is likely to be limited, and therefore, efforts to identify the social impacts of a project on a First Nation may be limited.

First Nations are often faced with the typical challenges, such as the lack of financial resources to adequately participate and secure the technical expertise to participate in review processes. The costs to conduct SIA should be negotiated as part of a reformed regulatory process, with government and industry expected to cost-share a First Nations process to identify social, economic, and cultural impacts on their communities.

There are two suggested approaches for incorporating First Nation SIAs:

- SIAs conducted by First Nations are submitted as part of the proponent's EIS.
- First Nations' SIAs become a standard requirement of the EA process and be submitted concurrently with the proponent's EIS to government (a precedent for this has been set for an LNG project by the Kimberly Land Council who hold native title to the Kimberly region of Australia).
- Conversely, a regional SIA could be funded by the government to incorporate the effects on a regional basis.

WHAT SHOULD AN EFFECTIVE SIA INCLUDE?

- Clear project description with associated impacts (labour demands, housing demands, pressures on land and surrounding resources, net influx of populations, etc.)
- Spatial/temporal boundaries (as determined by comparable projects)
- Baseline data (from government census surveys, health surveys, etc.)
- A clear definition of local community values of what is better or worse
- Community engagement with culturally appropriate communication materials
- Scenario analysis – an opportunity to explore various scenarios, ranging from no intervention on impacts to maximum intervention strategies
- Adequate funding to support full engagement
- Negotiated and implemented agreements (monitoring programs, adaptive management strategies and plans, etc.)

Health is the balance between the physical, mental, emotional and spiritual realms as well as the environment, culture, family, and community, and that well-being flows from balance and harmony among all elements of personal and collective life.

- National Aboriginal Health Organization

Esdilagh First Nation secured a research grant for a team of international experts to lead a health impact assessment of the impacts of an expansion of Gibraltar Mine within its territory, which the group is calling the first of its kind in Canada. When government and proponent approaches seem too limited to adequately address First Nation concerns, research partnerships are increasingly being pursued to help answer questions.

Health Impact Assessment

Health Impact Assessment (HIA) is not prescribed in environmental law federally or provincially, but can be an important part of an EA that is routinely overlooked. HIA considers health equity and health inequalities, meaning that it considers the way that different populations are affected by development.

HIA is defined by the International Association for Impact Assessment (IAIA) as:

> *A combination of procedures, methods and tools that systematically judges the potential and sometimes unintended effects of a policy, plan, program or project on the health of a population and the distribution of those effects within the population. HIA identifies appropriate actions to manage those effects (IAIA, 2015).*

IAIA uses the World Health Organization's definition of health, which is a 'state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity' (WHO, 2012). The National Aboriginal Health Organization (NAHO) defines health as the balance between the physical, mental, emotional and spiritual realms as well as the environment, culture, family, and community, and that wellbeing flows from balance and harmony among all elements of personal and collective life. This definition goes beyond the WHO definition. For First Nations, having health defined so narrowly by proponents means that important aspects of Indigenous health are overlooked, and therefore, are not considered as components that could be affected by impacts of development. Health and well-being are closely linked to social, cultural and spiritual connection to land and the ability to engage in traditional activities and take care of the earth are central to identity. Research has firmly established that there is a link between the health of Indigenous people and environmental degradation and the loss of a sense of place. It is important that First Nations conduct culturally appropriate HIA reflective of their own view of the world and their place within it.

For good references on this topic, see:

• The International Council on Mining and Metals (ICMM) has published guidance on HIA – Good Practice Guidance on Health Impact Assessment
See http://www.icmm.com/document/792

• IAIA. (2006). Newsletter - Health Impact Assessment: International Best Practices. Special Publication, Series No. 5
http://www.iaia.org/publicdocuments/special-publications/SP5.pdf

• World Health Organization. (2015). Health Impact Assessment
http://www.who.int/hia/en/

What opportunities could be pursued by BC First Nations looking to implement regional cumulative impact assessment (RCIA) as part of their own regulatory regimes, or as part of expected outcomes from government regulatory processes?

• Require proponents to make a contribution to a development fund that supports an ongoing regional RCIA as part of the due diligence required during consultation.

• Require all proponents to share detailed aspects of proposed project descriptions with a central First Nation information depository. The description should provide information required to develop RCIA throughout BC.

Cumulative Impact Assessment

First Nations have indicated that they are concerned that cumulative impacts are not being considered in development decisions.

So what are cumulative environmental impacts?

- The accumulation of human-induced change to the human or biophysical environment over time and space that are additive, change that may be individually minor but collectively significant over time.

- The changes may be minor individually, but collectively they can have a significant impact.

How can cumulative impacts be measured?

It is important to establish a baseline of current conditions and do predictive modeling tying project and regional effects into the cumulative effects assessment. This would involve:

Scoping

- Identify what the regional concerns are.
- Select Valued ecosystem components (VECs). VECs are those components of the physical and human environment that are considered important and require evaluation in environmental impact assessment. Identify VEC objectives/indicators/thresholds.
- Determine the spatial (geographic extent) boundaries. These may differ depending on the VEC. For example, air quality impacts might be more dispersed than soil quality impacts. These boundaries can be accomplished in a number of ways: based on natural watersheds/airsheds, to the boundary that the impact is no longer detected, local/regional, etc.
- Determine the temporal (time) boundaries. How far back and how far into the future should one consider change resulting from other projects or activities. How

far into the future is often determined as to whether future actions are likely to affect the same VECs as the ones currently under consideration.

- Identify all actions known that might affect the same VECs in the region
- Identify the potential impacts/effects of these actions

Analysis

- Establish the regional baseline and collect the data
- Assess effects of proposed project on VECs
- Assess effects of all known regional actions on the same VECs

Management

- Determine strategies to manage/mitigate effects

Determine Significance

- Evaluate significance of the residual effects
- Compare against baseline and thresholds

Monitor

- Identify VEC indicators for effects monitoring
- Develop regional effects monitoring program

Development of a Plan

What sources of information are there to help determine cumulative effects?

- Approved land use plans that designate the most appropriate activities on the land base (e.g. land and resource management plans, airshed plans, watershed management plans, etc);
- Comprehensive baseline studies which set out the current conditions and factor in effects of prior development;
- Overlapping impacts due to other developments, even if not directly related to the proposed projects; and,
- Future developments that are reasonably foreseeable and sufficiently certain to proceed.

QUICK TIP

Who will fund this work? Have the Cumulative Effects Assessment jointly funded by government and the proponent as the cost of doing business.

Regional Cumulative Impact Assessment

Increasingly, First Nations are demanding that EA's go beyond project-specific direct and indirect impacts to identify broader regional impacts and concerns. The CEAA (2003) amendments highlighted the importance of studying regional impacts through the expansion of the spatial boundaries and a focus on a wider range of impacts from multiple project development. While individual project impacts may be insignificant, a multiplicity of impacts to a region can cumulatively lead to significant environmental change.

However, a methodology to implement regional impact assessment is not clear. Project proponents individually cannot be held responsible for the impacts resulting from other projects, and they are not necessarily the correct party to obtain information from other proponents who may also be developing in the region. Other proponents may be unwilling to share what might be proprietary information. The government agency or the First Nations may be the appropriate parties to undertake this work, if funded by the project proponent.

Strategic Environmental Assessment

With the introduction of Bills C-38 and C-45 and the associated implications for Aboriginal communities, Strategic Environmental Assessment (SEA) may have potential to fill some of the gaps left behind by the streamlined federal EA process.

SEA is seen as a comprehensive planning-type framework, so that development actions are set within a broader environmental vision. First Nations negotiate to develop a SEA to guide decisions being made about project development and to influence the pace of development on traditional lands and territories.

Advocates for SEA argue that this process may be better suited to address cumulative impacts and development alternatives, can set a broader environmental framework for development, and can focus on the cause of environmental problems at the source rather than developing mitigation measures to deal with the adverse impacts of development after the fact. This proactive approach attempts to avoid, eliminate, or minimize potentially

negative impacts by examining alternatives leading to a preferred end.

SEA expands awareness of uncertainty and precautionary needs, respects diverse sources of knowledge, integrates social, economic and ecological analysis, and focuses on cumulative and synergistic effects.

Figure 1 - Generic Seven-Phase SEA Approach (Source: Noble, 2005)	
Phase I	Scope the assessment issues and identify baseline conditions
Phase II	Identify and describe alternatives
Phase III	Scope the assessment components and actors
Phase IV	Determine criterion significance
Phase V	Evaluate potential impacts
Phase VI	Compare the alternatives
Phase VII	Identify the best practicable environment (ranking of alternatives)

Examples of Strategic Environmental Assessment can be found at:

The Salmon Aquaculture Review
https://uwaterloo.ca/assessment-planning-project/british-columbia-case-studies

Bay of Fundy Tidal Energy SEA
http://www.oera.ca/wp-content/uploads/2014/05/Bay-of-Fundy-SEA-Update-PART-A-B_Background-Study-and-Community-Response-Report.pdf

How has the Tsilhqot'in Nation v. British Columbia, 2014 impacted the role of First Nations in an EA?

On June 26, 2014, the Supreme Court of Canada (SCC) released one of its most significant Aboriginal law decisions: ***Tsilhqot'in Nation v. British Columbia***, 2014. In this case, the court reiterated that **Aboriginal title** confers a special type of interest in lands:

- The right to exclusive enjoyment and occupation of the land.
- The right to determine how it is used and to enjoy its economic benefits.
- The right to pro-actively manage it.

The Court also made it clear that Aboriginal title imposes significant restrictions on what Aboriginal groups can do with the land, that it cannot be alienated except to the Crown, or encumbered or developed in ways that would prevent enjoyment and use by future generations. The Court confirmed that any infringement of an established Aboriginal title by the federal or provincial government must be preceded by appropriate consultation and accommodation with the Aboriginal group and must be justified under s. 35 of the *Constitution Act, 1982*.

The Court warned that governments and others who seek to develop or use lands which are subject to Aboriginal title must obtain the consent of the Aboriginal title holders and stressed the potentially serious consequences that failing to obtain such consent can have on both completed or pending projects:

> *…if the crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title (paragraph 92).*

Under the decision, Aboriginal Title is a unique interest in land that encompasses a right to exclusive use and occupation and that reflects an historical attachment to the land.

Duty to Consult

The Crown has a duty to consult under s.35 of the *Constitution Act, 1982*.

The Supreme Court of Canada (SCC) clarified the duty to consult over several decisions - *Haida Nation v. BC (2004), Taku River Tlingit v. BC (2004), Mikisew Cree v. Canada (2005), Rio Tinto v. Carrier Sekani (2010), and Beckan v. Little Salmon/Carmacks (2010).* In Haida, the SCC stated that

> …the duty to consult arises when the Crown has knowledge, real or constructed, of the existence or potential existence of an Aboriginal or Treaty Right and contemplates conduct that might adversely affect that Right (para. 47)

The SCC provided direction that an asserted right is sufficient to trigger the duty to consult, that the consultation must be meaningful, that accommodation must be made, and that the Crown can delegate only the procedural aspects of the consultation process to a third party. For any justification or infringement of proven rights, the government must show that it had the consent of the Aboriginal group, that it has discharged it duty to consult and accommodate, that there is a compelling and substantive objective, and that it acted consistently with the Crown's fiduciary obligation to Aboriginal Peoples.

Federal Guidelines

Canada is revising its *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011) and is working on a draft policy statement to clarify its approach on Aboriginal Consultation and Accommodation, including guidance for industry. (For the Guidelines see http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675)

BC Guidelines

BC has provided several resources to guide provincial ministries and agencies, and proponents in fulfilling its duty to consult.

- Ministry of Aboriginal Relations and Reconciliation – Consulting with First Nations (see http://www.gov.bc.ca/arr/index.html) for:
    - o Updated Procedures for Meeting Legal Obligations when Consulting with First Nations: Interim (May 2010)
    - o Guide to Involving Proponents when Consulting First Nations
    - o Building Relationships with First Nations – Respecting Rights and Doing Good Business

Consultation on Environmental Assessment (EA) Matters

Federal

Under the *Canadian Environmental Assessment Act, CEAA 2012*, the federal government recognizes its' Duty to Consult and has provided guidance for working with First Nations. They also provide guidance on integrating Aboriginal consultation at various phases of the EA process (see memory stick – Integration of Aboriginal Consultation into the Environmental Assessment Process and Working With Aboriginal Groups During a Federal Environmental Assessment).

The Canadian Environmental Assessment Agency (Agency) is the federal Crown Consultation Coordinator for consultation on environmental assessments under its jurisdiction. The Agency also provides funding under the Participant Funding Program (see http://www.ceaa-acee.gc.ca/default.asp?lang=en&n=E33AE9FB-1) to assist Aboriginal groups to prepare for and participate in the Agency consultation activities. The National Energy Board has established its own Participant Funding Program for the hearing process (for further information go to http://www.neb-one.gc.ca/prtcptn/hrng/pfp/prtcpntfndngprgrm-eng.html).

Aboriginal and Northern Development Canada provides guidance on environmental assessments for on-reserve projects (see The Proponents' Guide to Aboriginal Affairs and Northern Development Canada's Environmental Review Process at: http://www.aadnc-aandc.gc.ca/eng/1403215245662/1403215349135)

British Columbia

The BC government provides guidance to proponents that clarifies roles and responsibilities of the Crown and proponents in First Nation consultation in the EA process. See the Ministry of Aboriginal Relations and Reconciliation website - Consulting with First Nations (http://www.gov.bc.ca/arr/index.html)

- Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process. (See Memory stick for file Guide_to_Involving_Proponents_in_Consultation.pdf)

QUICK TIP

Nova Scotia Mi'kmaq Chiefs have negotiated a Consultation Protocol between First Nations, Nova Scotia, and Canada.

The Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process can be found at:

http://mikmaqrights.com/uploads/TORdocument.pdf

Consultation in BC on Mining

See the Ministry of Aboriginal Relations and Reconciliation website - Consulting with First Nations (http://www.gov.bc.ca/arr/index.html)

- Proponent Guide to Coordinated Authorizations for Major Mines Projects. (See Memory Stick for BC_Proponent_Guide_Major_Mine_Projects.pdf)

Alternative Arrangements

It is important to note that while the Crown provides guidance documents to project proponents on how to consult, alternative arrangements can be negotiated where the Aboriginal groups themselves set the standard of what they deem to be adequate accommodation according to their own needs.

- Strategic Engagement Agreements seeks to improve government-to-government relationships between the BC government and individual First Nations, establish procedures for consultation and accommodation, and support the parties in developing opportunities for sharing resource revenues.

- Economic and Community Development Agreements allow for sharing direct mineral tax revenue on new mines or major mine expansions.

- Natural Gas Pipeline Benefits Agreements provide for the BC government to partner with First Nations on LNG opportunities.

Treaty, Self-Government and First Nation Land Management Act Negotiations in BC

Prior to British Columbia joining Confederation in 1871, the colonial government had only signed the Douglas Treaties, land purchases on Vancouver Island. After joining Canada, the new province did not recognize Aboriginal Title, and so treaties were never negotiated, with the exception of Treaty 8, signed between First Nations and Canada, and included the northeast portion of BC.

Several court cases over the last half-century - Calder, Sparrow, Delgamuukw, Marshall and Bernard, and most recently Tsilhqot'in - have made it clear to the Crown that, indeed, the Aboriginal Peoples of BC have rights and title that must be accommodated. In July of 2014, Canada announced that its negotiation mandates up to that point had created some impediments to negotiating treaties in BC and promised to introduce more flexible mandates and to reform and renew the Comprehensive Claims Policy under which modern day treaties are negotiated.

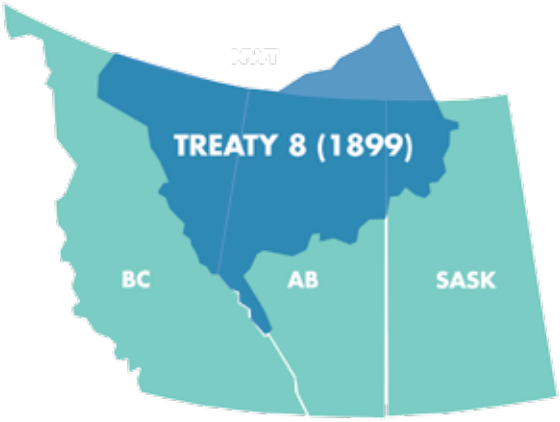
There are 65 First Nations currently at various stages in the BC Treaty negotiation process, representing 104 of the 203 *Indian Act* Bands in BC. Eight groups are at the final Treaty negotiation stage or have implemented, or are in the process of implementing, a Treaty.

Treaty Agreements provide for, among many other matters:

- Rights to Subsurface Resources
- Land Title
- Environmental laws on Nation lands

Since 1973, Canada has signed three self-government agreements in areas where Aboriginal land rights have not been dealt with by Treaty or other legal means. Self-government agreements address governance structures and accountability, financial matters, law-making authorities, and so on.

In BC, only Sechelt (shÍshálh) and Westbank have negotiated self-government agreements. For more information on the Sechelt process see http://www.shishalh.com. For more information on the Westbank process see http://www.wfn.ca.



QUICK TIP

To see if your First Nation is part of the BC Treaty Process go to the website of the BC Treaty Commission at:

http://bctreaty.net/files/updates.php

VISIT ONLINE

Final agreements and Agreements-in-Principle can be reviewed at:

http://bctreaty.net/files/treaties-and-agreements-in-principle.php

QUICK NOTE

Where the Nation has laws and administrative procedures in place to approve development on Nation lands, the Nation will negotiate to harmonize their EA procedures with the respective federal or provincial procedures.

VISIT ONLINE

To see which First Nations are negotiating within the Treaty Process, go to:

http://bctreaty.net/files/updates.php

The *First Nations Land Management Act*, 1999 (FNLMA) provides First Nations with the authority to make laws in relation to reserve lands, resources, and environment. The Agreement is not a treaty, and developing and ratifying a Land Code under the FNLMA only replaces the land management provisions of the *Indian Act*. The land remains a federal responsibility under section 91(24) of the *Constitution Act*, 1867. All other constitutional and treaty rights are retained.

A copy of the FNLMA can be accessed at:

http://laws-lois.justice.gc.ca/eng/acts/F-11.8/

In BC, there are 35 First Nations negotiating under the FNLMA. To see which First Nations are negotiating, or have concluded negotiations, please go to:

http://www.labrc.com/member-communities/

Environmental Assessment (EA) Regimes Under Treaty

EA regimes under treaty agreements have the following components:

- Federal/Provincial EA processes apply but no project will proceed without the First Nations' consent;

- The First Nation has the right to receive referrals on environmental matters from B.C. on the same basis as local governments and other First Nations;

- Where the Nation has laws and administrative procedures in place to approve development on a First Nation's lands, the Nation will negotiate to harmonize their EA procedures with the respective federal or provincial procedures;

• First Nations can forward names to be considered for appointment to Panel Reviews or have formal standing before a Panel;

• The First Nation may make laws in relation to the prevention, mitigation, and remediation of pollution and degradation of the environment;

• The Nation may make laws in relation to waste management, including solid wastes, and wastewater;

• The Nation may make laws for the protection of local air quality.

Environmental Assessment (EA) Regimes Under Self-Government Agreements

EA regimes under self-government agreements have the following components:

• The First Nation has jurisdiction to make environmental protection laws and enact enforcement procedures, with mechanisms comparable but not greater than federal laws;

• The First Nation has jurisdiction in relation to EAs for projects on their lands and the determination of which projects shall be subject to an EA;

• No project on First Nation's lands can proceed without the First Nation's EA authorization;

• Public access to EA information;

• Where the First Nation has laws and administrative procedures in place to approve development on First Nation's lands, the First Nation will consider harmonization with other legislative bodies.

QUICK NOTE

Where the Nation has laws and administrative procedures in place to approve development on Nation lands, the Nation will consider harmonization with other legislative bodies.

QUICK NOTE

In December, 2014 the Yukon Supreme Court rendered its decision in the First Nation of Nacho Nyak Dun v. Yukon (Government of). This decision has important implications for resource companies and government, particularly as it relates to regional land use planning in areas where modern-day treaties have been negotiated and provisions have been made for a consultation process under Final Agreements. It this case it was found that a Final Land Use Plan approved by the Yukon government had been modified from the plan used during the required Consultation Process. The First Nation took the case to court, and the court determined the Final Land Use Plan was void. The honour of the Crown must still be upheld under modern-day treaties.

Environmental Assessment (EA) under the First Nations Lands Management Act

Under the FNLMA, the First Nations can:

- manage the natural resources of that land;
- can enact laws for environmental assessment and environmental protection;
- can harmonize their environment laws with federal and provincial laws;
- can enact an Environmental Protection Regime at least equivalent to the standards and enforcement procedures established by the province in which the First Nation is situated;
- the Regime is applicable to all projects carried out on First Nation lands.

How to Read a Generic Environmental Impact Statement

An Environmental Impact Statement (EIS) is submitted by the proponent and will describe the project, describe the impacts (positive and negative), and provide alternatives to the project. Since the responsibility for assessing impacts is delegated to the proponent, this sets up an inherent conflict, in that the proponent is motivated to achieve project approval. EIS statements are difficult for the layperson to read and comprehend. Proponents should understand that when the public does not understand the contents of an EIS, they often will rely on other sources of information to communicate what the project is about.

What is the process to develop an EIS?

Federal Process (See Section 1: Environmental Assessment Roles and Responsibilities)

- Proponents provide the CEAA a project description. The Agency has **45 days** to determine if a federal EA is required, which includes a 20-day public comment period. The Agency issues a Notice of Determination (NOD) and discusses cooperation with the province/First Nation (under EA Regime) if an EA is required. The Agency issues a Notice of Commencement (NOC).

- Public is invited to comment on draft Environmental Impact Statement (EIS) Guidelines. Scoping – Regulatory body assesses what the key issues and concerns are, sets the boundaries to be considered, including baseline conditions and scoping of alternative. Agency issues final EIS Guidelines to the proponent.

BC Process (See Section 1: Environmental Assessment Roles and Responsibilities)

- Proponent submits a Project Description and EAO posts it online.

- The EAO determines the project is reviewable and issues a Section 10 Order (see Appendix 5 - Section 10 Order)

- Working Group is formed, and First Nations are invited to participate with Agency,

other federal and provincial government agencies, and local government representatives.

• Section 11 Order is issued by the EAO (see memory stick - Section 11 Order which directs the proponent on the scope of the project, what parts of the proposed undertaking will be assessed, what effects will be considered in the assessment, what actions and activities the proponent is responsible for in the EA, and sets out the required delegated consultation activities and timeframes. Timeline is within **three months** of receiving the project description.

• EAO requests the proponent to draft a "Application Information Requirement" (AIR), and seeks input on the draft from the working group, First Nations, and the public by posting the draft on its website, specifies a period for written input, and requires the proponent to hold public Open Houses in one or more locations near the project. Timeline is **30 to 45** days for public comment period.

• EAO issues an AIR document (formerly termed the Terms of Reference), which identifies the issues to be addressed in the assessment and the information that must be included in the application.

How to review an EIS?

Get the EIS Guidelines and a copy of the Section 11 Order

• Does the EIS meet what guidelines require (process expectations)?

• How did the proponent perform? Are the descriptions clear?
    - o Project description – name, information on proponent, location (maps), type of facility, timeline.
    - o Project purpose – all projects have a purpose and it should be clear
    - o Project alternatives – has the proponent clearly considered and presented alternatives? Have you considered alternative?

o Environment description:

- Valued EC identification - Scoping is the part of the process where government, public, and First Nations determine what the focus of the EA should be and the issues and concerns that are of utmost importance to be considered. The scoping process will look at both the biophysical and human environments, and it will determine how widespread (spatial and temporal) the impacts may be.

- Baseline – what is the environment against which you will measure change, the state of the environment before the project, and what the future state of the environment could be without the project. This data is what you could use to measure change over time with project development. However, caution should be exercised as changes in environments and ecosystems naturally occur. Attention should be paid to the size (impact prediction approach).

- Social Impact Assessment (SIA) (See page 36 of this section). This is one aspect of the EIS that the First Nation should lead, as this is an opportunity to share local knowledge that the proponent would not necessarily have. SIA should link to Community Vision Statements, Planning Strategies, etc.

- SIA should describe social impacts (positive or negative) on how people live, work, play, or relate to one another. Cultural aspects include norms, beliefs, values. Economic aspects include such things as how people/community are impacted from the financial aspects of development, cost of living changes, etc.

- Cumulative impact assessment is the consideration of the environmental effects that one project will have along with the effects of other projects locally, regionally, provincially, or nationally. (See page 39 of this section). Impact-prediction approach or significance determination may include:

o Forecasting is used to predict the future state of the environment, so therefore, you need to know your baseline (discussed above), and the future conditions with or without the project. There are several ways you can do this – through modeling (will cost) and looking at EIS of similar projects. This gets a little complicated because, as mentioned above, change in environment naturally occurs, and there could be cumulative impacts from other projects.

o Time-space boundaries – These terms are also presented as temporal and spatial boundaries. These scales are relative to how your community interprets them, not as the proponent necessarily understands them.

- Have these boundaries been clearly defined?
  - Temporal – how long will the project operate?
  - Spatial – is the project looking at the environment from a local, regional, provincial, or national scale? Do you understand these scales and how they impact your community?

o Monitoring is usually done to measure expected/unexpected changes as a result of the project, done through the collection of data to provide information on the characteristics and functioning of both the natural and human environment.

- Know what monitoring methods are proposed? How frequently does the monitoring occur? Who does it and why? How long are monitoring programs in place? Are there better approaches?

o Impact Management – Identifies impact management and mitigation strategies, and development of environmental management or protection plans. Once impact significance has been determined, mitigation measures for negative impacts can be put into place. Do you agree? Would you suggest alternative approaches?

Four strategies to manage impacts and mitigate include:

- Avoidance
- Minimize
- Rectify
- Compensate

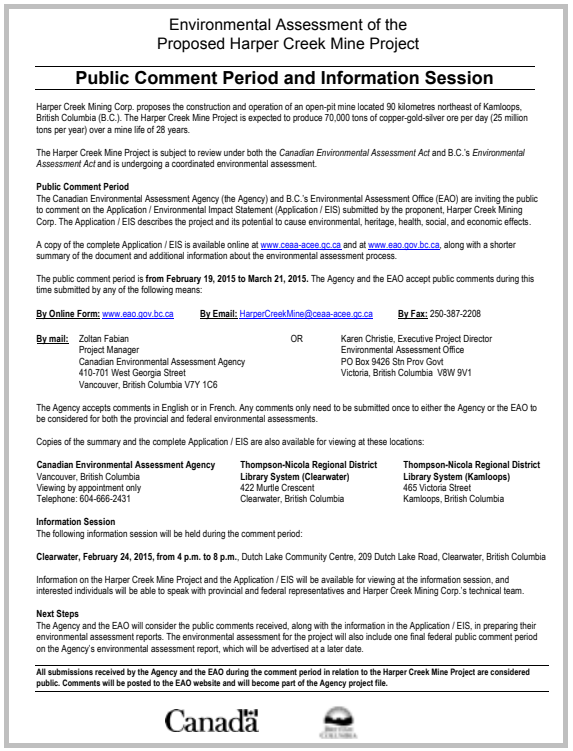
o Follow-up
- Federal Process – there are still opportunity for input (Section 1: Environmental Assessment Roles and Responsibilities).
    - After the Final EIS is submitted to the responsible authority (RA), the pubic is invited to comment (not for Panel Reviews).
    - Once the Agency prepares the draft EA Report, the public is invited to comment on the draft EA Report (only for Standard EAs).
- Provincial Process – The proponent submits a project application based on the Application Information Requirement (AIR) (See Section 1: Environmental Assessment Roles and Responsibilities).
    - Once the application has been accepted, the EAO initiates the public comment period before the Final Assessment Report is prepared and a decision is made by the Minister.

QUICK TIP

If there are any aspects of the project that are not clear, or that you need clarification on, contact the proponent. Alternatively, you can contact either CEAA or the BC EAO for information.}

General Process Questions

- Did the EIS reflect and address concerns that your First Nation raised?
- If traditional knowledge was included in the report, was it with the consent of your First Nation, and is it appropriately reflected?
- Did the proponent consult with your community, and is the process and its results accurately described?
- Is your community accurately described in relation to the undertaking?
- Are your community's goals in relation to the undertaking clearly defined?
- Are the land use practices of your community accurately described?
- Are mitigation protections adequate and likely to be implemented?
- Have the cultural, heritage, and resource values associated with your community been adequately considered?
- Is your First Nation included in any monitoring/follow-up programs?



Environmental Assessment of the
Proposed Harper Creek Mine Project

Public Comment Period and Information Session

Harper Creek Mining Corp. proposes the construction and operation of an open-pit mine located 90 kilometres northeast of Kamloops, British Columbia (B.C.). The Harper Creek Mine Project is expected to produce 70,000 tons of copper-gold-silver ore per day (25 million tons per year) over a mine life of 28 years.

The Harper Creek Mine Project is subject to review under both the *Canadian Environmental Assessment Act* and B.C.'s *Environmental Assessment Act* and is undergoing a coordinated environmental assessment.

Public Comment Period
The Canadian Environmental Assessment Agency (the Agency) and B.C.'s Environmental Assessment Office (EAO) are inviting the public to comment on the Application / Environmental Impact Statement (Application / EIS) submitted by the proponent, Harper Creek Mining Corp. The Application / EIS describes the project and its potential to cause environmental, heritage, health, social, and economic effects.

A copy of the complete Application / EIS is available online at www.ceaa-acee.gc.ca and at www.eao.gov.bc.ca, along with a shorter summary of the document and additional information about the environmental assessment process.

The public comment period is **from February 19, 2015 to March 21, 2015.** The Agency and the EAO accept public comments during this time submitted by any of the following means:

By Online Form: www.eao.gov.bc.ca **By Email:** HarperCreekMine@ceaa-acee.gc.ca **By Fax:** 250-387-2208

By mail: Zoltan Fabian, Project Manager, Canadian Environmental Assessment Agency, 410-701 West Georgia Street, Vancouver, British Columbia V7Y 1C6
OR
Karen Christie, Executive Project Director, Environmental Assessment Office, PO Box 9426 Stn Prov Govt, Victoria, British Columbia V8W 9V1

The Agency accepts comments in English or in French. Any comments only need to be submitted once to either the Agency or the EAO to be considered for both the provincial and federal environmental assessments.

Copies of the summary and the complete Application / EIS are also available for viewing at these locations:

Canadian Environmental Assessment Agency
Vancouver, British Columbia
Viewing by appointment only
Telephone: 604-666-2431

Thompson-Nicola Regional District Library System (Clearwater)
422 Murtle Crescent
Clearwater, British Columbia

Thompson-Nicola Regional District Library System (Kamloops)
465 Victoria Street
Kamloops, British Columbia

Information Session
The following information session will be held during the comment period:

Clearwater, February 24, 2015, from 4 p.m. to 8 p.m., Dutch Lake Community Centre, 209 Dutch Lake Road, Clearwater, British Columbia

Information on the Harper Creek Mine Project and the Application / EIS will be available for viewing at the information session, and interested individuals will be able to speak with provincial and federal representatives and Harper Creek Mining Corp.'s technical team.

Next Steps
The Agency and the EAO will consider the public comments received, along with the information in the Application / EIS, in preparing their environmental assessment reports. The environmental assessment for the project will also include one final federal public comment period on the Agency's environmental assessment report, which will be advertised at a later date.

All submissions received by the Agency and the EAO during the comment period in relation to the Harper Creek Mine Project are considered public. Comments will be posted to the EAO website and will become part of the Agency project file.

Canada

How to find information on what projects are being proposed for your area

Case Study: Harper Creek Mine Project

Summary of the project: Harper Creek Mining Corp., is proposing the construction and operation of an open-pit mine located 90 kilometres northeast of Kamloops, British Columbia (BC). The Harper Creek Mine Project is expected to produce 70,000 tons of copper-gold-silver ore per day (25 million tons per year) over a mine life of 28 years. The Harper Creek Mine Project is subject to review under both the Canadian *Environmental Assessment Act* and BC's *Environmental Assessment Act* and is undergoing a coordinated environmental assessment.

CEAA Registry – Harper Creek Mine Project (see http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=61898)

- News Release – Public Comments Invited on Summary of EIS (Feb 12, 2015)
  - o Link to British Columbia Environmental Assessment Office (EAO) – Copy of Joint (CEAA/EAO) Advertisement of Public Comment Period For Public Participation
  - o Summary of the EIS (.pdf download)
- Other Documents – EIS (.pdf downlands – 28 Chapters)
- Contact(s)

British Columbia Environmental Assessment Office (EAO) Project Information Centre: Harper Creek Mine Project (see: http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_333.html

- News Release – Public Comments Invited on Summary of EIS (Feb 12, 2015)
- Application and Supporting Studies (EIS.pdf)
- Contact(s)

ENVIRONMENTAL ASSESSMENT REGULATORY REQUIREMENTS

NATIONAL ENERGY BOARD (NEB)

- Independent federal agency
- Regulates pipelines that cross inter-provincial and international boundaries.

Section 3 of this toolkit describes regulations that are specific to development associated with pipelines, mining and liquified natural gas (LNG) projects.

Canadian Environmental Assessment Agency Regulatory Review: Pipelines

The *CEAA 2012* put a new EA process for major pipeline projects under the National Energy Board's (NEB) jurisdiction and integrated the federal EA process into the certificate process.

The NEB is an independent federal agency created to regulate pipelines that cross inter-provincial and international boundaries. Pipelines that are intra-provincial (entirely within one province) are regulated by that respective province. The NEB is also mandated to regulate some international and interprovincial power lines, and regulating exploration activity north of 60.

The NEB operates in a quasi-judicial role (like a court) and independent of government, and holds public hearings to decide whether projects should be built. The NEB reports to Parliament through the Minister of Natural Resources.

A company proposing to build an international and/or interprovincial pipeline must obtain a certificate of public convenience and necessity along with a positive environmental decision statement. This begins with an application sent to the National Energy Board (NEB) followed by a review conducted by the Minister of Natural Resources and the Governor-in-Council (GIC) including associated federal government agencies. The EA process is integrated into the certificate process, so when the proponent files the application to the NEB, the EA is one part of the complete application package. The NEB is the Responsible Authority for pipelines under *CEAA 2012*.

Pipeline Application Review

Following the submission of the certificate of public convenience and necessity, the NEB considers:

- The public interest based on economic factors, social consequences and environmental impact.
- The consultation with First Nations.
- The public hearings for interested parties if the pipeline exceeds 40 km.

If the NEB is satisfied with these criteria, they will issue a certificate of public convenience and necessity. As well, the NEB writes a report containing recommendations to the federal Minister of Natural Resources. This report may contain additional terms and conditions that must be satisfied for the issuance of the certificate.

Following that, the Minister of Natural Resources will recommend the report to the GIC for a review and a final decision. The reviewing federal agencies will analyze the report to determine if the NEB should issue the certificate according to the terms and conditions listed in the report. The agencies can send the report back to the NEB for reconsideration up to a maximum of two times.

Once the federal agencies have completed the review of the NEB report, the GIC will either:

a. Order the NEB to issue the certificate of public convenience and necessity to the company.
b. Order the NEB to dismiss the application for certificate.

This process can take up to 18 months in total. This includes 15 months for the NEB review and 3 months for the government review. Following this, the company must obtain a favorable environmental assessment (EA) decision as outlined by the *Canadian Environmental Assessment Act 2012* (CEAA 2012) to move forward with development.

VISIT ONLINE

The NEB makes all project related documents, including the environmental reports, available to the public on its website:

http://www.neb-one.gc.ca/pplctnflng/mjrpp/index-eng.html

The proponent must demonstrate and justify the consultation efforts it carried out.

Federal and NEB Environmental Assessment Process

As part of the EA, the environmental effects for pipeline projects will be listed in the Environmental Impact Statement (EIA) and can include the following:

- Atmospheric environment (air quality)
- Acoustic environment (Noise)
- Soils
- Geology and terrain
- Vegetation
- Wildlife
- Surface water resources
- Freshwater fish and fish habitat
- Hydrogeology (effects on groundwater flow)
- Paleontology (archaeology)

Once the NEB concludes its EA, it submits an EA report and a certificate report to the Government of Canada that will include the NEB's recommendations. The GIC reviews all the information and considers the following options:

- Send recommendations back to the NEB for reconsideration up to a maximum of two times

- Determine if the project will cause adverse environmental effects
  - If adverse environmental effects are imminent, determine if the effects are justified in the circumstances to proceed with the project

- Order the NEB to issue a decision statement
  - Positive decision statements set out mitigation measures and the follow-up program that the pipeline company must implement

Challenges of the *CEAA 2012* Pipeline Process

The pipeline EA process outlined by the *CEAA 2012* has the following identifiable issues:

- The NEB considers the risks associated with the pipeline, **not** the indirect effects associated with the source of petroleum liquids, or what happens at the end of the pipe.

- The NEB will consider the type of commodity transported through the pipeline, the risks inherent in the route, the environmental effects of the construction, operation, and decommissioning of the pipeline, the effects on water bodies, construction of access roads, pumping stations, etc.

- Cumulative effects from one project along an environmental corridor are not well addressed in this process.
    - For example, multiple impacts on the same waterway along the pipeline course

- Public participation in the review of EAs is **now limited** to interested parties directly affected by the pipeline, as well as those with relevant information or expertise.
    - What may be important to one person or group may not be important to someone else who does not have their own **land** impacted by pipeline crossings.

    - What is deemed acceptable is considered a value judgment.

    - **This is where Aboriginal consultation is critical.**

PUBLIC HEARING TOPICS

- Design and safety of the project
- Environmental matters
- Socio-economic and land matters
- Financial responsibility of the applicant
- Economic feasibility of the project
- Impact of the project on directly affected Aboriginal groups
- Impact of the project on directly affected persons
- The Canadian public interest

Provincial Environmental Assessment Process

A proposed pipeline project may require a provincial EA for some aspects of the project in addition to the federal EA. Pipelines that are intra-provincial (entirely within one province) are regulated by that respective province, and are subject to the Provincial EA process.

Land Claim Agreements

A proposed pipeline may cross lands subject to a historic or modern day comprehensive land claims agreement with an Aboriginal group, and may be required to follow the EA regime set out under that agreement.

Public Hearings on Pipelines

Public hearings are required prior to a decision in the following circumstance:

- Applications for the construction and operation of major international or interprovincial pipelines.
- Applications to abandon a pipeline.
- Oppositions by a landowner as to the detailed route of an approved pipeline require hearings before a decision can be made.

The public hearings allows the company proposing the project, the people directly affected by the project, and the people with relevant information or expertise on the project, a chance to provide their views in support or against the project.

Hearings at the NEB can be conducted entirely in writing or through a combination of written and oral submissions.

The decision to approve or to reject a major pipeline project on the basis of public interest is made by the federal government (GIC) based on recommendations from the NEB.

If an application is approved, the project proponent has permission to construct, operate and maintain the pipeline. The proponent is usually required to file documents called *Plans, Profiles and Books of Reference* with the NEB. These documents show precise locations of the pipeline or power line, the type of land rights the company needs, and the descriptions of the lands that would be affected. Landowners affected by the proposed project may request that a detailed route hearing be held.

Additionally, toll applications may involve making decisions on the amount of money a pipeline company is allowed to charge for the transportation of oil or gas, or for access to the pipeline.

Refer to the following page outlining the steps in the hearing process.

Steps in the Hearing Process

1. An application is filed by the project proponent with the NEB.

2. A Hearing Order or process letter is prepared and the public is notified about the hearing. See the note below for details on the Hearing Order.**

3. Federal and provincial government agencies may become involved in the hearing process if they have relevant information or expertise. (i.e. Agencies that look at environmental or energy issues).

4 Apply to participate in a hearing by filling in an online form with such details as how the project will impact you or your group. Anyone wishing to participate in the hearing must apply to the NEB.

5 The NEB will decide who can participate and how.

6 The proponent and those who are allowed to be Intervenors file written evidence.

7 Information requests are submitted and answered based on the evidence that is filed.

8 People who have been allowed to participate in ways other than as an Intervenor follow the directions listed in the Hearing Order.

9 If there is an oral hearing, Intervenors may gather on a specific date to ask oral questions of witnesses and provide final argument.

**The Hearing Order gives a brief description of the proposed project, the list of issues that will be considered, and the details on the steps and schedule in the hearing process. The date, location and time of the oral hearing may be shared if these details are known. The NEB may send out a news release when the Hearing Order is issued and is posted on the NEBs website. As well, the company may publish notice of the hearing in newspapers serving the area of the proposed project or may send the notice directly to persons that may be affected (See memory stick - National Energy Board Hearing Order).

How does the NEB determine who is a "directly affected person"?

The National Energy Board (NEB) decides on a case-by-case basis who is directly affected. The NEB may consider these factors when making this decision:

- The nature of the person's interest.
  - Specific interest including commercial, property, employment or other financial interest.
  - Personal use and occupancy of land and resources.
  - Land and resource use for traditional Aboriginal purposes.

- The degree of impact the project application may cause.
  - Direct effect on the person's interest.
  - The degree of connection between the project and the interest.
  - The likelihood and severity of harm a person is exposed.
  - The frequency and duration of a person's use of the area near the project.

How does the NEB determine who has "relevant information or expertise"?

The NEB may consider these factors when deciding if a person has relevant information:

- The source of the person's knowledge (for example, local, regional or Aboriginal).
- The extent the information is within the project scope and related to the list of issues.
- The value the information will add to the NEBs decision or recommendation. The person's qualifications (i.e. specialist knowledge and experience);
- The person's qualifications (i.e. specialist knowledge and experience).
- The extent the person's expertise is within the project scope and related to the list of issues.
- The value the information will add to the NEBs decision or recommendation.

VISIT ONLINE

For more information on the NEB Participant Funding Program, see:

http://www.neb-one.gc.ca/prtcptn/hrng/pfp/prtcpntfndngprgrm-eng.html

How does the Participant Funding Program work?

When the NEB announces a hearing, it will also include information on how the hearing will be conducted and how people can participate. The NEB offers participant funding to help with the costs of the registered Intervenors in an oral facility hearing. Eligible recipients include:

- Individuals
- Aboriginal groups
- Landowners
- Incorporated non-industry not-for-profit organizations
- Other interest groups approved by NEB

The public can also submit written submissions to the NEB.

How does Consultation with First Nations occur?

The NEB encourages Aboriginal groups to participate in the review process if they will be potentially impacted by the project. The NEB requires the companies to consult with these Aboriginal groups early in the project planning and design phases – the timing makes it easier for the company to respond to concerns raised by the Aboriginal groups.

The NEB also encourages Aboriginal people or groups with concerns about proposed projects to contact company representatives and to request information sessions in their communities. This should be done as early as possible upon learning about a proposed project. Project information can also be obtained by attending company open houses, calling company information lines, and visiting project-related websites.

While Aboriginal groups are encouraged to raise their concerns with the company, they may bring any outstanding concerns or views about the project directly to the attention of the NEB during the hearing process. This includes:

- The potential impact on Aboriginal communities
- The use of traditional territory

- The potential or established Treaty or Aboriginal rights

Aboriginal groups may participate in the NEB hearing process in several ways, ranging from more formal written options to less formal oral statements. Ceremonies or other traditional practices may also be integrated into a hearing process at the request of the Aboriginal participants. (See link to Hearing Handbook below).

It is important that Aboriginal groups bring any concerns or views they may have about a proposed project to the NEB's attention through the hearing process. Since it is a quasi-judicial tribunal and works much like a court, the NEB can only consider information that has been placed on its public record when making a decision. Beyond the hearing process, the NEB cannot take part in one-on-one discussions with anyone about a project application that is being considered by the NEB. In addition, the NEB understands that Crown consultation is an issue of interest to Aboriginal groups. The Crown has stated that it will rely on the NEB process to consult with Aboriginal groups.

The NEB will take all relevant concerns into account when determining whether a project can proceed. The NEB will also consider the conditions to place on its approval of the project.

How are recommendation provided to the GIC?

The NEB releases its recommendations report within 12 weeks following the conclusion of the hearing. This is announced in a publication called the NEB Report or the NEB Decision which is available on the NEB website. A news release is also sent to media.

Under the NEB Act, the NEB has **15 months** to make a recommendation to the Governor In Council (GIC) once the application is determined to be complete. This can be extended if the hearings become very complex. The GIC will decide whether a certificate or licence should be issued by the Board within **3 months** of receiving the NEB Report. Within this

VISIT ONLINE

For more information, see Hearing Handbook at:

https://www.neb.gc.ca/prtcptn/hrng/hndbk/index-eng.html

period, the GIC may ask questions on the report or ask the NEB to reconsider the recommended conditions before it approves or denies the project. If the GIC denies a project, it will order the Board to dismiss the application.

Is there a Public Registry of Document?

The NEB maintains the complete application, letters of comments, written information, and all correspondence between the NEB and the proponent and intervenors (see https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=llworkspace)

Regulatory Requirements - Mining Projects

Canada is rich in minerals, and mining is an important industry in Canada's economy. The federal government promoted the changes brought about by CEAA 2012 as necessary for resource development in this country. The federal government is responsible for mines on federal lands and for uranium mining. Provincial governments are responsible for mining on provincial lands. In BC, prospectors require licensing before exploration for minerals and must obtain a lease in order to proceed with development of a property into a mine.

Natural Resources Canada's Minerals and Metals Sector (MMS) encourage partnerships between Aboriginal communities, the mining industry and government, and produce several information packages or assist with the partnership development.

LIFE CYCLE OF A MINE

Mining can cause severe environmental effects such as:

- Destruction of natural habitat of wildlife and fish.
- Generation of excessive noise, waste, and dust.
- Contamination of water, land, and air with organic chemicals, cyanide, and heavy metals that leach from acid mine drainage.
- Continued destruction of the environment long after the mine has closed.

New Mining Environmental Assessment Process

The Canadian Environmental Assessment Agency and British Columbia's Environmental Assessment Office have both signed a Substitution Agreement to harmonize EA efforts and minimize process duplication. This allows the federal Minister of Environment to recommend a project be exempted from CEAA 2012 if a provincial review process meets all of the requirements for substitution. However, the federal Minster must still make a final environmental assessment (EA) decision based on the outcome of the substituted process.

A mining project will require an EA under the *CEAA 2012* if it includes any activity listed in the *Regulations Designating Physical Activities*.CEAA 2012 will require Aboriginal consultation (see Section 2: First Nations Rights and Responsibilities in EA)

Federal Process

See Section 1: Environmental Assessment and Responsibilities

Federal Permits

- Under Section 35 of the *Fisheries Act,* the proponent is prohibited from causing serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery, to fish that support such a fishery, and to fish habitat. If harm will occur, a permit is required from the Department of Fisheries and Oceans (DFO).

- Under the *Migratory Birds Convention Act,* regulations outline the protection of migratory birds and their nests - particularly the prohibition of incidental impacts on nests or eggs. Environment Canada maintains a breeding timetable for this purpose. If harm will occur, a permit is required from Environment Canada (EC).

- Under the *Navigation Protection Act,* permits are required for any work placed on, over, or under "scheduled" navigable waters (see memory stick - British Columbia's Protected Waterways). If development will impact a scheduled body of water, a permit is required.

- Under the *Explosives Act,* permits are required for the manufacture and storage of explosives.

Provincial EA Process

Under the 2013-14 Natural Resource Sector Transformation Plan, the Natural Resource Sector took the "One Land Base – One Land Manager" approach to streamline the regulatory processes and to encourage economic development in the Province. The Natural Sector is comprised of the following provincial ministries:

- Aboriginal Relations and Reconciliation
- Agriculture, Ministry of Energy and Mines
- Natural Gas Development, Environment (including the Environmental Assessment Office)
- Ministry of Forests, Lands and Natural Resource Operations (FLNRO)

VISIT ONLINE

To see which First Nations have Strategic Engagement Agreements, see:

http://www2.gov.bc.ca/gov/topic.page?id=00C8FEF3481D-4028B1EF0FD67B1695C4

To see which First Nations have Reconciliation Agreements, see:

http://www2.gov.bc.ca/gov/topic.page?id=496EF-FA5F6C14CB6B9186F4C9A959A50

To see which First Nations have Economic and Community Development Agreements, see:

http://www2.gov.bc.ca/gov/topic.page?id=00D9B39C169B4E95BAAB740A9B52D54A

The FLNRO is responsible for Aboriginal consultation. A single recommendation report will be created by the Mine Review Committee that is specific to the project and will be presented to the statutory decision-makers.

Process

For the provincial EA process, refer to the Environmental Assessment Roles and Responsibility section.

- An EA Certificate may be required under the *Environmental Assessment Act* prior to obtaining mining authorizations. A federal EA may also be triggered (see federal Process above).

- Applicants for *Mines Act* permits are required to advertise project proposals when submitting the permit application. As well, the applicants are required to provide information for public review and comment within 30 days of the submission.

Provincial Permits

- Under the *Mines Act*, a Section 10 permit is required for construction, operation, closure, and reclamation.

- Under the *Environmental Management Act,* permits may be required during site disturbance and construction. This could include an Effluent Discharge Permit related to erosion prevention and sediment control ponds. As well, the Effluent Discharge Permit may be required for the discharge of effluent to a tailings pond, and from the tailings pond to the environment where applicable.

- Under the *Mineral Tenure Act* or *Coal Act*, a mineral claim or coal license must be converted to a mining lease or coal lease before production can begin.

- Under the *Forest Act,* an occupant license is required for removal of any timber.
- Under the *Forest Practices Code of British Columbia Act Provincial Forest Use Regulation*, a Special Use Permit and associated authorizations are required for access road development on Crown land off mineral and coal tenures
- Under the *Health Act*, permits are required for the construction and operation of a base camp.
- Under the *Water Act,* approvals and licenses are required for water withdrawals during the construction, operation and production phase.
- Under the *Land Act,* licenses and leases for Crown land tenure are required for infrastructure. This also applies to transmission lines.
- Under the *Heritage Conservation Act,* authorizations may be required – this is mine dependant.
- Other Process Requirements

First Nation Mining Agreement

There are agreements currently negotiated in BC with First Nations that provide for shared decision-making about land and resources.

Revenue Sharing Agreements specific to the mining industry include:

- Strategic Engagement Agreements – establish a consultation process between the province and a First Nation.
- Reconciliation Agreements – pursue resource revenue sharing, economic development opportunities, and socio-cultural initiatives.

Tailings Pond Storage Facility Breach (Photo) prompts BC Chiefs to push for a new mining industry that protects the environment while promoting economic and social benefits for all. The Imperial Metals-owned Mount Polley mine became the site of the most devastating tailings storage facility disaster in Canadian history, when nearly 25 million cubic metres of toxic mine effluent waste and chemicals spilled and damaged both Hazeltine Creek and Quesnel Lake, which reside within the traditional territorial boundaries of the Secwepemc Nation. The BC government pledges to take a leading role in implementing policy that would see First Nation communities as partners in environmental regulation.

Revenue Sharing agreements include economic and Community Development Agreements. These agreements provide a share of mining tax revenue and an opportunity for consultation on the process.

First Nation Mining Policy

Several First Nations and Tribal Councils in BC have developed their own mining policies.

The Northern Secwepemc te Qelmucw Mining Policy (2014) was finalized in November, 2014. This policy was made in response to a devastating spill from a tailing storage facility that damaged areas within the traditional territory of the Secwepemc Nation. The policy was set in place to hold industry and government accountable for mining practice in their territory. Proponents will be required to pay for First Nations to conduct their own EAs.

Reference the following websites for information on current First Nations Mining Policies.

Northern Secwepemc te Qelmucw Mining Policy (2014)
(see http://northernshuswaptribalcouncil.com/?page_id=765)

Taku River Tlingit First Nation Mining Policy (2007)
(see http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_low_resolution.pdf)

Teslin Tlingit Council Mining Policy (2008)
(see http://www.ttc-teslin.com/documents/TTC-Mining-Policy.pdf)

BC First Nations Energy and Mining Council Impact and Benefit Agreement Community Toolkit
(see http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_low_resolution.pdf)

Regulatory Requirements: Liquefied Natural Gas Projects

In Canada, there are no operational liquefied natural gas (LNG) export facilities, and the Federal Government is working closely with the BC Government to support the development of the LNG industry. As of September 2014, there are 16 LNG export facilities in BC that have entered the regulatory review process - there is a total of 17 facilities in Canada (See table below).

On February 19, 2015, it was announced that the Federal Government granted tax relief to proposed LNG terminals hoping that the incentive would spur final investment decisions in a fledgling industry. While there are proposals in the system, none of the LNG export facilities have made firm decisions to move ahead.

In December 2014, the Nadleh Whut'en and Nak'azdli First Nations filed for a judicial review of British Columbia's Environmental Assessment Office (EAO) decision to approve a TransCanada Corporation natural gas pipeline project. The proposed pipeline will run from northeastern BC to Kitimat. The First Nations alleged they were not adequately consulted prior to the environmental assessment (EA) certificate being issued in October for the project. The two First Nations have the support of other First Nations throughout BC.

Proposed Export Terminals	LOCATION	WEBSITE
Douglas Channel LNG	Kitimat, BC	Under construction
Kitimat LNG	Kitimat, BC	http://www.chevron.ca/our-businesses/kitimat-lng
LNG Canada	Kitimat, BC	http://lngcanada.ca/
Pacific Northwest LNG	Prince Rupert, BC	http://pacificnorthwestlng.com/
Prince Rupert LNG	Prince Rupert, BC	http://www.princerupertlng.ca/
Woodfibre LNG	Squamish, BC	http://www.woodfibrelng.ca/
WCC LNG	Kitimat or Prince Rupert, BC	http://www.imperialoil.ca/Canada-English/operations_ngas_export.aspx
Triton LNG	Kitimat or Prince Rupert, BC	No link

Proposed Export Terminals	LOCATION	WEBSITE
Aurora LNG	Prince Rupert, BC	http://www.nexencnoocltd.com/en/Operations/ShaleGasOil/AuroraLNG.aspx
Kitsault Energy Project	Kitsault, BC	http://www.kitsaultenergy.com/
WesPac Marine Terminal	Delta, BC	http://wespac.com/irvine-ca-june-24-2014-wespac-midstream-vancouver-llc-wpmv-a-subsidiary-of-wespac-midstream-llc-wespac-has-submitted-an-application/
Steelhead LNG	To be determined, BC	http://www.steelheadlng.com/
Grassy Point LNG	Prince Rupert, BC	http://www.woodside.com.au/Our-Business/GrassyPoint/Pages/default.aspx
Discovery LNG	Campbell River, BC	http://www.discoverylng.com/
Cedar LNG	Kitimat, BC	No link
Orca LNG	Prince Rupert, BC	http://orcalng.com/

(Source: Natural Resources Canada – LNG Projects http://www.nrcan.gc.ca/energy/natural-gas/5683)

Liquefied Natural Gas Environmental Assessment

The following section outlines the provincial and federal regulatory requirements to undertake LNG terminal construction and operation. All LNG projects must have the respective Ministerial decisions before approvals or permits are allowed to proceed. LNG projects will likely pursue an EA approach that meets the requirements of both the federal and the provincial EA processes. *The Canadian Environmental Assessment Act,* 2012 (CEAA 2012) supports delegation, substitution, or equivalency to the provincial EA process.

Federal Environmental Assessment Process

An LNG project will require an EA under *CEAA 2012* if it includes any activity listed in the Regulations Designating Physical Activities such as marine terminals or pipelines. However, the legislation only requires review of the aspects that fall under federal jurisdiction including marine environment, migratory birds, trans-boundary effects, and Aboriginal communities. The *CEAA 2012* process also requires Aboriginal consultation.

Pipelines that cross interprovincial boundaries are regulated by the National Energy Board (NEB). As a result, pipeline infrastructure related to *intra*-provincial LNG facilities will be regulated by each individual province.

Technical Review Process of Marine Terminal Systems and Transhipment Sites (TERMPOL)

A Proponent that works with a review committee chaired by Transport Canada and includes:

- Transport Canada
- Fisheries and Oceans Canada
- Canadian Coast Guard
- Environment Canada
- Aboriginal Affairs and Northern Development Canada
- Canadian Hydrographic Services
- Pacific Pilotage Authority
- BC Coast Pilots
- BC Chamber of Shipping and Council of Marine Carriers
- First Nations
- Members of public affected by the project.

Federal Process

- The CEAA process begins with a screening to determine if a federal EA is required, and whether it will be a Standard EA or a panel review. A Panel Review is the likely consideration since these are more complex projects and the public has a high interest in the outcome.

- Once the screening is complete, the federal government will also consider a request for substitution or equivalency from the province.

- If the request is not permitted, the Canadian Environmental Assessment Agency will produce an assessment report that determines the potential impacts, and that recommends on whether a project should proceed based on the significance of these impacts.

- A Decision Statement is issued that includes conditions which may be attached to the approval.

Federal Permits

- Under the *Canadian Environmental Protection Act,* the Disposal at Sea Regulations govern the disposal of approved substances at sea including dredged materials that must be moved to keep shipping channels open.

- Under Section 35 of the *Fisheries Act,* the proponent is prohibited from causing serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery, to fish that support such a fishery, and to fish habitat.

- Under the *Migratory Birds Convention Act,* regulations outline the protection of migratory birds and their nests - particularly the prohibition of incidental impacts on nests or eggs. Environment Canada maintains a breeding timetable for this purpose.

- Under the *National Energy Board Act*, the export of natural gas from Canada is

regulated.

- Under the *Navigation Protection Act,* permits are required for any work placed on, over, or under "scheduled" navigable waters.

- Under the *Railway Safety Act,* the construction of or modification of railways to an LNG site are regulated.

- Under the *Species at Risk Act* (SARA), the proponent is prohibited from killing, harming or harassing of species listed as endangered or threatened. This includes the damage and destruction of their residence, and the destruction of critical habitat that has been identified in a recovery strategy and protected by an order from the minister or the federal Cabinet. While these prohibitions do not automatically apply to all species throughout Canada, they do apply to aquatic species and migratory birds.

Provincial Environmental Assessment Process

Under the *British Columbia Environmental Assessment Act Reviewable Project Regulation* (BC Project Regulations), a natural gas processing facility designed to process natural gas at a greater rate than 5.634 million m3/day will be subject to an EA (see http://www.eao.gov.bc.ca for link to regulations) - this requirement encompasses most LNG projects. The complexity of the project will determine the scope of the review and the amount of information that will be required for the EA (see Section 1: Environmental Assessment Roles and Responsibilities). If the project is approved, an EA certificate will be issued.

Provincial Process

- A Project description (PD) is prepared by the proponent and submitted to the BC Environmental Assessment Office (EAO) that is mandated to oversee the BC Environmental Assessment Act (BCEAA). The PD is reviewed.

VISIT ONLINE

To see if there is a modern day land claim agreement in current/proposed LNG facility areas go to:

http://bctreaty.net/files/updates.php

To find out if self-government agreements have been negotiated in these areas go to the website of Sechelt FN at **www.shisalh.com** or Westbank FN at **www.wfn.ca**.

For those negotiating under the *First Nations Lands Management Act* go to:

http://www.labrc.com/member-communities/

- If complete, the EAO will issue a public notice in the form of a Section 10 Order. This confirms the project is reviewable under the BCEAA which details the general conditions of the EA.

- The proponent and EAO work together to draft the Terms of Reference or Application Information Requirements (AIR) for the EA. The draft AIR is subject to a public comment period before it is finalized.

- A Section 11 Order is issued for the proponent to undertake the EA Application as per the AIR. The EA Application is prepared and completed by the proponent. There is no timeline for this part of the process. However, once the EA Application is formally submitted to the EAO, it will be screened for completeness within 30 days.

- Once accepted as complete, the EA Application is subject to a 180-day legislated review stage that includes a public comment period. The EAO will prepare an EA Report along with recommendations on whether an EA Certificate (EAC) should be issued for approval. This will included any terms and conditions attached to the approval.

- Within 45 days, the Ministers can decide to approve the project, to refuse the project or to request further assessment of the project. If approved, the EAC is issued and the project proceeds to the permitting stage.

Provincial Permits

- Under the *Heritage Conservation Act* (HCA), a Section 12 permit is required.

- Under the *Water Act*, a Section 9 permit is required.

- Under the *Environmental Management Act*, several permits (wastewater discharge, storm water management, hazardous waste) are required.

- Under the *Public Health Act*, the Industrial Camps Regulation, the *Sewerage System Regulation*, and the *Drinking Water Protection Act*, permits are required.

- *Oil and Gas Activities Act, Pipeline and Liquified Natural Gas Facility Regulations* (which include regulated consultation and notification requirements with First Nations).

Municipal Environmental Assessment Process

Authorities held by the municipalities under the Local Government Act include:

- Land use and development permits
- Building permits
- Dust control
- Noise management
- Storm water management

Land Claim Agreements/Modern Day Treaties

In February 2012, the Pembina Institute noted that strong First Nation opposition coupled with strong public concern make the prospect of LNG development and the export of oil-sands from Canada's West Coast challenging - even uncertain. Although the federal and the provincial governments have approved Enbridge's Northern Gateway pipeline (subject to conditions), Enbridge is still required to consult with First Nations regarding permits for the project. As a result, First Nations have considerable legal power to challenge the pipe-line in court which could result in long delays for this process and this project.

APPENDIX LIST

All resource materials identified can be found on the accompanying USB.

Document Name	File Name
BC First Nations Energy Action Plans	Energy-Action-Plan.pdf
Action Plan - BC First Nations Mineral Exploration and Mining	Final_Mining_Action_Plan.pdf
First Nations and Natural Resource Development: Advancing Positive, Impactful Change	Natural_Resource_Development_Report.pdf
Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process	BC Guide_to_Involving_Proponents_in_Consultation.pdf
Proponent Guide to Coordinated Authorizations for Major Mine Projects	BC_Proponent_Guide_Major_Mine_Projects.pdf
British Columbia Protected Waterways	British Columbia Protected Waterways.doc
	Protected Oceans and Lakes BC.tiff
	Protected Rivers BC.tiff
	Map.png
Proposal for Reform (FNEMC)	BC FN Process Backgrounder.doc
	BC FN Process in BC 2009.pdf
Integration of Aboriginal Consultation into the Environmental Assessment Process	Integrating_Abor_Cnsln_in_Fed_EA.tiff
Working with Aboriginal Groups During a Federal Environmental Assessment Process	Integrating_Abor_Cnsln_in_Fed_EA.tiff