

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT



Photo courtesy of Mark Connor, Habitat Steward, Taku River Tlingit First Nation

Prepared by the **First Nations Environmental Assessment
Technical Working Group**

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First Nations Environmental Assessment Toolkit

▶ ACKNOWLEDGEMENTS

The document that is before you is the result of the work of countless people. Many First Nation or Aboriginal individuals and organizations have worked tirelessly to advance mechanisms for the recognition and protection of Aboriginal rights and title in Canada generally, and First Nation participation in environmental assessment specifically. Through their dedication and work they have helped to define and expand consultation requirements. This work has led to the recognition of the existence of Aboriginal rights and title and the clarification of the responsibility for Crown legislators and decision-makers to address the interests, concerns, Aboriginal rights and title and treaty rights of First Nations potentially affected by Crown decisions.

The First Nations Environmental Assessment Toolkit builds on this foundation in hopes that relations among BC First Nations, provincial and federal governments, and project proponents will continue to improve and lead to better EA decisions.

Thank you to all those people who have contributed directly or indirectly to this important project!

More specifically, there are numerous BC First Nations, provincial and federal government participants who have contributed to making the First Nations Environmental Assessment Toolkit a reality.



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THE WRITING

The primary authors of the toolkit are **Tony Pearce** and **Ann Hillyer**. Tony's invaluable EA experience combined with the experience of FNEATWG participants has resulted in the toolkit before you. Tony and Ann's tireless redrafts and reworking of sections (*BCEAA* and *CEAA* were both amended during the preparation of this toolkit) is truly appreciated. FNEATWG gratefully acknowledges the important contributions of both primary authors.

Marie Lagimodiere had the responsibility of final rewrite and editing. Marie worked diligently throughout the creation of the pilot and final versions of this toolkit. Her communication skills and attention to detail have contributed substantially to the final product. **Doug Ward** provided layout and design for the entire tool kit and produced a document that we can all be proud of. FNEATWG wishes to extend to all involved in the writing our deepest appreciation. We could not have done this without you!

FNEATWG members contributed substantially to the toolkit by reviewing and providing detailed comments on each draft section of the toolkit.

Susan M. Carlick brought her enthusiasm and in-depth experience with the Taku River Tlingit First Nation participation in the environmental assessment of the Tulsequah Chief Project to the position of FNEATWG coordinator during the latter stages of the project. Her assistance was invaluable in bringing the toolkit project to completion.

PILOT WORKSHOPS

FNEATWG conducted a pilot launch of the toolkit. The pilot included having 50 First Nation representatives attend two workshops (in Prince George and Vancouver) and provide feedback regarding the toolkit and the workshop. Thank you to those who attended those first workshops and provided valuable input.

FNEATWG retained ESSA Technologies to develop and deliver the toolkit workshop materials. We particularly appreciate **Mary Ellen MacCallum's** highly successful design for the workshops. Her design provided First Nations around BC with an in-depth understanding of the toolkit and its usefulness as a resource.

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Many thanks to all the organizations and photographers who provided photos used in this toolkit. Photo credits are indicated below each photo.

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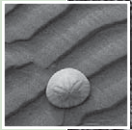
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DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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Cover photo courtesy of Tourism Victoria

The purpose of this toolkit is to assist First Nations in British Columbia who are engaged or interested in EAs being conducted for proposed projects or developments. This toolkit is designed primarily for First Nations leadership, employees and communities. It is meant to provide information and practical advice that will help First Nations participate effectively in EA processes. It is hoped that this toolkit will help your First Nation develop strategies and decision-making processes that benefit your community and result in favourable outcomes from EAs.

WELCOME

Welcome to the **First Edition** of the First Nations Environmental Assessment Toolkit. This toolkit was developed by the First Nations Environmental Assessment Technical Working Group (FNEATWG).

FNEATWG is committed to helping First Nations increase their capacity to engage effectively in environmental assessment processes. You may contact FNEATWG by e-mail at scarlick@trtfn.com or ccrffc@cyberlink.bc.ca

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▶ WELCOME

Welcome to the first edition of the First Nations Environmental Assessment Toolkit.

The purpose of this toolkit is to assist First Nations in British Columbia (BC) whose Aboriginal rights and title and treaty rights may be affected by a project undergoing an EA. This toolkit is designed primarily for First Nations leadership, employees and communities. It is meant to provide information and practical advice that will help First Nations participate effectively in EA processes. It is hoped that this toolkit will help your First Nation develop strategies and decision-making processes that benefit your community and result in favourable outcomes from EAs.

▶ BACKGROUND

This toolkit was developed by the First Nations Environmental Assessment Technical Working Group (FNEATWG), an informal organization of EA practitioners in BC. FNEATWG participants include representatives from several BC First Nations and provincial and federal government agencies. FNEATWG is focused on increasing the effectiveness of First Nation's practice and participation in provincial and federal EA processes.

One of FNEATWG's goals is to create products and tools that will assist all parties in the following EA related areas:

- consultation
- capacity requirements and capacity development
- traditional knowledge and community based approaches to EA
- cumulative impact assessment
- socio-economic benefits
- development agreements/impacts and benefits agreements

The First Nations Environmental Assessment Toolkit is intended to be a useful tool to address these complex and inter-related issues.

▶ SCOPE OF THE TOOLKIT

The information in the toolkit is presented by topic and is also illustrated through case studies and experiences of First Nations in various types of EA processes in BC and other regions of Canada.

This toolkit describes the basics of environmental assessment and specific aspects of the regulatory process for:

- BC provincial environmental assessments under the *British Columbia Environmental Assessment Act (BCEAA)*

- federal environmental assessments under the *Canadian Environmental Assessment Act (CEAA)*
- joint review processes that occur when an environmental assessment is required by more than one regulatory authority

It describes opportunities for First Nation participation in these regulatory processes and potential strategies for ensuring that your issues are addressed and your community's perspective is considered. It also provides guidance to First Nations for interacting effectively with project proponents and regulatory agencies during and after EAs for proposed projects. Some of the areas covered include consultation, funding for participation, using and protecting traditional knowledge in an EA, negotiating agreements with proponents and government agencies and approaches to reviewing EA reports.

This toolkit is not meant to be in-depth training on EA practices but instead to provide relevant information on which to base strategies and to form your own questions about a proposed development. The intent of this toolkit is to help you to build capacity and confidence in your participation, to know where to go to find additional information and to identify situations where legal or technical assistance would be beneficial.

PERSPECTIVE

The toolkit is neutral on the issue of proposed projects. The intent of the toolkit is to provide information that will assist First Nations in understanding EA processes and in asking questions that can help them to assess the acceptability of a project from their First Nation's perspective. Asking relevant questions will help to ensure that First Nations are better informed for making decisions relative to proposed developments.

This document is written primarily from a First Nation perspective. However, it also provides information on the perspectives of other participants in the EA process including project proponents, government regulators and decision-makers.



Transmission line site tour – Nature's Trust lands on the Nanaimo River Estuary. Photo courtesy Kathleen Johnnie, Lands and Resources Co-ordinator, Snuneymuxw First Nation.

THEME

The underlying theme of this toolkit is full engagement in any EA process relevant to your community. It is only through effective participation that your First Nation can influence the EA process and outcome. By understanding the EA process, legislation, participating actively and having effective strategies, you are more likely to accurately represent your First Nation's interests.

▶ HOW TO USE THE TOOLKIT

QUICK TIP

Consider making additional copies of this toolkit so that each toolkit user can personalize their copy.

STRUCTURE OF THE TOOLKIT

The toolkit is available in hardcopy and on CD. It consists of 12 sections:

- Section 1 – Introduction to the Toolkit
- Section 2 – Environmental Assessment Basics
- Section 3 – Environmental Assessment from a First Nation Perspective
- Section 4 – British Columbia’s Environmental Assessment Process
- Section 5 – Canada’s Environmental Assessment Process
- Section 6 – Joint Review Processes
- Section 7 – Traditional Knowledge and Environmental Assessment
- Section 8 – Reviewing Environmental Assessment Reports
- Section 9 – Follow-up Programs
- Section 10 – Development Agreements
- Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine
- Section 12 – Detailed Case Study – Tulsequah Chief Project
- References, Glossary and Index

Each section covers a main topic and is generally written so that an individual section is informative without having to be familiar with the entire toolkit. However, EA processes are complex and many topics are inter-related. Within each section references are provided to different sections of the toolkit where you can find related or complementary information.

TABLE OF CONTENTS

The main table of contents at the beginning of this document is your guide to various topics covered in the toolkit. Use this to find the topic you want quickly. Each section in the toolkit also has its own table of contents.

If you are using a CD or online version of this toolkit, click on page or section references to link directly to related topics. If you are using the hard copy version, check the table of contents within each section to find the correct page number.

INDEX

Another way to find information is to use the index at the back of the toolkit. The index lists the section and page numbers for key topics discussed in the toolkit.

GLOSSARY

The glossary at the back of the toolkit contains definitions for the various terms used in the toolkit.

ABBREVIATIONS

There are many abbreviations and acronyms used in the toolkit – for example, environmental assessment is often abbreviated to EA. Abbreviations are provided in brackets the first time they are used in each section. There is also a complete abbreviation list in the glossary.

SIDEBAR BOXES

The toolkit uses sidebar boxes to highlight certain points and provide related information. Sidebar boxes include quick tips, key definitions (these are also included in the glossary) and shaded boxes with more detailed information on specific topics.

ADDITIONAL INFORMATION

Sources for additional information on the key topics presented are listed in a text box at the end of each section. The additional information lists include useful documents and links to websites. The references section at the back of the toolkit provides additional information including documents and links to relevant court cases and websites.

CHECKLISTS

Checklists are presented at the end of some sections. Blank checklist forms can be photocopied and used as guidelines when you are participating in specific aspects of an EA.

CASE STUDIES

Case studies are included to illustrate the concepts being discussed. They give examples of First Nation's experiences in various aspects of the EA process. Short case studies appear in full-page shaded boxes in the main sections of the toolkit.

There are also two detailed case studies that illustrate the experiences of participating Aboriginal groups and lessons that can be learned from their experiences:

- Detailed Case Study – Voisey's Bay Nickel Mine (Section 11) describes a harmonized Innu-Inuit-federal-provincial review of a proposed project.
- Detailed Case Study – Tulsequah Chief Project (Section 12) describes the experience of a First Nation in a joint federal-provincial review of a proposed mine re-opening.

NOTES

Throughout the toolkit there is space to take notes – in some of the margins and at the end of sections. You are encouraged to personalize your toolkit by adding your own notes, highlighting sections that are important to you and adding other reference materials to your binder.

QUICK TIP

This toolkit is a resource for you. Consider adding your own notes, highlighting sections and adding other reference materials to your binder. Also consider using flags to mark sections that will be accessed repeatedly.

▶ TOPICS OF INTEREST TO TOOLKIT USERS

The primary users of this toolkit are expected to be First Nations EA practitioners who need to assess, or to participate in the assessment of, a proposed project on or adjacent to their lands. This could include staff who are representing a First Nation in EA processes, community leadership and community members.



Orca breaching. Photo courtesy Tourism Victoria.

This toolkit may also be useful to provincial and federal regulatory agency personnel, project proponents and consultants. It can provide some useful information to proponents and consultants as they work to engage First Nations in an EA process.

This toolkit focuses on EA practice in the province of British Columbia. However, many parts of the toolkit would be useful to indigenous organizations and communities in other jurisdictions in Canada and around the world.

The following lists of topics are starting points for different groups of users (if you are using the CD version, click on underlined words to connect directly to the section).

MAIN TOPICS

If you have a broad topic in mind, check the following sections:

- [What are environmental assessments and how are they done? \(Section 2\)](#)
- [First Nation approaches to EA and project decision-making \(Section 3\)](#)
- [BC EA process \(Section 4\)](#)
- [federal EA process \(Section 5\)](#)
- [joint review processes \(Section 6\)](#)
- [use of traditional knowledge in EA \(Section 7\)](#)
- [suggestions for reviewing EA reports \(Section 8\)](#)
- [follow-up programs \(Section 9\)](#)
- [development agreements or impacts and benefits agreements \(Section 10\)](#)
- [Voisey's Bay Mine Case Study \(Section 11\)](#)
- [Tulsequah Chief Project Case Study \(Section 12\)](#)

FIRST NATION LEADERSHIP

The following key sections of the toolkit may prove to be beneficial starting points for First Nation's leadership:

- The common law duty of the Crown to consult with First Nations (Section 3, page 2)
- EA strategies (Section 3, page 18)
- Engaging the proponent (Section 3, page 20)
- Funding opportunities (Section 3, page 14)
- Assessing capacity (Section 3, page 13 and Section 10 , page 3)
- Negotiating development agreements (Section 10)
- Case studies (Sections 11 and 12)

FEDERAL AND PROVINCIAL REGULATORY AGENCY PERSONNEL

The following sections of the toolkit may prove helpful for regulatory agency personnel:

- understanding what First Nations need to achieve in an EA (Section 3, Section 10)
- understanding the need for First Nations to negotiate their role in an EA (Section 4, page 11 and Section 6, page 7)
- understanding the capacity needs of First Nations to participate in an EA (Section 3, page 13)
- using traditional knowledge in an EA process (Section 7)
- understanding funding needs for a participating First Nation (Section 3, pages 14 to 18)

PROONENTS AND CONSULTANTS

The following sections of the toolkit may prove helpful for proponents and consultants:

- understanding what First Nations need to achieve in an EA (Section 3 and Section 10)
- understanding a First Nation's need to have certainty about the environmental acceptability of a project before supporting it (Section 3, page 18)
- understanding a First Nation's objectives for benefiting from a project (Section 3, page 18 and Section 10)
- the need for participating First Nations to have expert technical assistance (Section 3, page 24)
- understanding the experience of First Nations in challenging EAs (Section 11 and 12)
- using traditional knowledge in an EA process (Section 7)
- the meaning of consultation in the common law (Section 3, page 2)
- First Nation consultation requirements in *BCEAA* (Section 4, page 9 to 11)
- First Nation considerations in the context of *CEAA* (Section 5, page 26)

▶ **DISCLAIMER**

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments presented.



BC ocean and mountain view. Photo courtesy of Tourism Victoria.

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▶ **CONTACT INFORMATION**

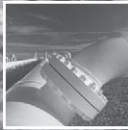
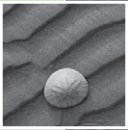
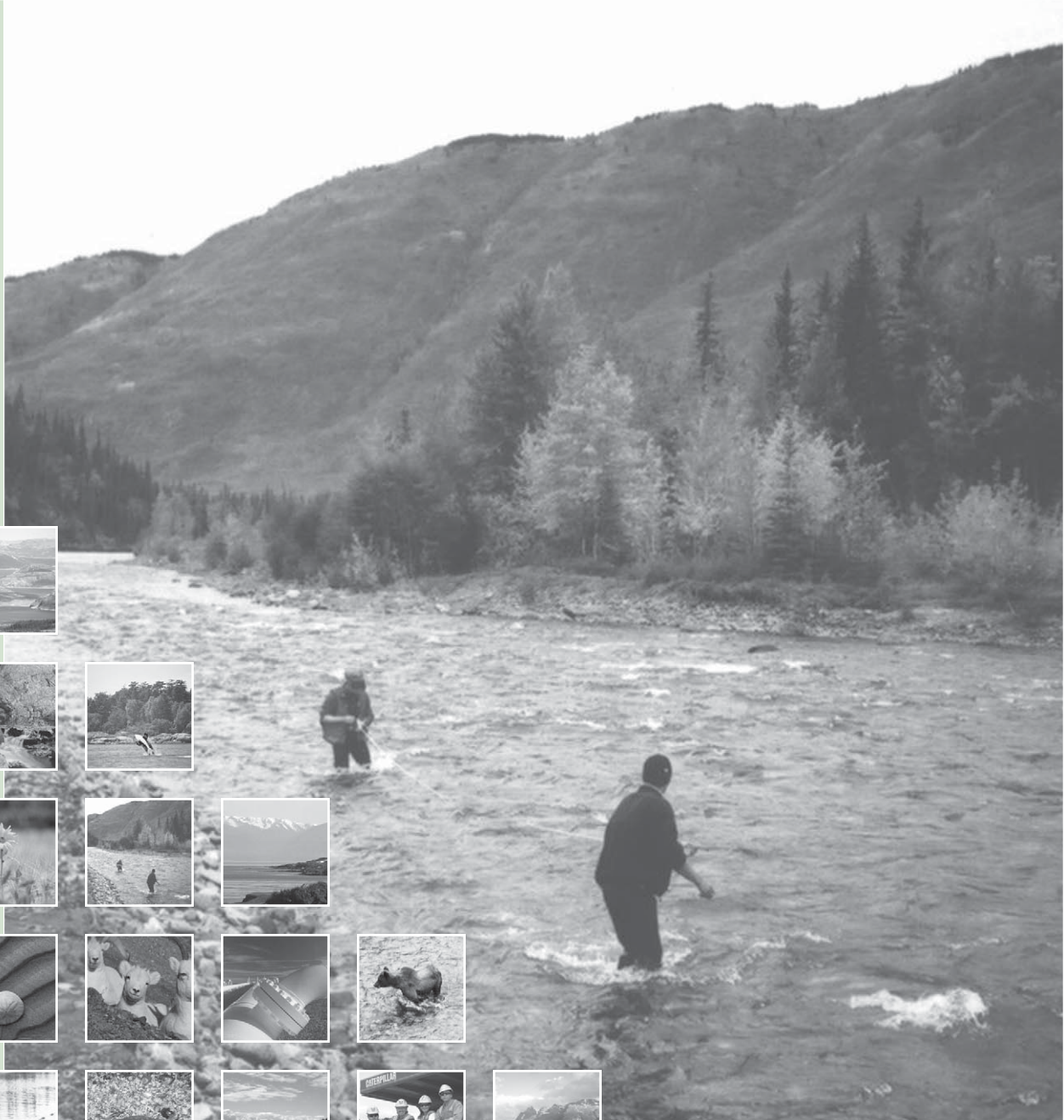
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NOTES

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 2 – ENVIRONMENTAL ASSESSMENT BASICS



Section 1 – Introduction to Toolkit

 **Section 2 – Environmental Assessment Basics** 

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

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Cover photo courtesy of Taku River Tlingit First Nation

EA is a process used to assess and predict the effects of a proposed project and evaluate the acceptability of the project. This section of the toolkit describes the general benefits and limitations of EA processes. It provides an overview of typical environmental assessment processes and describes the basic components of an EA.

This section includes the following:

- What is an environmental assessment?
- Benefits of environmental assessment
- Limitations of environmental assessment
- Overview of the environmental assessment process
- Step 1 – Determine if an EA is required
- Step 2 – Scoping
- Step 3 – Conduct the environmental assessment
- Step 4 – The EA report
- Step 5 – The EA decision
- Step 6 – Follow-up

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▶ WHAT IS ENVIRONMENTAL ASSESSMENT?

Environmental assessment (EA) is a process used to assess and predict the environmental effects of a proposed project or activity before the proposed activity is carried out and to incorporate environmental factors into decision-making.

The EA process is designed to answer questions such as:

- Is the proposed project the best alternative to meet the need for the project that has been identified by the proponent?
- Is there a risk that the proposed project will have adverse effects on the environment or nearby communities? If so, how much uncertainty is attached to this risk?
- Have the potential impacts been avoided or mitigated as much as possible?
- Are the potential impacts significant, even with mitigation?
- Are the predicted effects or risks so high that the project should not proceed?



Photo courtesy of Tourism Victoria.

In most environmental assessments the term environment is used in a broad sense to include the natural environment and human society.

An EA may include the consideration of direct or indirect impacts of a proposed development on:

Environmental factors

- terrestrial (land) ecosystem
- marine (ocean) ecosystem
- aquatic (freshwater) ecosystem
- air quality
- animals (numbers, distribution, movements, behaviour)
- habitat (soil, landforms, water quality, vegetation quality and quantity)

Health and socio-economic factors

- population change
- quality of life indicators
- community social structure and stability
- individual and community health risk
- infrastructure requirements
- employment and business opportunities
- social adjustment programs

Cultural factors

- impacts to traditional land use practices
- impacts to lifestyles, language, and customs

BENEFITS OF EA

By considering environmental effects and mitigation early in the project planning cycle, environmental assessment can have many benefits, such as:

- ensuring that the likely environmental effects of a project are identified and avoided, minimized or mitigated at an early stage
- increasing protection of the environment, socio-economic conditions, human health, traditional use of lands and resources.
- the sustainable use of natural resources
- better project design
- reduced project costs and delays
- increasing government accountability
- providing opportunity for direct participation of First Nations, the public and other potentially affected groups or individuals

Environmental assessments are often conducted using an iterative (repetitive) process with feedback from consultation and impact analysis influencing the project design. Key issues and potential impacts identified through consultation are assessed. If the project impacts are predicted to be significant or uncertain, the project can be redesigned and reassessed to ensure that the potential

impacts have been prevented or minimized. This feedback may occur several times through the environmental assessment. This type of process may result in improved projects that have fewer negative environmental, socio-economic and cultural effects and more benefits.

LIMITATIONS OF EA

Environmental assessment is an effective tool to assist in decision-making about resource development, but it is not perfect. There are a number of limitations associated with the environmental assessment process that you should be aware of.

Limitations may include:

- predictions made during an EA may rely on incomplete information that is subject to many unforeseen variables
- there is often inadequate attention paid to determining if actual impacts correlate with predicted impacts (i.e., follow-up)
- there may be uncertainty associated with mitigation measures
- the significance of environmental effects can not be predicted with 100% certainty, and different groups may have different interpretations of significance

What about ... Sustainable Development?

According to the 1998 Report of the Commissioner of the Environment and Sustainable Development, EA is "a critical tool for sustainable development" (see the commissioner's report at http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c8menu_e.html). The common definition of sustainable development is "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs."

Currently EA's in Canada are focused on predicting and minimizing impacts of proposed developments, not on sustainability. The link between EA and sustainability, and how to evaluate the sustainability implications of a proposed project, are not yet clearly defined in federal or provincial EA processes. However, two recent federal panel reviews under CEAA (the Red Hill Creek Expressway and Voisey's Bay Nickel Mine projects) have addressed the concepts of sustainability (see **Section 5 - Canada's Environmental Assessment Process**). The concept of sustainability was also raised by the Taku River Tlingit First Nation during their participation in the BCEAA review of the Tulsequah Chief Mine Re-opening (see **Section 12 - Detailed Case Study - Tulsequah Chief Project**).

OVERVIEW OF THE ENVIRONMENTAL ASSESSMENT PROCESS

It is important to be aware that environmental assessments are part of regulatory processes. In other words, environmental assessment legislation is triggered when a proponent applies for authorization from government to develop a specific project. In BC, both Canada and British Columbia have EA legislation in place. The requirements are not exactly the same.

Therefore, for details on the regulatory aspects of specific EA processes see the following sections of the toolkit:

- Section 4 – British Columbia’s Environmental Assessment Process
- Section 5 – Canada’s Environmental Assessment Process
- Section 6 – Joint Review Processes

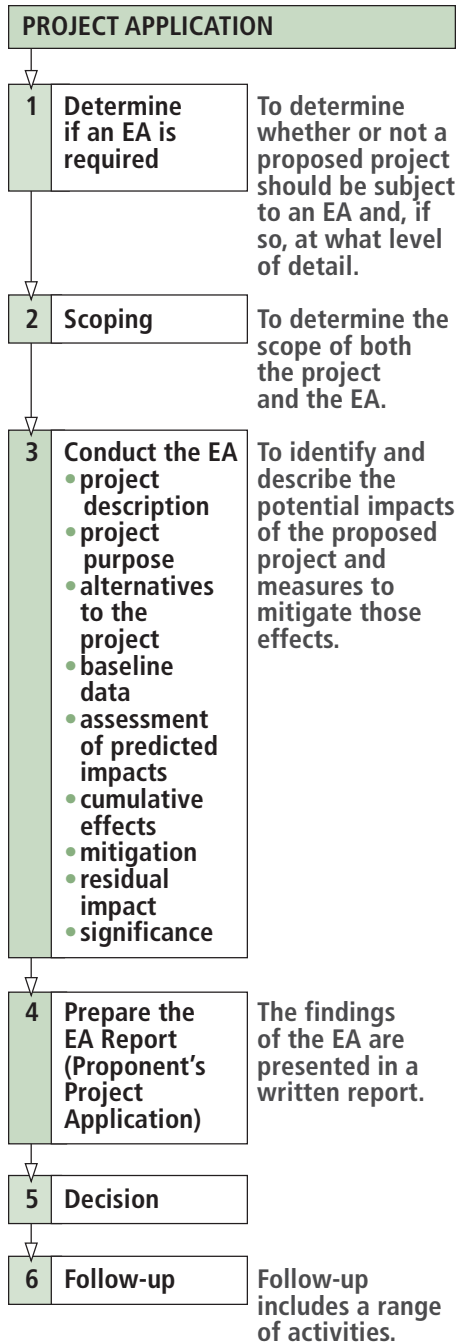
For strategies on effective participation in EA processes see **Section 3 – Environmental Assessment from a First Nation Perspective**. Also, see **Section 8 – Reviewing EA Reports** for information on reviewing an EA report on behalf of your First Nation.

This section provides an overview on the general process of conducting an environmental assessment. It describes terminology and methods that are common to most EAs. However, the methods discussed in this section may be applied differently depending on which EA legislation has been triggered.

The main steps of an EA are shown on page 5 and described in detail in the following numbered sections.



Sealions. Photo courtesy Tourism Victoria.



to determine whether an EA will be required. Even if no EA is required, other regulatory licenses and permits may be needed.

The decision as to whether or not an EA is required is based on determining whether or not the appropriate federal or provincial EA legislation has been triggered. See the sections of this toolkit on the provincial (Section 4) and federal (Section 5) EA processes for more detail on how EAs are triggered under provincial or federal EA laws.

STEP 2 – SCOPING

Once it has been decided that an EA is required, the government body responsible for conducting the EA determines the “scope” of the environmental assessment.

Scoping focuses the EA on relevant issues and concerns, by establishing:

- the scope of the project
- the scope of the EA
- the scope of the factors to be considered

The scoping process for a project involves establishing which aspects of the project will be included in the EA. It involves making a determination about both the principal project (for example, a mine) and any ancillary projects (e.g., access roads, temporary workers’ accommodations) that will be assessed.

The second aspect of scoping sets out the factors that will be considered in the environmental assessment. Some factors are set out in legislation, and must be considered in an EA, but generally, any factor may be considered if it is determined to be relevant to the EA.

STEP 1 – DETERMINE IF AN EA IS REQUIRED

Most environmental assessments begin with an application to build the project by the proponent to a government permitting agency. Once an application has been received, the first step taken by the agency receiving the application is

What are ... the stages of a project?

Projects are developed in stages and each stage needs to be considered in the environmental assessment. Project stages include:

Construction. The construction phase of a project usually employs more people at the site than the operations phase and the pace and intensity of activity can be much greater than the operating project. Temporary facilities such as camps, water supply, sewage disposal, access roads and airstrips may have to be constructed.

Operation. Most large industrial projects have an operations phase that lasts from a few to several dozen years.

Closure. At the end of a project's life-cycle, it is closed either permanently, or temporarily. Permanent closure of a project is reached when the operator of a project decides to permanently shut down the project and leave the site. There are three stages involved with permanent closure:

1. **Decommissioning** is the process of shutting down all physical and processing facilities such as buildings, machinery, plants, roads, pipelines and other infrastructure.
2. **Reclamation** is the stage when the site is cleaned up and modified to make it physically and chemically stable and safe.
3. **Abandonment** or post-closure is the stage when the project site has been fully and satisfactorily decommissioned and reclaimed and approved by regulatory authorities.

Temporary closure occurs when a project is suspended in its normal operations.

All projects that undergo an environmental assessment should include a plan describing what will be done when the project is temporarily or permanently shut down. This is typically called a closure plan.

Some examples of factors that may be considered in an EA include:

- environmental effects, such as impacts on water quality, wildlife, air quality, fish and fish habitat
- impacts on traditional uses
- cumulative effects
- health, cultural, and socio-economic factors
- mitigation measures
- alternatives to the project
- project purpose
- significance of environmental effects

The third aspect of scoping involves setting out the scope of the factors to be considered. For example, the scope of the factors to be considered may establish the extent of the geographic area to be considered, the temporal boundaries, which wildlife species will be focused on, and which specific water quality parameters will be assessed (e.g., turbidity, heavy metal levels).

The net result of scoping is a clear expression of the information that the proponent must include in their EA. This may be set out in a "scoping document" or the "terms of reference" for the EA.

STEP 3 – CONDUCT THE EA

Assessing the potential effects of a proposed project may involve collecting and considering various types of information including:

- a project description
- an identification of the purpose of the project
- an identification of alternative means of carrying out the project or "alternatives to the project"
- an environmental baseline description
- an impact analysis of the project
- a cumulative effects assessment
- an identification of ways to mitigate the adverse impacts
- an identification of residual impacts
- a determination of significance of the residual impacts

PROJECT DESCRIPTION

It is important to have a detailed project description to conduct a thorough EA.

In its project description the proponent usually includes the following information:

- the name and proposed location of the project
- the purpose of the project
- regional and local maps showing the site and layout of the main project components (e.g., plant site, roads, utility corridors)
- descriptions of the main project components including permanent and temporary structures, associated infrastructure and type of equipment used
- conceptual level details of all engineered components (e.g., roads, dams, processing facilities, waste disposal and storage areas, air and water emission discharge locations)
- requirements for off-site land use or dependence on other facilities
- the production capacity and processes to be used in the project
- the project's raw materials, energy and water requirements and sources including associated infrastructure such as access roads, pipelines, electrical transmission lines and water withdrawal locations
- any solid, liquid or gaseous wastes likely to be generated by the project and waste management plans
- storage and disposal procedures for toxic or hazardous materials to be used or generated by the project
- excavation requirements and quantity of fill added or removed
- identification of the First Nations who may be affected by the project, plus some introductory information about who they are

- information on consultations held on the project with regulators, First Nations and the public
- information on other EA regimes to which the project has been or could be subjected to such as provincial, territorial and land claim EA processes
- information relating to permits and authorizations that must be obtained by the proponent for the project to proceed
- a summary of the physical and biological components in the area likely to be affected by the project, such as land, soil, water, air, vegetation, fish and wildlife

PROJECT PURPOSE

Many EAs require that the proponent explicitly state the purpose of the project.

Terms commonly used in EAs for this topic include:

- project purpose
- project rationale
- need for the project
- project justification

There can be different interpretations as to how much information is needed to describe the purpose of the project. At one extreme, the purpose of a project can be a very simple statement of what the project is designed to do - for example: "the purpose of the project is to build a pipeline from point A to point B to transport natural gas". At the other extreme, a full rationale for the project, including a defensible demonstration of need may be required. Project need is meant to express public need. Sometimes, project need may be justified in

KEY DEFINITION

Temporal Boundaries

Temporal boundaries are the time frame associated with EA predictions, a project or an impact. For example, the temporal boundaries for an EA may extend from the date defined as baseline to many years after project closure. A project may span 15 years but impacts to wildlife might last several years beyond project closure if wildlife continue to avoid an area. Therefore, the temporal boundaries for EA predictions would extend from baseline to 25 years in the future.

CASE STUDY – VANCOUVER ISLAND GENERATION PROJECT

The Vancouver Island Generation Project is a natural gas-fired electricity generating facility proposed by BC Hydro for Duke Point in Nanaimo. The project started its review under the 1995 *BCEAA* process and in December of 2002 was transitioned into the new *BCEAA*. This review was completed in August 2003.

In its application for a project approval, the proponent described the purpose of the project as:

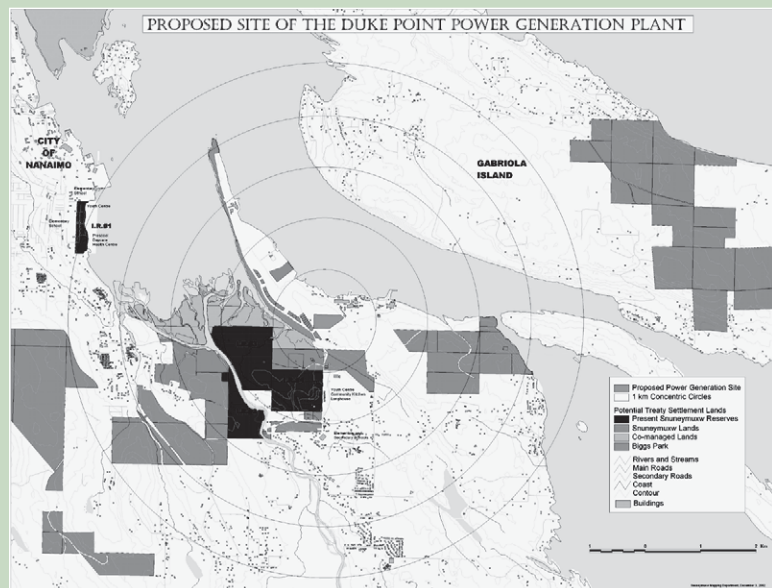
- a growth in electricity demand for Vancouver Island projected at 1.6% per year
- replacement of aging components of current electrical transmission system to Vancouver Island from the mainland
- identification of a generation facility at Port Alberni in BC Hydro's 2000 Integrated Electricity Plan (IEP)
- a 2-year old directive from the Minister of Energy to the proponent to construct a generation facility in Port Alberni

The provincial members of the project review committee accepted this rationale. However, one of the other project committee members, the Snuneymuxw First Nation (the Snuneymuxw), did not accept these

reasons as sufficient for explaining the purpose of the project. The Snuneymuxw first raised their concerns about project justification in their initial issues scan submitted August 29th, 2002. The EAO declined to review project justification, citing mandate limitations."

The Snuneymuxw identified additional information that should have been provided by the proponent as:

- data used in forecasting Vancouver Island electricity demand
- a transparent description of how data was used in the analysis, along with assumptions and uncertainties in this process
- an evaluation of the results in relation to past, actual and forecast demand growth, and a calibration of the forecasting model to accord with past performance
- a discussion of the way data interpretation was used to reach the conclusions



The Vancouver Island Generation Project proposed by BC Hydro for Duke Point in Nanaimo. Map courtesy of Kathleen Johnnie, Lands and Resources Co-ordinator, Snuneymuxw First Nation.

The Snuneymuxw felt strongly that the points presented by the proponent did not satisfactorily explain the purpose of the project. For instance, no information had been provided on how the projected growth in electricity demand for Vancouver Island was determined. The proponent had not discussed an alternative means of fixing the aging transmission lines, such as refurbishing the system. As well, no explanation was provided as to why a new gas plant and a new gas pipeline under Georgia Strait to supply the fuel was the preferred option for replacing the aging electrical transmission lines.

The Snuneymuxw also argued that the plan for a generation facility at Port Alberni in BC Hydro's 2000 IEP was not credible, since it had not been subject to BC Hydro's established integrated resource planning process, which identifies and rationalizes preferred options for new capacity. The 2000 IEP contained no data or analysis specific to Vancouver Island demand for electricity. In the view of the Snuneymuxw, the project appeared in the 2000 IEP as a result of a policy decision rather than a proper planning process.

The Snuneymuxw also reviewed the ministerial directive and found that it was simply "to establish a generation facility at Port Alberni"—it did not specify a gas-fired turbine as the technology to be adopted. As well, the directive would seem to have eliminated other potential locations since it specified Port Alberni as the site.

The Snuneymuxw introduced expert evidence to the project committee, which had been submitted to another environmental review panel (the federal joint *NEB/CEAA* review of the Georgia Strait Crossing pipeline).

This information presented the following arguments against the proponent's case:

- There is no upward trend in Vancouver Island peak electrical loads.

- Population growth is expected to remain below 1% annually for the next five years and employment declines may be expected in the short run.
- Vancouver Island currently has over 2300 MW of peak power supply. Load is not expected to reach that level within the next ten years.
- There is sufficient electrical supply to accommodate the retirement of the high voltage DC cables after 2007.
- By 2007 BC Hydro expects energy conservation on Vancouver Island to be saving up to 200 MW of power.
- Any potential shortfalls in electricity can be accommodated by interruptible power arrangements already in place with industrial users. These arrangements are likely more cost effective than the \$710 million expenditure required for the proposed natural gas alternative.
- BC Hydro's forecasts are consistently close to 15% higher than actual consumption. The average annual error of the forecast made in December 1994 for the period 1994-present was more than 19%. Had this forecast been relied upon for creating new supply, the error would have been 500 MW over-capacity.

The EA for this project was completed in August 2003, but the recommendation to the ministers was withheld until the BC Utilities Commission rendered a decision on the proponent's application for a certificate of public convenience and necessity. The BC Utilities Commission rejected the application, and suggested the proponent issue a Call for Tenders to properly conduct an identification of alternatives for power generation on Vancouver Island.

terms of the proponent's need and economic considerations. The difference between these two interpretations can be the source of controversy within an EA process.

What are... valued ecosystem components?

An environmental assessment sometimes focuses on key aspects of the environment, called valued ecosystem components (VECs) or key indicator resources. An example of VECs would be individual fish or wildlife species or a specific type of habitat. VECs may be selected by the EA practitioners completing the assessment or through a consultation process with government regulators and affected parties. Using VECs has the advantage of making sure that specific aspects of the ecosystem identified as important are addressed in the EA. However, sometimes those using the VEC approach focus on specific parts of the ecosystem without looking at interactions within the ecosystem or understanding the ecosystem as a whole. Hence, the use of VECs is sometimes a source of controversy in an EA.

Some of things that influence what is required by the proponent in their project purpose discussion include:

- what the project was scoped to include during the scoping exercise
- the potential for significant adverse effects
- any existing government policies on the type of project
- concerns raised by First Nations and stakeholders

PROJECT ALTERNATIVES

Some environmental assessments may require consideration of project alternatives. **Project alternatives may be interpreted in one of two ways: alternatives to the project, and alternative means to carrying out the project.** Environmental assessments tend to focus on alternative means to carrying out the project, as opposed to alternatives to the project. For example, under the federal EA process, comprehensive studies, mediations and panels require the consideration of alternative means to carrying out the project.

As an example, if the project being assessed is the supply of natural gas by pipeline for an energy co-generation facility, an alternative to the project might be wind generation. An alternative means to carrying out the project might be laying out the pipeline along a different route, or supplying liquefied natural gas by tanker. **It is important to keep this distinction in mind, as the consideration of alternatives may be a controversial issue.**

BASELINE DESCRIPTION

A description of the baseline conditions is an essential component of an environmental assessment.

Common terms used to describe the baseline include:

- environmental baseline
- environmental setting
- baseline description

The baseline includes a description of the existing environmental, social, cultural and economic conditions.

Topics that are to be included in the baseline are defined in the scoping exercise and are related to:

- the type of project and its potential effects
- regulatory requirements
- consultation with stakeholders

The baseline can include some or all of the following topics:

- air quality
- hydrology (water flow, levels and quantity)
- hydrogeology (underground water)
- water quality
- aquatic (freshwater) life
- marine (ocean) life
- geology
- soils
- landforms and terrain
- vegetation
- wildlife
- biodiversity
- traditional land use
- traditional knowledge
- industrial and recreational land use
- archaeology
- socio-economic conditions
- cultural studies
- human health
- safety
- noise

Baseline Data Collection

It is important that baseline conditions are well understood since the baseline is used to compare potential project impacts with the existing situation and to support follow-up monitoring.

Ideally, environmental baseline data sets reflect seasonal and year-to-year variability. Usually field surveys are conducted and any previously documented information on the area is reviewed. To understand the natural variability several seasons and years of data need to be collected. However, this is not always possible within the time-frame of an environmental

assessment. This limitation is often addressed by commitments from the proponent to conduct further baseline work once the project is approved. This is a controversial approach that is common in EAs.

Traditional land use, traditional knowledge, cultural and archaeology baseline studies, when conducted, should be done in consultation with First Nations and other Aboriginal peoples who may be affected by the project.

Traditional knowledge studies can also be very helpful in documenting baseline environmental conditions since it represents long-term observations and understanding of the land (see **Section 7 - Traditional Knowledge and Environmental Assessment** for further information).

Similarly, socio-economic, industrial and recreational land use information is generally collected in consultation with land users, local industries and potentially affected communities.

Baseline Time-frame

Project impacts are compared against the baseline. Therefore, it is important that the time-frame used to establish the baseline is appropriately defined. This is sometimes a source of controversy in the scoping of an EA. Often the baseline is defined as the period just prior to the proposed project.

However, in areas where there has been previous industrial development, there may be existing, social, economic and cultural impacts. Even small impacts from a new project may be significant in the context of existing effects.

Therefore, some stakeholders prefer to have the baseline defined as a period prior to the industrial development in the area.

ANALYSIS OF IMPACTS

A detailed project description and a description of the baseline provide the basis for the environmental assessment. Impact analysis methods are then used to assess the potential for the various activities associated with the project to change environmental conditions.

QUICK TIP

If your First Nation is using these types of assessment tools (e.g., tables of interactions, matrices) ensure that the values entered into the tables or matrix reflect your First Nation's values.

There are many potential interactions between project activities and aspects of the environment. An EA process may provide a logical and systematic approach to evaluate these interactions and highlight issues that require additional investigation. The following are common ways that assessors use to evaluate potential interactions and assess impacts:

Tables of Interaction

A table of interaction is a matrix that plots project activities against environmental variables of concern to determine if there is a potential interaction between them. These tables are essentially checklists to help you identify whether or not an interaction might exist.

A widely used version of such a tool is the Leopold matrix. The horizontal axis has 100 columns for project activities that could cause positive or negative effects. The vertical axis consists of 88 rows of environmental variables including physical, chemical, biological, cultural and ecological dimensions. The assessor examines each potential interaction and rates the magnitude and importance of that interaction on a scale of 1 to 10 with 10 being the maximum. Each cell is divided by a diagonal line, with magnitude and importance of the potential impact entered in the relevant half of each cell.

The advantages of a matrix are:

- simple to develop and use
- provides a picture of potential environmental impacts, highlighting the particular parts of the project with major potential impacts
- allows the application of only the relevant part of the matrix for a particular project

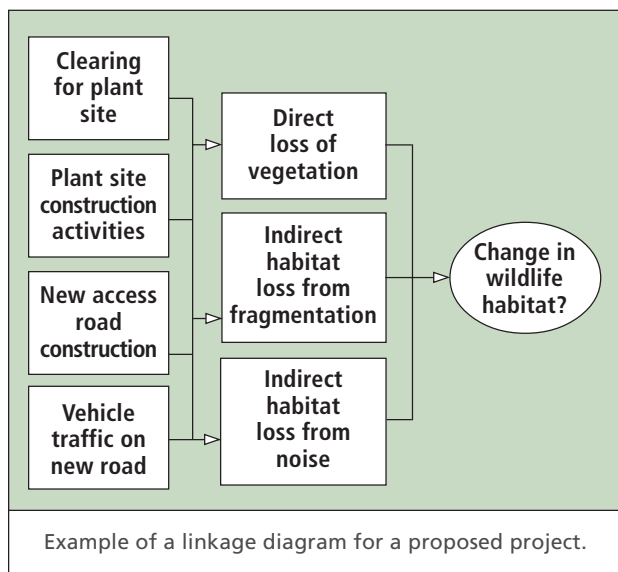
- indicates beneficial and adverse impacts

The disadvantages of a matrix are:

- insufficient as stand-alone assessment tool
- more useful when assessor is experienced and knowledgeable
- influenced by values of the assessor

Key Questions and Linkage Diagrams

Key questions are questions about the potential effects of the project on specific environmental components. "Will the proposed project cause a change in wildlife habitat?" is an example of a key question. A linkage diagram visually shows the potential cause and effect pathways between project activities, environmental



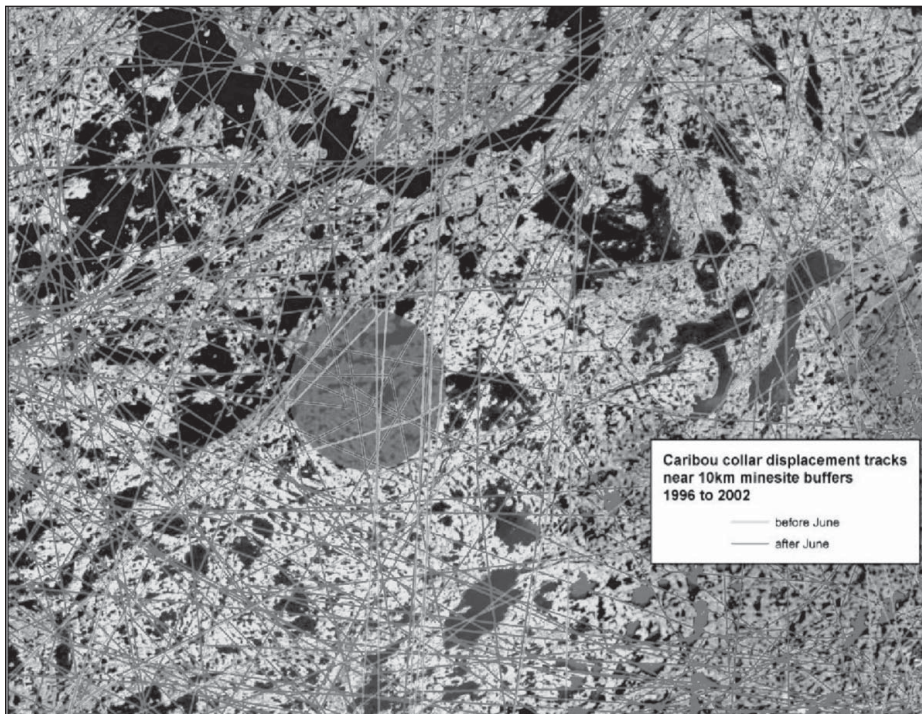
changes and key questions. Linkage diagrams provide a systematic way to evaluate potential impacts. The assessor evaluates each pathway in the linkage diagram to determine if there is a valid linkage. If there is no valid linkage, no further assessment is done. If a valid linkage is determined, then an impact analysis of the linkage is conducted using one of the following methods.

Map Overlays

Map overlays are an effective way of identifying potential impacts of a proposed development. The overlays are transparent map layers, each containing a particular type of information. Map overlays can be used for qualitative (descriptive) or quantitative (number-based) assessments.

For example, a map illustrating a proposed new road superimposed on a map of grizzly bear habitat may indicate how close the road gets to important habitat, how much important habitat might be affected and whether any bear trails are crossed by the road, provided you have this type of information mapped.

Computer-based mapping systems such as Geographic Information Systems (GIS) are a powerful analytical tool, since they can quickly process large amounts of spatial data. This can allow the assessor to carry out complex quantitative (number-based) analyses that would be impossible with a manual mapping system. GIS is often used for calculating the areas of vegetation or wildlife habitat that are affected by the project's footprint.



This figure shows a satellite image in the Canadian tundra overlain with caribou movements (straight grey lines) and a proposed mine location with a 10 km disturbance zone surrounding it (grey circle). This example shows potential interaction between caribou and the mine site and assists in evaluating the potential effects of the project on seasonal caribou migration.

Image courtesy of Government of Northwest Territories, Department of Renewable Resources, Wildlife and Economic Development.

Modelling

A model is a greatly simplified representation of the real world. If one can construct a model that behaves in a way similar to the real world, it can be used for exploring how change might affect conditions in the real world.

There are different kinds of models - some use numbers (quantitative models) and others use patterns or scales to demonstrate their results (qualitative models). To construct a model, the modeller has to make assumptions or choices in how the model is designed and what input data are appropriate. The assumptions and data sets used influence the reliability and accuracy of the model.



This figure shows the dispersion of an airborne contaminant (white contours) from the emissions stack of a proposed powerplant for a coastal BC town. The proposed power plant is located at the centre of the smallest contour. The dispersion contours were produced with a computer model.
Image used courtesy of BC Hydro.

Models are frequently constructed with the aid of computers. For example, a spreadsheet of income and expenses is a simple model of cash flow through a financial system. More complex spreadsheet models can be developed for things like a water balance for an industrial project or air dispersion from a new power plant.

Many models have specifications, established by a regulatory authority or scientific standards organization, which must be met for the model to be considered valid. Specifications and standards help ensure that the modelling is consistent with conventional practice.

However, some models are developed specifically for the project being assessed and, therefore, have no standards or specifications.

Models can be a powerful tool to explore how variations in environmental conditions influence potential effects. In an air dispersion model, for instance, the prevailing wind speed can be changed and recalculations made to discover what difference is made to dispersion of contaminants from a plant stack.

The results (output) from a model have some uncertainty. When models are used in EA predictions it is helpful if the confidence limits are calculated so that the level of uncertainty is understood. As well, complex models should have a sensitivity analysis completed. A sensitivity analysis examines how sensitive the model outputs are to changes in the levels of specific model inputs. Ideally, models used in EA will also be calibrated or checked against data from the real world to evaluate the accuracy of model predictions.

Experiments

In some cases experiments are conducted to predict impacts. Like models, experiments are a simplified representation of the real world. They are often conducted in laboratories but sometimes field experiments are done. Experiments can be useful for understanding the potential effects of a project, especially where new or untested technology is being planned. However, it is important that the results of experiments be verified through follow-up field studies and monitoring programs.

Here are some examples of the use of experiments in impact assessment:

- A physical model of a river could be developed in the lab to assess the changes to river channels and sediment movement from port and marine projects.
- In the Georgia Straight Crossing (GSX) Natural Gas Pipeline Application, a concern was raised by reviewers that the submarine portion of the pipeline would block the migration of Dungeness crab. No one really knew much about this migration or whether the crabs would be constrained by the pipeline. The proponents (BC Hydro and Williams Pipeline) conducted an experiment in a tank to investigate how crabs of different sizes behaved when they had to cross a section of pipe. The experiment was designed to mimic the conditions that crabs might encounter and it provided useful information for evaluating the potential impact.
- Geochemical tests are often used in mining projects to identify the potential for acid rock generation and metal leaching from rock that is going to be disturbed through development. Lab generated effluent will then be tested on specific aquatic species to help determine whether there is potential for impacts to downstream water quality.

Professional Judgement

Professional judgement is when conclusions are reached based on the opinion and experience of a qualified specialist in a particular subject area. For example, a fish biologist conducting baseline fish

studies and an impact analysis for a proposed project might conclude that the impact from the project on fish would be negligible based on their review of material (reports, maps, etc.) and on his or her professional judgement.

Professional judgement is commonly relied on as a method of identifying impacts, where the other methods (e.g., models, experiments) cannot be easily applied. Specialists engaged for this type of analysis should be very experienced in their field, the type of project being assessed and the particular environment and geographic region.

The judgement and values of the specialist concerned may influence the outcome of the assessment.

Because of its subjectivity and potential for misinterpretation, it is an approach that should be avoided if other, more systematic approaches are available.

However, it is important to note that all methods of analysis involve some degree of professional judgement.



Photo courtesy of Dr. Randy Shuman, King County Department of Natural Resources

Case Studies

Comparison to past experience with similar projects can be useful in identifying the kinds of impacts that may occur from a proposed project. Lessons learned from an existing project can be used to refine the predictions made for a proposed project.

Case studies are particularly helpful where the proposed technology is well understood, and the influence

of the local environment in creating project-related effects is minimal. For example, some industrial plants have commonly understood environmental effects that are similar regardless of the environment in which the plants are situated.

QUICK TIP

Social impact assessment is a methodology used to assess the effects of a project on social aspects such as quality of life, housing, employment, population and community resources. Social impact assessment is not covered in this edition of the toolkit. For some helpful introductory information on social impact assessment see the International Association of Impact Assessment (www.iaia.org; members section - publications and reference materials).

Risk Assessment

Risk assessment is a tool for assessing the risks of potential impacts and their implications for the environment or people. Risk assessment can be done as part of an impact assessment or as a stand-alone exercise. In the context of environmental assessment, ecological risk assessments are often conducted for the purposes of assessing potential health risks to people and animals.

Risk assessment can be conceptual, resulting in a qualitative assessment of the risks posed by a project or activity. Most often, however, risk assessments are quantitative and involve calculating the probability that a certain result will occur. The procedure is quite complex, and usually requires computer modelling to process the data.

All risk assessments generally follow four steps:

Step 1 – Hazard Identification. The hazard identification process typically includes predicting the types and quantities of potentially harmful chemicals the project will produce. Scientific information on the potential toxicity of different chemicals is used to compile an initial list of potential hazards.

Step 2 – Pathway Identification. This step involves identifying who or what may be exposed to the hazard and may include computer modelling of air quality, water quality or hydrogeology (underground water).

Step 3 – Determining Probability. The probability that the hazard will occur is determined by assessing the potential harmfulness of the chemical and the level of exposure that is expected to occur for each component of the ecosystem. This is usually done using computer modelling.

Step 4 – Determining the Significance of the Event. Once the risk has been characterized, the next step is to determine the significance of the risk and whether it is acceptable.

Summary

Most impact analyses use several of the methods described above. The choice of method may depend on the ecosystem component being assessed and the type of data available. For example, potential for effects on air and water quality are often assessed using computer models. Vegetation effects may be assessed using map overlays and GIS analysis. A combination of map overlays, experiments, case studies and professional judgement may be used to assess effects on fish and wildlife. Methods for analysing impacts to culture, socio-economic conditions and traditional land use are usually more qualitative and are ideally developed by or in consultation with potentially affected communities.

CASE STUDY – KEENLEYSIDE 150 MW POWERPLANT PROJECT

The Columbia Power Corporation and the Columbia Basin Trust (CPC/CBT) proposed construction of a 150 MW power plant at a previously existing dam (Hugh Keenleyside Dam) on the Columbia River in British Columbia. The project plan included a diversion channel through the reservoir wall, construction of a powerhouse on a rock outcrop below the dam and construction of a 48-mile 500 kV transmission line.

The proposal was reviewed through a joint review under *BCEAA* and *CEAA*. A cumulative effects assessment was deemed necessary because of the large number of dams and industrial projects along the affected reach of the Columbia River. The Project Committee developed an outline for conducting the assessment, including an initial list of direct impacts to be considered. The committee reserved the right to make final determination about the level of significance of the cumulative effects

identified in the assessment prepared by the proponent.

The geographic and temporal scope of the assessment was set flexibly for each issue, since different issues had different historical timelines or geographic dimensions. The exception was the downstream effects boundary, which was set to coincide with the US/Canada border. This decision was based on the rationale that cumulative effects identified at this point could be used to decide whether further assessment was required downstream.

A public consultation session was held to scope issues. The scoping produced the following results:

- 22 past and future projects identified as relevant
- the identification of 15 biophysical impacts and three socio-economic impacts from the Keenleyside Powerplant Project for evaluation

The direct effects assessment focused on four main areas of impact:

- altered flows and temperatures downstream of power plant operations
- altered reservoir levels
- land use and visual impacts from transmission line construction
- additional issues

An analysis matrix was used to list each identified direct effect from the project and track it through a series of steps to determine its cumulative impact potential. An example is shown in the table on page 18:

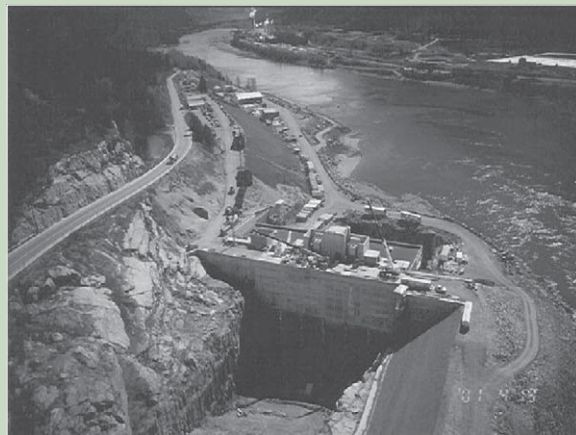
| Potential Direct Effect | Direct Effect (yes/no) | Mitigated Effect (yes/no) | Compensation Prescribed | Residual Effect (yes/no) | Impact Significance (High/Moderate/Low) | Certainty of Impact (High/Moderate/Low) | Locally Confined | Cumulative Potential |
|------------------------------|------------------------|---------------------------|-------------------------|--------------------------|---|---|------------------|----------------------|
| Fish Entrainment in Turbines | yes | no | yes | yes | low | low | no | yes |

The assessment enabled the evaluation of direct project effects with potentially interacting effects from the other projects.

The analysis concluded that the cumulative effects were all neutral or positive:

- reductions in downstream gas pressure from the power plant would benefit all aquatic species
- there would be no cumulative effects from temperature changes to the water
- an upstream compensation plan would offset the impact of fish entrainment (fish being drawn toward the turbines due to the current)
- forestry, wildlife and visual impacts of transmission corridor clearing could be mitigated
- no additional compensation would be required for cumulative effects
- cumulative effects at the Canada/US boundary are positive, so there would be no need to extend the assessment downstream

Keenleyside Powerplant Project, subject to conditions unrelated to the CEA. Moreover, the Keenleyside Powerplant CEA provided an opportunity to learn about CEA methodologies and to develop a baseline for future assessments of cumulative effects of other hydro projects in the area.



Aerial view of powerhouse looking downstream. Photo courtesy of Columbia Power Corporation.

The Canadian Columbia River Inter-tribal Fisheries Commission (CCRIFC) participated in the CEA scoping and in the detailed review of the draft CEA. Additional cumulative effects analyses were undertaken in response to First Nations concerns. Based in part on the favourable conclusions from the CEA, CCRIFC recommended to concerned Columbia Basin First Nations that they not oppose the proposed

CUMULATIVE EFFECTS ASSESSMENT

A cumulative effects assessment (CEA) may be a required component of an EA. For instance, a CEA is required for all projects subject to a federal EA (see the *CEAA* section of this toolkit for more information on the federal process).

Cumulative effects assessment is a process for evaluating the effects of the project currently being reviewed, in combination with the effects of other activities in the area. For example, if the project under review includes plans to discharge an effluent into a river where there are other projects that may also affect the river, the cumulative effects on water quality, of the project and existing projects, would be considered in the CEA.

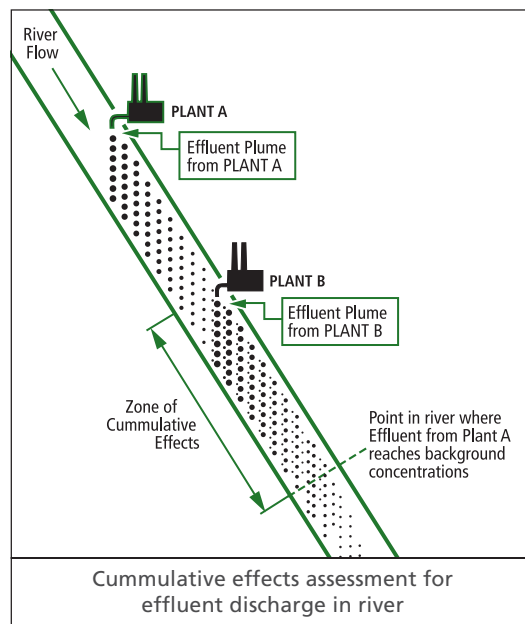
Cumulative effects assessment may include effects from the past, present or future. Not all existing or future projects need to be considered, just those likely to interact in some way with the project being reviewed.

In a few cases, the project being assessed will directly cause, or encourage, another project or activity to occur. This is called an induced future project. An example would be the construction of an access road to a mine, which would then encourage or induce other industrial activities such as mining, exploration or timber harvesting. The induced projects may be included in the scope of a cumulative effects assessment.

The steps for conducting a cumulative effects assessment are similar to the basic steps for

conducting an impact assessment and include:

- identify residual impacts for project under review
- identify other projects that might interact with the project under review
- determine geographic scope
- determine temporal scope
- analyse the scale of cumulative impacts to determine need for mitigation
- identify mitigation measures to offset cumulative effects
- determine significance of cumulative effects



MITIGATION

Once impact analysis has been completed, the next step in an EA is to identify and evaluate means of reducing, and eliminating where possible, the predicted adverse impacts. These measures, taken together and committed to by the proponent, comprise the mitigation package for the project.

Mitigation can include:

- making changes in the project design to avoid the impact (e.g., re-route the road to avoid a moose salt lick)
- installing control technology to reduce the impact (e.g., scrubber on an emissions stack)
- using the best-available technology and practices (e.g., low emission vehicles)

- using best management practices (e.g., erosion prevention techniques)
- implementing monitoring programs to detect impacts and mitigation measure effectiveness, coupled with a management plan to take action if a problem is detected

Describing the Mitigation Program

The EA should describe how the mitigation programs will be carried out. The preferred way to describe proposed mitigation is in the context of an Environmental Management Plan (EMP), or Environmental Management System (EMS), that is designed by the proponent for the project. The EMP is a document describing how environmental management will be carried out. The EMS is the actual administrative system within the company that will implement the EMP. For large industrial projects, the EMP and EMS are becoming fairly standard, since they are requirements for an international environmental standard called ISO 14000 certification. They are often submitted as part of the supporting documentation for the environmental assessment, and if not, it is possible to request them from proponents.

Determining Effectiveness of Mitigation

In situations where serious impacts from the project are predicted, the proposed mitigation measures are extremely important to the acceptability of the project. Therefore, it is important that there be some assessment of the likely effectiveness of the mitigation measures.

In many cases, proposed mitigation will consist of standard technology or practices with proven effectiveness. In these cases, it is important that anything unique about the project or the local environment be taken into account when the effectiveness of mitigation measures is assessed.

In situations where the mitigation is relatively new or unproven it is important that some assessment be made of its potential to be effective. Reports from other situations where similar mitigation has been applied can be helpful. In addition, follow-up programs or monitoring programs may be used to test the effectiveness of a mitigation measure. If follow-up programs are to be used, it is important that they are tied to a management system that allows changes to the project to be made if the mitigation measure does not work as predicted.

IDENTIFYING RESIDUAL IMPACTS

Residual impacts are impacts remaining after all mitigation measures have been applied. These are the impacts that are expected to occur if the project proceeds.

Once the residual impacts are determined they are usually described qualitatively using criteria such as the following:

- direction (positive, negative, neutral)
- magnitude (severity)

- geographic extent (local, sub-regional, regional, national, international)
- duration (short-term, long-term, permanent)
- reversibility (Can the effect be reversed at some point in the future, or is the change permanent?)
- frequency (How often does the effect occur? Is it seasonal?)
- likelihood (risk, uncertainty or confidence in the prediction)
- other impact characteristics (indirect, cumulative, synergistic)

These residual impact descriptions form the basis of determining the significance of the impacts – the last step in impact assessment.

DETERMINING SIGNIFICANCE

Significance is a value judgement on whether a residual impact is acceptable or unacceptable. Determining the significance of a predicted impact is the most subjective and complex part of impact assessment. For information on the determination of significance under the federal EA process see **Section 5 – Canada’s EA Process** page 16.

Comparison to Regulatory Standards

A common approach assessors use to determine significance is to compare the predicted impacts with current regulatory standards. Regulatory standards are criteria designed to contain certain environmental conditions within specified limits. They are often based on a combination of social objectives, such as protection of human, aquatic or wildlife health and technological capability.

Examples include:

- limits on effluent discharge concentrations
- clean air and water quality standards, policies or plans
- plans or policies that protect areas or limit the use of natural resources

If the regulatory standard is not exceeded by the project component being examined, the assessor considers the issue to have been adequately addressed.

Using Statistical Significance

Another approach to establishing significance is to use a statistical test. A statistical significance threshold may be established to define an acceptable range of variation from the baseline or pre-project state. Testing for statistical significance is often limited by the lack of data and knowledge concerning the natural variability of the local ecological or community system.

Other Criteria for Determining Significance

Other criteria that can be used to determine significance include:

- level of public concern (particularly over health and safety)
- scientific and professional judgement
- disturbance or disruption of valued ecosystem components
- degree of negative impact on social values and quality of life

What is...**Follow-up versus compliance monitoring ...**

Follow-up is often confused with compliance monitoring since both involve collecting monitoring data and include filing written reports.

Compliance monitoring is the process used to check that the terms and conditions of regulatory permits are being met. For example, the requirement for a proponent to collect and analyze water samples from their wastewater system or to measure the levels of air emissions from their processing plant would be an example of compliance monitoring. Follow-up, on the other hand, is used to verify the predicted environmental effects of the project.

FOLLOW-UP

An environmental assessment should include a discussion of any planned monitoring or follow-up programs since these are used to address the uncertainty associated with impact predictions. Follow-up programs are implemented after a project has been approved but it is best if they are identified in the EA so that they are part of the information used to make a decision about the project and can be incorporated into the terms and conditions for project approval. For further information see **Section 8 – Follow-up Programs**.

STEP 4 – THE EA REPORT

The findings of the environmental assessment are generally presented in a written report. Depending on the particular regulatory process, this report may be written by the proponent (or their consultants) or a government agency. The specific types of reports in the provincial and federal EA processes are outlined on page 2 of **Section 8 - Reviewing EA Reports** and described in detail in **Section 4 - British Columbia's EA Process** and **Section 5 - Canada's EA Process**.

STEP 5 – THE EA DECISION

Following the submission of the EA report, the government agency will review the EA report for adequacy and accuracy, and may have others review the report as well. Based on the findings of the report, the government agency reviewing the EA decides whether adverse environmental effects are likely to be significant. This decision is taken into account when determining whether the proposed project should proceed.

Next, a decision on the project's acceptability is made, either by the government agency reviewing the EA, or by the minister(s) of the reviewing department(s). The decision-maker will document their findings, describe the reasons for their recommendation and outline the terms and conditions under which the project should proceed.

STEP 6 – FOLLOW-UP

A follow-up program is an activity that occurs after an environmental assessment has been submitted and a project has been approved and initiated.

The main goals of a follow-up program are to:

- verify predictions made about the environmental, cultural, and socio-economic effects of the project
- evaluate the impacts of the project and the success of mitigation measures
- assist in the detection of unanticipated environmental, cultural and socio-economic effects

- address information gaps
- lessen the uncertainty associated with complex or new types of projects
- provide information that can be used for future environmental assessments, including cumulative effects assessments
- provide reliable information for environmental management.

Follow-up is not an official requirement in the *BC Environmental Assessment Act (BCEAA)*. However, the Minister of Sustainable Resource Management has the discretion to require follow-up programs and the policy of the BC Environmental Assessment Office is to require follow-up programs where the need is identified. See **Section 4 – BC’s EA Process** for additional information.

Under the *Canadian Environmental Assessment Act*, follow-up is not mandatory for screenings, but is mandatory for comprehensive studies, mediations and panels. See **Section 5 – Canada’s EA Process** for additional information.

The extent of follow-up varies. For small projects or those that involve well-known technologies or processes, follow-up may be limited. For large, complex or new types of projects, follow-up may be extensive. It could include monitoring programs, directed studies, environmental audits and post-project impact assessment.

It may be possible to negotiate formal participation for your First Nation in follow-up programs with the proponent or the regulatory agency. Regardless of whether

formal participation is negotiated, your First Nation can provide written comments on the need for follow-up in your review of the environmental assessment and in consultation with the proponent.

See **Section 9 – Follow-up Programs**, for additional information on follow-up and follow-up programs, including descriptions of the requirements for follow-up under the federal and provincial EA processes.

SUMMARY

An environmental assessment provides a systematic process for describing and assessing the potential environmental, social, economic and cultural effects of a project. The basic steps in an environmental assessment include determining if an EA is required, scoping, conducting the impact analysis, preparing and submitting an EA report, the EA decision and conducting any follow-up program that may be required. This information is used to make a decision about the terms and conditions under which the project may be approved.

For an environmental assessment to be done well there needs to be detailed project information for all phases of the project, an adequate environmental baseline, key issues identified through consultation with potentially affected parties and effective methods for impact analysis. Methods used to analyse impacts include matrices, key questions and linkage diagrams, map overlays, experiments, models, and professional judgement.

ENVIRONMENTAL ASSESSMENT BASICS

Additional Information

For additional information, refer to the following websites:

ENVIRONMENTAL ASSESSMENT

International Association of Impact Assessment

<http://www.iaia.org>

Canadian Environmental Assessment Agency

<http://www.ceaa-acee.gc.ca>

BC Environmental Assessment Office

<http://www.eao.gov.bc.ca/>

<http://www.oneworld.org/econetworth/EIAdocs.html>

General Guidelines on EA:

<http://>

www.oneworld.org/econetwortheiaguide.html#_Hlk464020999

EIA Links:

http://dmoz.org/Science/Environment/Impact_Assessment/

RISK ASSESSMENT

US Environmental Protection Agency

<http://www.epa.gov/ncea/>

Human Health Risk Assessment

http://www.facsnet.org/tools/ref_tutor/risk/index.php3

Ecological Risk Assessment

<http://www.epa.gov/ORD/WebPubs/ecorisk/>

ENVIRONMENTAL MANAGEMENT SYSTEMS

http://www.epd.gov.hk/epd/english/how_help/tools_ems/ems.html

LEOPOLD MATRIX

<http://www.ucs.mun.ca/~kstorey/leopold.htm>

<http://www.ucs.mun.ca/~kstorey/matrix.htm>

http://www.icsu-scope.org/downloadpubs/scope5_listoffigures.html

ENVIRONMENTAL ASSESSMENT BASICS

Additional Information

CASE STUDIES

Prepared by the Canadian Environmental Assessment Agency

http://www.ceaa.gc.ca/013/0001/0004/b_e.htm

CUMULATIVE EFFECTS ASSESSMENT

Reference Guide for the Canadian Environmental Assessment Act – Addressing Cumulative Environmental Effects

http://www.ceaa.gc.ca/013/0001/0008/guide_e.htm#cumulative

ENVIRONMENTAL ASSESSMENT PROVISIONS OF KEY INTERNATIONAL AGREEMENTS OR CONVENTIONS

United Nations Conference on Environment and Development (UNCED)

<http://www.ciesin.org/TG/PI/TREATY/unced.html>

Rio Declaration

<http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>

Framework Convention on Climate Change (FCCC)

<http://www.ciesin.org/TG/PI/TREATY/framework.html>

Convention on Biological Diversity (CBD)

<http://www.ciesin.org/TG/PI/TREATY/bio.html>

Agenda 21

<http://www.un.org/esa/sustdev/documents/agenda21/index.htm>

Statement of Forest Principles

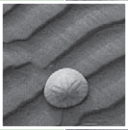
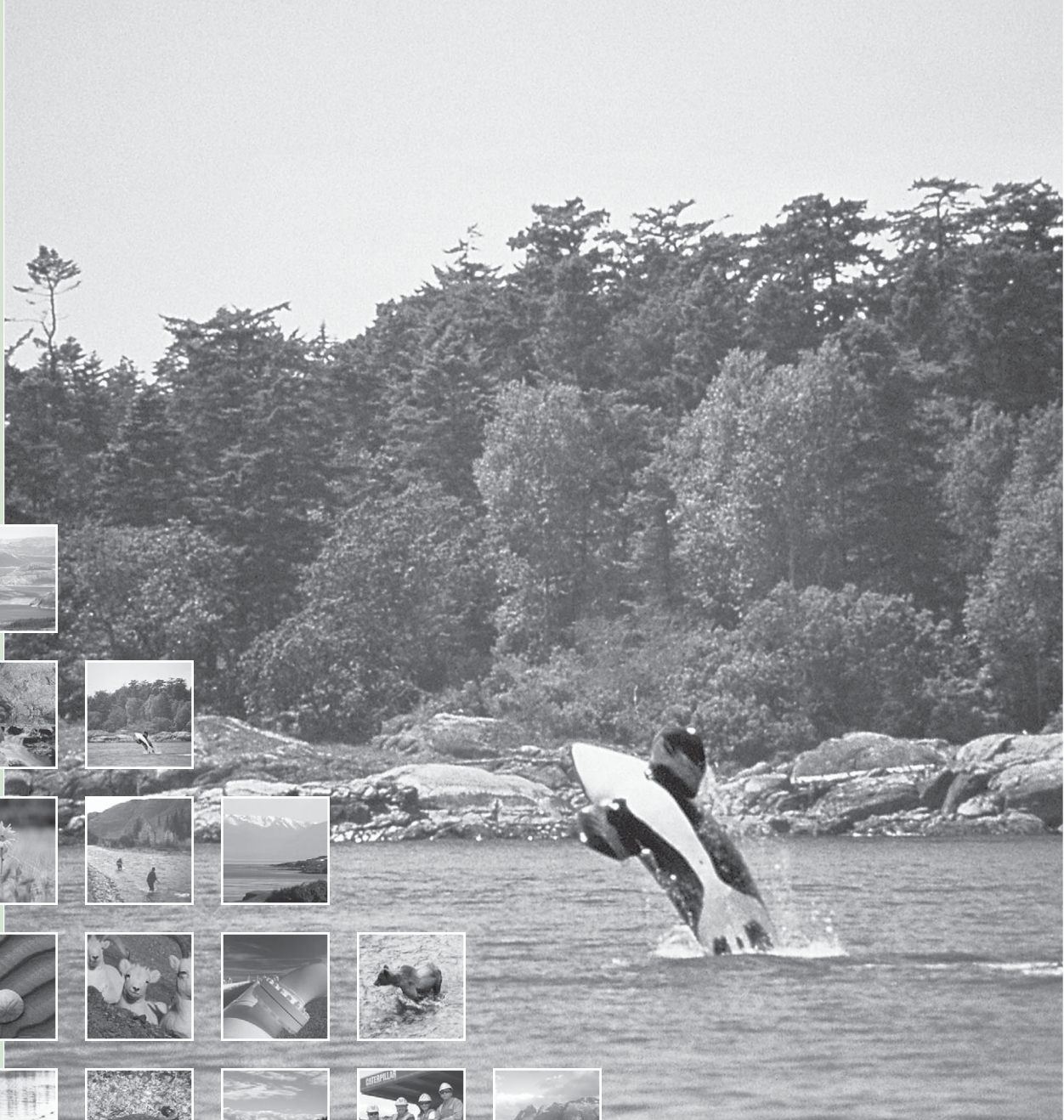
<http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>

(European) Convention on Environmental Assessment in a Transboundary Context

<http://www.unece.org/env/eia/documents/conventioncontextenglish.pdf>

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 3 – ENVIRONMENTAL ASSESSMENT FROM A FIRST NATION PERSPECTIVE



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

 **Section 3 – Environmental Assessment from a First Nation Perspective**

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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Cover photo courtesy of Tourism Victoria

This section provides information and potential strategies that are relevant to First Nation participation in federal and provincial EA processes. It explains the common law duty for governments to consult with First Nations whose Aboriginal rights and title and treaty rights may be affected by a project. Factors to consider when deciding on your First Nation’s level of participation in an EA are described. In addition, strategies for effective participation and potential funding sources are outlined. As well, the need to develop a formal process or policy that your First Nation can use for future environmental assessments is discussed and linked to capacity building for your First Nation.

This section includes the following:

- Consultation and accomodation requirements
- Scope of participation
- Funding for participation
- Strategies for effective participation
- Participating in specific aspects of the process
- Developing your own EA process

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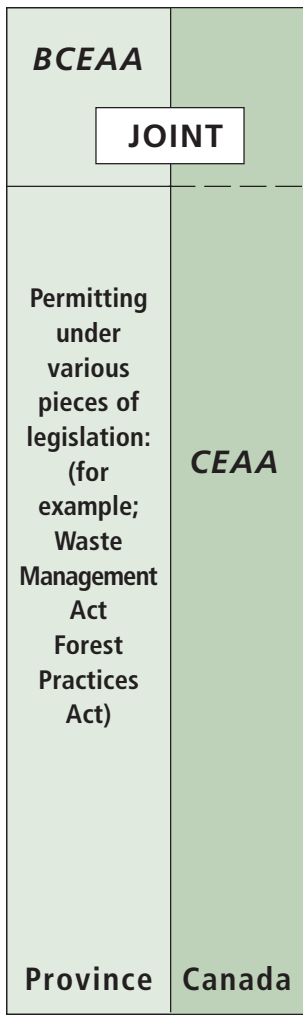
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INTRODUCTION



Example: Mine
 ↑
SIZE OF PROJECT
 ↓
 Example: Culvert

In BC there are several specific types of environmental assessment (EA) regulatory processes. In general, projects of varying sizes, from small projects such as culverts to large projects such as mines, can trigger a federal environmental assessment under the *Canadian Environmental Assessment Act (CEAA)*. In the provincial regulatory process, small projects generally are covered by specific permitting processes under various pieces of legislation. An EA under the *British Columbia Environmental Assessment Act (BCEAA)*, is generally only required for large projects that are deemed to have potential for significant environmental effects. Similarly, joint federal-provincial review processes tend to be triggered for large projects.

Details on the regulatory aspects of EA processes and specific opportunities for First Nation participation are described in detail in other sections of the toolkit:

- Section 4 – British Columbia’s Environmental Assessment Process
- Section 5 – Canada’s Environmental Assessment Process
- Section 6 – Joint Review Processes

This section describes elements that are common to First Nation participation in both federal and provincial EA regulatory processes in BC including the following:

- the common law duty for federal and provincial government agencies to consult with First Nations regarding any activity that may affect their Aboriginal rights and title and treaty rights
- considerations regarding your First Nation’s scope of participation in an EA including benefits, limitations, risks, costs, responsibilities and capacity issues
- potential funding sources for First Nation participation in EA processes
- strategies for your First Nation to consider using for participation in EA processes
- participating in specific aspects of an EA process
- developing your own EA process

CONSULTATION AND ACCOMMODATION REQUIREMENTS

STATUTORY REQUIREMENTS

Currently there are no statutory requirements for consultation with First Nations during an EA under the *British Columbia Environmental Assessment Act* or the *Canadian Environmental Assessment Act*. For further discussion on the First Nations considerations in relation to these statutes, see **Section 4 – British Columbia’s Environmental Assessment Process** and **Section 5 – Canada’s Environmental Assessment Process**.

COURT IDENTIFIED REQUIREMENTS

The common law requires that First Nations be consulted if an action, such as approval of a proposed project, might infringe or restrict the First Nation’s Aboriginal rights or title. There are several court cases in Canada that have dealt with the issue of consultation with First Nations, in general, and specifically during environmental assessment processes. This case law applies to federal or provincial government authorities and, in some situations, project proponents.

In a series of decisions, the Supreme Court of Canada has clarified:

- the nature of Aboriginal rights and title
- the necessity of consultation with First Nations when Aboriginal rights or title or treaty rights might be infringed or limited
- the kinds of factors that must be taken into consideration during consultation

Definition of Aboriginal Rights and Title¹

Aboriginal rights are the practices, customs and traditions that are integral to a First Nation, and they are recognized and protected under Section 35 of the *Constitution Act, 1982*. It is not necessary to have established title to land in order to establish an Aboriginal right. For example, a First Nation may not be able to demonstrate title to the land, but may nevertheless have a site-specific right to engage in a particular activity. The legal test for proving Aboriginal rights² is:

- a. An activity must be an element of a practice, custom or tradition of central significance, or integral, to the distinctive culture of the Aboriginal group claiming the right.
- b. The activity must be of independent significance to the Aboriginal culture in which it exists.

- c. The activity must be one which has continuity with the traditions, customs and practices that existed prior to European contact.

While Aboriginal title is an Aboriginal right, it is distinct from other Aboriginal rights because it arises when the connection of a First Nation with a particular piece of land is of central significance to the distinctive culture of that First Nation.³ Aboriginal title, often described as a *sui generis* (unique) interest in land, is a right of a First Nation to use the land for a variety of activities. These activities are not restricted to only the practices, customs and traditions that are integral to the distinctive culture of a particular First Nation. They may also be used for the general welfare and benefit of a First Nation. However, it is understood that the basis of a claim to Aboriginal title is found within an attachment to the land. Thus, the use of the land cannot be incompatible or conflict with the nature of that First Nation's attachment to the land.

Aboriginal title is seen by the courts as being held communally by the members of the First Nation to whom it belongs. That means that it is a collective right to land held by all members of a First Nation and cannot be held by individual Aboriginal persons. The legal test for proving Aboriginal title⁴ is:

- a. The land must have been occupied prior to the claim of British sovereignty.

KEY DEFINITION

Aboriginal Rights

Aboriginal rights are the customs, practices and traditions that are integral to a First Nation. These rights are recognized and protected under Section 35 of the *Constitution Act, 1982*. Aboriginal rights vary from group to group depending on the customs, practices, traditions, treaties and agreements that have formed part of their distinctive cultures.

KEY DEFINITION

Aboriginal Title

Aboriginal title is an Aboriginal right that is distinct from other Aboriginal rights because it arises when the connection of a First Nation with a particular piece of land is of central significance to the distinctive culture of that land. Aboriginal title is a right of a First Nation to use the land for a variety of activities.

¹ A full discussion of the definitions of and how to prove Aboriginal rights and title is beyond the scope of this toolkit. Court decisions to consider include *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Nikal*, [1996] 1 S.C.R. 1013; and *R. v. Bernard*, [2003] 4 C.N.L.R. 48 (N.B.C.A.).

² *Van der Peet* at paras. 44 – 74.

³ *Delgamuukw* at para. 137.

⁴ *Delgamuukw* at paras. 143 – 159.

- b. If present occupation is relied on as proof of occupation before the claim of British sovereignty, there must be continuity between present and pre-sovereignty occupation.
- c. At the claim of British sovereignty, that occupation must have been exclusive.

KEY DEFINITION

Treaty Rights

Rights that are described in a written agreement (e.g., treaty, land claim or self government agreement) between a First Nation and the Crown and protected by section 35 of the *Constitution Act, 1982*.

Infringement of Aboriginal and Treaty Rights and Aboriginal Title and the Argument for Justification

The court has held that although constitutionally recognized Aboriginal rights and title are not absolute, they may only be infringed by federal and provincial governments if the infringement is justified. Infringement of Aboriginal rights or title is justified if the infringement furthers a compelling and substantial legislative objective such as the conservation and management of resources or public safety and is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.⁵ This fiduciary relationship means there is an obligation on the Crown to consult with First Nations about decisions that may infringe their Aboriginal or title or treaty rights or other Aboriginal interests. One purpose of consultation is to allow the Crown to justify any potential infringement of Aboriginal right or title or treaty right.

KEY DEFINITION

Aboriginal or First Nation's Interests

In the context of environmental assessment, Aboriginal interests are the interests that are specific to each Aboriginal group or First Nation that may be impacted by a proposed project, including but not limited to environmental, cultural, social and legal interests.

Requirements of Consultation

There are a number of factors to consider when determining the scope of the fiduciary duty, and thus the degree of consultation that is required. The duty to consult will vary depending on the scope of the fiduciary duty the government owes to a First Nation⁶, and although the efforts must be reasonable, they do not need to be extraordinary.⁷ First, one must consider the nature of the Aboriginal rights or title infringed and the strength of the claim for those rights or title.⁸ In some cases, the fact that the Crown has accepted a claim for the purposes of treaty negotiation and entered into a Framework Agreement may be sufficient proof of rights to trigger the duty.⁹ Second, the seriousness and duration of the proposed restriction on the Aboriginal right or title will affect the level of consultation required. Finally, the level of consultation may depend on whether or not the government is required to act in response to unforeseen or urgent circumstances.

These factors will affect the degree of consultation that is required to be considered meaningful consultation. To be considered meaningful, the consultation must take place before the infringement takes place.¹⁰ It must be done in good faith and with the intention of substantially addressing the concerns of the First Nation whose lands are at issue.¹¹ The process may need to be distinct from the process of consultation with

5 See, for example, *Sparrow*, on Aboriginal rights and *Delgamuukw* on Aboriginal title.

6 See *Sparrow* and *Delgamuukw* at para 168.

7 *Nikal*.

8 *Haida Nation v. British Columbia (Ministry of Forests)* (2002), 99 B.C.L.R. (3d) 209 (B.C.C.A.) (Haida No. 1) at 51. On appeal to the Supreme Court of Canada.

9 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 98 B.C.L.R. (3d) 16 (B.C.C.A.). On appeal to the Supreme Court of Canada.

10 *Haida No. 1* at para. 46.

11 *Delgamuukw*, at para. 168.

other stakeholders, as the First Nations' concerns are considered a higher priority than other stakeholders.¹²

Accommodation and Compensation

To be meaningful, consultation must also seek workable accommodation with the First Nation for the infringement of the Aboriginal rights or title.¹³ The duty to accommodate is a separate obligation from the duty to consult.¹⁴ Like consultation, what amounts to adequate accommodation of Aboriginal interests depends on the circumstances of each case. Accommodation may be met by minimizing the impact or infringement of the Aboriginal right or title or treaty right as much as possible through the consideration of adequate alternatives. The obligation to consult and accommodate extends to both cultural and economic interests of First Nations.

Meaningful consultation also may require that a fair amount of compensation has been paid to the First Nation for the infringement on the Aboriginal rights or title.

Who Has the Duty to Consult and Accommodate?

Both the federal government and the provincial governments, have a

duty to consult.¹⁵ The duty of the Crown cannot be delegated to interested third parties.¹⁶ However, the duty may be extended to third parties who seek rights or permission from the governments relating to lands subject to a claim of Aboriginal title or rights.¹⁷ For example, a proponent of a project undergoing an environmental assessment likely has a duty to consult with First Nations and provide accommodation for the infringements of their Aboriginal rights or title or treaty rights. This makes sense on a practical level as it will often be the third party who has the strongest interest in consultation and who will be making day-to-day decisions regarding the operation of the project.

When is Consultation Required?

Consultation is required as early in the process as possible and before the infringement occurs.¹⁸ Normally, the consultation is required before the Aboriginal right or title or treaty right is proven in court.¹⁹

First Nations Obligations with Respect to Consultation

While there is a strong duty on behalf of the federal and provincial governments, as well as third parties, to consult with First Nations, the court has cautioned

QUICK TIP

If more than one First Nation has claimed Aboriginal rights and title and/or treaty rights to an area, the Crown has an obligation to consult with each group whose rights are likely to be impacted. Your First Nation should be prepared to provide information about the type of rights and interests that may be affected by a project.

12 *Mikisew Cree First Nation v. Canada (Ministry of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.) at para. 153. This decision was over turned on other grounds by the Federal Court of Appeal ((2004) FCA 66). Since *Lambert J. of the B.C. Court of Appeal in Haida Nation v. British Columbia (Minister of Forests)* (2002), 5 B.C.L.R.(4th) 33 (B.C.C.A.) ("Haida No. 2"), approved of the lower court decision in *Mikisew*, the principles set out by the court in *Mikisew* may still be persuasive in court.

13 *Haida No. 1* at para. 60.

14 *Haida No. 1* at para. 51.

15 *Delgamuukw* at para. 168.

16 *Haida No. 2* at paras. 62 and 101

17 *Haida No. 1* at paras. 48 and 49.

18 *Haida*, at para. 43.

19 *Haida*, at para. 43.

that, in the consultation process, First Nations demands for information must not be unreasonable.²⁰ The court has also cautioned that First Nations or other participants in an assessment who do not participate in the consultation process and complain about unaddressed concerns at a later stage in the process may lose the opportunity to do so.²¹ Failure to obtain funding or to meet unreasonable demands does not justify refusal to participate. A First Nation cannot ignore requests to participate.

For example, it may be difficult to challenge a decision of the federal or provincial governments based on lack of fairness where your First Nation initially participated in consultation process and then stopped attending meetings.²²



Photo courtesy of Teresa Morris,
BC Environmental Assessment Office

Consultation in Environmental Assessment

There have been court cases specifically considering the requirements of consultation with First Nations within the context of the environmental assessment process if Aboriginal rights or Aboriginal title might be infringed.

There are two court cases related to the 1995 *British Columbia Environmental Assessment Act (BCEAA)* prior the revision of the legislation in 2002. In the former *BCEAA*, project committees were used as a formal mechanism for consultation with First Nations and stakeholders. The court described participation on the project committees as a unique form of "consultation".²³

The courts said that without adequate information about a proposed project and its potential effects:

- a First Nation would not have had meaningful input into the environmental assessment
- the project committee would not have had an opportunity to consider the impact on the lives and land of the First Nation
- the project committee would not have had an opportunity to consider what measures or compensation would be required²⁴

20 *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 64 B.C.L.R.(3d) 206 (B.C.C.A.) at para. 161 and *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)* (1999) 53 B.C.L.R.(3d) 1 (B.C.S.C.) at para. 72.

21 *Halfway* at para. 182.

22 *Cheslatta*. at para. 36.

23 *Cheslatta* at para. 36.

24 *Cheslatta* at para. 58

The courts have held that the statutory duty to consult under the former *BCEAA* did not take the place of or lessen the duty identified by the courts.²⁵

Therefore, although the *Canadian Environmental Assessment Act* and the current *BCEAA* do not have particular requirements for consultation with First Nations, the common law still requires that consultation and accommodation of potential infringements of Aboriginal rights and title and treaty rights occur in environmental assessments under the BC legislation. However, your First Nation must be clear about of the common law requirements to be sure they are met. See also **Section 4 – British Columbia’s Environmental Assessment Process** and **Section 5 – Canada’s Environmental Assessment Process** regarding the Crown’s policies and practices with respect to consultation with First Nations.

The courts have indicated that:

- the existence of Aboriginal interests has an impact on Crown decisions that are likely to affect those interests and must be taken into account²⁶
- where the federal and provincial governments have entered into treaty negotiations with a First Nation involved in an environmental assessment under *BCEAA*, the ministers should be aware that their decision to grant project approval might infringe Aboriginal rights and should be careful to ensure they effectively address the substance of the First Nation’s concerns²⁷

What the Common Law Means for Your First Nation in a Federal or Provincial EA Process

The exact requirements of consultation and accommodation at common law in a government EA process depend on such things as:

- the type of project being assessed
- the strength of your claim for Aboriginal rights or title or treaty rights
- the seriousness of the potential infringement on those rights

Generally, to meet the obligations to a First Nation of consultation and accommodation set out by the courts during a federal or provincial government EA, the First Nation:

- must be provided with adequate information to assess the potential impacts of the project on your community
- must be given the opportunity to provide your views on the potential impacts of the project on your community to the EA government decision-maker and the proponent of the project
- the EA government decision-maker and the proponent must attempt to make workable accommodations of the potential impacts on your community including measures that may minimize the impacts, provide economic benefits or compensate for impacts

KEY DEFINITION

Common Law

Common law is law that is established by the courts rather than through a legislative process. The law is found in court decisions rather than in statutes and regulations. The common law can change over time with new court decisions. Common law, like other laws, can govern the actions of government.

25 Cheslatta at para. 43.

26 Taku at paras. 198-199.

27 Taku at paras. 192 -193.

QUICK TIP

It is important to clarify what “appropriate consultation” means to your First Nation. It is key to identify the lead or official contact for your First Nation on any EA it may be involved in. In addition, it is important to identify who in your First Nation organization is the principal contact for consultation with government on EA matters.

If there is inadequate consultation from either the relevant government EA decision-maker or a third party, you may be able to get an injunction to stop the work until adequate consultation takes place. A court has sent the ministers back to reconsider the issuance of the environmental assessment certificate for a mining project.²⁸ This included directing the ministers to revisit the question of the issuance of the certificate in light of the Crown’s constitutional and fiduciary obligations to consult with respect to matters that may affect Aboriginal rights or title even before they are proven in a court.

Most importantly, the duties of consultation and accommodation in the environmental assessment process may provide workable mitigation of impacts on your community and provide significant cultural, social or economic opportunities for your First Nation.

For example, the following arrangements may accommodate an infringement of your Aboriginal rights or title or treaty rights:

- modification of the project to reduce or eliminate the impacts on your First Nation’s Aboriginal interests
- a role in interpreting or participating in cultural aspects of the project (e.g., cultural interpretative centre within a larger development)
- a royalty payment based on resources extracted
- provision of alternative lands
- a lump sum payment of cash for infringement as “fair compensation”



The Snuneymuxw First Nation and The Natures Trust of BC identified concerns regarding bird interactions with transmission lines located on the Nanaimo River Estuary, specifically raptors, migratory birds and bird species critical to the Snuneymuxw culture. The transmission lines are the subject of a baseline study funded by the proponent. Photo courtesy of Kathleen Johnnie, Lands and Resources Co-ordinator, Snuneymuxw First Nation.

- provision of infrastructure to benefit the First Nation
- participation in the project by way of joint ventures
- sub-contracting and employment opportunities with the same or another project (including education and training of community members)
- service fees for reviewing proposed activities and development cost charges
- a priority to the First Nation in the allocation of licences at reduced fees

²⁸ Taku.

SCOPE OF PARTICIPATION

When you learn that an environmental assessment will take place for a proposed project that could potentially affect your First Nation's interests, your First Nation must determine the level of involvement required to represent your First Nation's interest.

Your options are:

- not to participate
- to participate strategically at certain stages of the review or for priority issues
- to be fully engaged in the process

Seek out some initial information about the proposed project, either from the proponent or the responsible government regulatory agency. As soon as possible, decide on whether your First Nation will participate. If you do choose to become involved in the EA process, the earlier you initiate your involvement, the better. If you are involved early you have the greatest number of options for effective participation.

When deciding on whether to participate and to what extent, there are a number of factors to consider.

The table on pages 10 and 11 outlines some of these factors and is intended to help your First Nation analyse these considerations in terms of the following:

- benefits of participating
- limitations of participating
- risks of participating
- risks of not participating

In making the decision as to your level of involvement you will also need to consider the following:

- responsibilities for consulting within your First Nation
- the capacity of your First Nation to participate

These are described on pages 12 to 14 of this section.



Site visit related to the Vancouver Island Generation Project. Photo courtesy of Kathleen Johnnie, Lands and Resources Co-ordinator, Snuneymuxw First Nation.

| | BENEFITS OF PARTICIPATING | LIMITATIONS OF PARTICIPATING | RISKS OF PARTICIPATING | RISKS OF NOT PARTICIPATING |
|--|---|--|---|---|
| General | The interests and concerns presented by your community will be considered | The interests and concerns your community presents may not carry the weight that your community expects or desires. | Participating in the EA may create or increase divisions in your community. | If you don't participate, decision-makers might rely on other sources for information about your community. |
| Influence over the Environmental Assessment Process | Your community will have an opportunity to influence the project design and the EA process. | Your community's influence may not be given the weight that is expected or desired. | You could be held accountable by your community for any influence you exert on the process. | Your community will lose the opportunity to influence the project design (and conditions of approval) and the EA process. |
| Final Decisions on Project Approval – Your First Nation | Your community's participation will assist your First Nation government to decide whether to support (and conditions for) or oppose the project. | | Participation may increase any divisions in your community over whether to support or oppose the project. | Your community will not have the opportunity to make a full and informed decision about whether to support or oppose the project. |
| Final Decision on Project Approval — Government | Your community's participation may influence the government's statutory decision on whether to approve the project. | Government decisions are made under statutory authority and may not be consistent with your community's decisions. | Courts are sometimes reluctant to overturn government decisions. ¹ | Not participating may limit your community's ability to challenge the government's decision about the project in court. |
| Access to Information | Participation in the EA will provide your community with access to important information regarding the project. | Your community may not have access to information that is protected by statute, or laws governing intellectual property. | Information that your community provides, including information that you would prefer to keep confidential, may not be protected because of Access to Information legislation. | Valuable information may come to light that your community will not be aware of and context may be lost by not participating. |
| Government Relations | Your community may develop better relationships with government. | | If your community's interests and concerns are not addressed to the satisfaction of your community, your relationship with government may be negatively impacted. | Your community will lose an opportunity to build relationships. |
| Proponent | Your community will have a better opportunity to develop positive relations with the proponent, influence the proponent's actions and possibly to benefit from the project. | There are limits to what a proponent can do or support. For example, they are limited by government regulations and by economic constraints. | If your community's goals and objectives are not clear, your EA representative can be placed in a difficult position and may be perceived as "being in bed" with the proponent. | Your community will have less opportunity to develop a beneficial relationship with the proponent and to benefit economically from the project. |

¹ In some circumstances, a judicial review of a government decision must prove that the government decision-maker was "patently unreasonable" or exceeded his/her jurisdiction in making, or failing to make, a decision. For example, see the British Columbia Supreme Court discussion in *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)*, (1999) 53 B.C.L.R. (3d) 1 at paragraphs 39 – 41.

| | BENEFITS OF PARTICIPATING | LIMITATIONS OF PARTICIPATING | RISKS OF PARTICIPATING | RISKS OF NOT PARTICIPATING |
|---------------------------------|--|--|--|---|
| Capacity Building | Your community will have opportunity to enhance its capacity in lands and resources planning, legal and statutory considerations, government and industry conduct, environmental assessment processes, negotiation skills and the efforts to balance multiple interests in public decision-making. | EA process timelines can move very quickly and this can impact on your community's ability to develop EA capacity to participate effectively in the process. Funding to support capacity building may not be adequate to meet your community's needs. | Participation may be very demanding in terms of time, staff resources, funding and available skills. Other priorities may suffer and there are no guaranteed results. | Your community will have less opportunity to develop environmental assessment capacity. |
| Expert Assistance | Your community will have access to the information and perspectives of a range of experts. With this information your community will be in a better position to assess the impacts of the project more fully. | Hiring experts can be costly. Your community may also disagree with the conclusions of your expert, or find them inappropriate or inadequate for your community's purposes. | In some fields, there is a limited pool of qualified experts to choose from which may make it difficult to find someone for your community to hire. Other experts may not agree with the findings or conclusions of your community's experts. | Your community will lose the opportunity to obtain the perspectives of different experts. |
| Legal Issues² | Your community may gain capacity, understanding and expertise in the legal issues related to environmental assessment and the advancement or protection of your First Nations' rights and interests. | Legal assistance is costly and may not be definitive. Also, your community's expectations of the law and legal system may be unrealistic. | | The many issues that arise in an EA cannot be addressed through legal means alone. Also be aware that it may be difficult to challenge a government's decision in court. ³ |
| Development Agreements | If your community is interested in negotiating a Development Agreement with the proponent, participating in an EA may improve your bargaining position. | Development agreement negotiations are time consuming and complex, resulting in increased costs to your community. The Agreement may not meet all of your community's objectives. | The proponent may not be prepared to negotiate a Development Agreement even if you want to. If an agreement is negotiated it may lead to conflicts in the community with members who do not support the project or who consider the benefits inadequate. | Potential opportunities to benefit the community through employment, funding, training or infrastructure will be missed. |

2 This toolkit provides general legal information that cannot necessarily be directly applied in all circumstances or for all communities. Legal counsel should be approached to determine what legal issues may arise for your community and to provide legal advice in the context of a particular environmental assessment. For information on how to know when you may want to seek legal counsel, see Section 3, pages 24 and 25.

3 Several court decisions have found that First Nations who do not voice their concerns during a process which is open to them may later forfeit that opportunity. See further discussion under Court-Identified Requirements on page 2 of this section.

COSTS OF PARTICIPATING

Costs of participating in an EA can include:

- financial resources to support the First Nation representatives participating in the assessment and to pay for legal or technical expertise that may be required
- significant amounts of time, energy and administrative attention (human and financial resources)
- community consultation and meeting costs
- leadership involvement – it costs the First Nation to have their leaders time dedicated to reviewing a project

See the discussions on **Capacity Issues** (page 13) and **Funding for Participation** (page 14) in this section for further information on specific costs.

RESPONSIBILITIES

Successful participation in an environmental assessment process will require your First Nation to ensure that your community is supportive and informed about the work being done to participate in the EA. Your First Nation must ensure that the following are addressed and funded if they occur during the EA of a project:

Consultation within Your Community

If your First Nation decides to participate in an EA, it is beneficial to set up a process for community consultation regarding important decisions throughout the assessment. Not only will your First Nation representatives need to provide community members with accurate, understandable information regarding the project; they must have feedback to know if community members accept potential terms and methods for carrying out a project. In addition, having guidance from the leaders, Elders and community members is invaluable for assessing impacts to the First Nation's activities and determining the acceptability of any mitigation that may be proposed.

Your community consultation process also needs to take into account EA timelines (see **Sections 4 and 5** for timelines during *BCEAA* and *CEAA* assessments). Ideally, a consultation schedule would include community sessions before and after each major step in any EA process.

Band Governance Requirements

Specific band governance requirements will vary. Individual First Nation's may have their own constitution that defines decision-making processes generally or they may have developed by-laws or policies regarding consultation or environmental assessment participation. For instance, there are some First Nations who have land claims, treaty or self government agreements that would define the relationship between their First Nation and government agencies.

CAPACITY ISSUES

After your First Nation hears about a proposed project, you will need to assess your community's capacity to deal with reviewing and understanding the project. Participating effectively in an EA process takes financial resources, time and expert assistance. Your First Nation may not have the financial or technical resources within the community and may need to look outside the community for additional resources to support effective participation in an EA.

The type of project proposed and the potential impacts on your land and resources will affect how much time and money your First Nation will want to devote to the environmental assessment of a proposed project.

To assess the capacity of your community to deal with a specific EA, you will need to find out about:

- the nature of the proposed project and potential impacts to the environment
- the area in which it is proposed to be located
- the existing and/or historical uses of that area

Often, the proponent will have prepared a project description that outlines basic and general information related to the project. Regulatory authorities (federal or provincial), or the proponent itself, are important sources for project information. It is important to ensure that early contact is made and maintained with the appropriate regulatory authorities even if your First Nation decides not to participate in the EA.

You will also need to assess your community's capacity to participate in the environmental assessment of a proposed project.

In assessing the capacity of your First Nation, consider:

- the ability of your community to communicate among its members, disseminate information, build consensus and make decisions
- the ability to coordinate participation efforts in an environmental assessment
- the ability to review, understand and comment on complex written documents and technical materials – it is key to have a First Nation member that is able to speak to the interests of your First Nation at a technical and interest-based level (with support from appropriate technical staff or consultants)
- the availability of and ability to raise the required financing for all components of EA participation, including funding for:
 - legal advice and expertise
 - information systems
 - technical expertise
- access to advocacy skills and networking
- how much time your community has to participate
- current and potential partners who may cooperate and assist in the EA process – you may need to identify partners to contact and engage



Photo courtesy of Nisga'a Lisims Government

After assessing what you need to participate in an environmental assessment of a particular proposal and your existing capacity, you will need to determine what resources must be found outside the community through technical experts or by working with other interested parties.

Participant funding programs can provide the funds needed for First Nations to hire outside help to complement existing community capacity and to coordinate internal and external resources (see the next section - **Funding for Participation**).

Some First Nations have increased their internal capacity to deal with technical and scientific materials through participating in a number of environmental assessments. Involvement in environmental assessment processes can give rise to opportunities for continuous and incremental learning, formal and informal training, skill development and improved information management systems. This may occur at the individual, organization and community levels.

It is helpful to have done an initial assessment of capacity issues when considering the scope of your participation. If you have a clear sense of the capacity held by your First Nation, it will help you in your discussions with the proponent and government agencies about resources and funding opportunities that can help you to both participate effectively in an EA as well as build long-term capacity within your community.

FUNDING FOR PARTICIPATION

It is important to get funding to support your First Nation's participation in an EA. Costs of participating in a review vary based on the size and complexity of the proposed project and your community's objectives and concerns. Full participation in a major project review can cost somewhere in the range of \$50,000 to \$100,000, and in many cases may exceed this amount.

Activities associated with full participation in an EA process that may require funding include:

- dedicating one or more staff to coordinating your First Nation's involvement in the EA, including:
 - coordinating community meetings and information sessions
 - coordinating technical and legal advisors as needed
 - coordinating First Nation decision-making meetings
 - fund-raising for EA participation
 - coordinating and fund-raising for additional studies
 - travel for meetings

- development agreement negotiations
- participating in field studies associated with the EA
- reviewing studies conducted by the proponent or government agency in relation to the project
- participating in and conducting traditional use and traditional knowledge studies
- site visits (can be a substantial cost if project location is isolated)
- honorariums or wages for First Nation representatives
- administration costs, office space etc... if new role created

As soon as you hear about the EA of a project you have interests in, it is important to locate and apply for funding to participate.

Potential sources of funds include:

- the proponent
- the BC Environmental Assessment Office for participation in *BCEAA* assessments
- Federal government for participation in comprehensive studies and panels under *CEAA*
- other federal government funding through the Department of Indian and Northern Affairs (DIAND)
- private foundations and non-governmental organizations (NGOs)

FUNDING FROM THE PROPONENT

Proponents are an important potential source of funding. In BC, proponents may also have a common law duty to consult with First Nations, so it is in their interests to provide funding for your participation. It may also be the policy of the proponent to establish good working relationships with the First Nations potentially affected by their proposed project. Part of developing this relationship may include providing financial support for First Nations to actively engage in the project assessment. For most large industrial projects, proponents budget for and expect to provide some funding for First Nation participation.

It is also likely that proponents will require certain kinds of information from your First Nation such as traditional land use, traditional knowledge or socio-economic information. Proponents will often fund the studies needed to compile this information. (See **Section 7 – Traditional Knowledge and Environmental Assessment** for further information.) Adequate funding is important so that your First Nation can communicate as much as possible about your historical and current use of areas of your traditional territory so that decision-makers are aware if and how project approval will result in infringement on your First Nation's Aboriginal rights and title and treaty rights. (See **Section 7 – Traditional Knowledge and Environmental Assessment** for more information on mechanisms for protecting your First Nation's information.)

Proponent-funded participation in an EA is a topic that should be raised with the proponent at the earliest opportunity. Develop a budget for your First Nation's participation in the EA after your first meeting with the proponent, when you are familiar with the project application and have some idea of what your expenses for the negotiations and review might be.

PROVINCIAL FUNDING FOR PARTICIPATION IN A BCEAA REVIEW

See **Provincial Funding for Participation** on page 11 of **Section 4 – British Columbia's Environmental Assessment Process** on funding for participation in EAs conducted under *BCEAA* legislation.

FEDERAL FUNDING FOR PARTICIPATION IN CEAA REVIEW

See **Participant Funding** on page 22 of **Section 5 – Canada's Environmental Assessment Process** for information about participant funding in EAs conducted under *CEAA* legislation.

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT (DIAND) FUNDING

There is no dedicated source of funds within the federal government to assist First Nations in participating in EA processes. However, in addition to funding available specifically for participation in *CEAA* reviews, some First Nations have been able to attain funds from DIAND programs for specific components of the First Nation's participation in EA's. DIAND funding may be an initial place to start to secure funds for scoping the EA and your potential participation.

Resource Access Negotiations Program

The **Resource Access Negotiations (RAN) program**, created by **Indian and Northern Affairs Canada (INAC)**, provides funding for the purpose of:

- "accessing business and employment opportunities from major projects
- disposing of reserve resources
- accessing off-reserve natural resources
- participation in the management of off-reserve natural resources."

Funds are allocated to INAC regional offices, based primarily on on-reserve populations. Regional offices will accept unsolicited funding requests and will provide funding through proposal driven contribution agreements. Funding is typically provided to cover the fees and expenses of technical experts, including consultants, negotiators and lawyers. The intent is to provide First Nations with the technical expertise to conclude productive negotiations leading to economic benefits.

Resource Partnerships Program

The Resource Partnerships Program (RPP) provides financial support to First Nation governments, organizations, and community-owned and controlled enterprises to participate in the planning of and obtaining economic benefits from major resource development projects.

Regional offices of INAC submit eligible proposals to INAC headquarters for consideration. Funding is conditional on meeting program criteria including partnerships with provincial or territorial governments, First Nation, Inuit and Innu groups or the private sector.

OTHER FUNDING SOURCES

In specific situations it may be possible to obtain funds or assistance in fund-raising through non-governmental organizations such as legal, environmental or social change advocacy groups and private foundations. Raising money from private foundations may be possible, depending on the context and the strategic implications of your situation with respect to setting precedents or other higher-level concerns. If there are rare or endangered species, important habitat or other significant environmental issues, you may be able to find non-profit organizations with interests in similar issues. Start by checking with the following organizations in the Vancouver area that can get you started and may even be able to help you obtain funding:

Environmental-Aboriginal Guardianship through Law and Education (Eagle)

Eagle specializes in providing legal advice and educational materials to First Nations. They do not have funds available to assist First Nations, but may have access to private foundations for special cases or be able to suggest possible funding sources.

Sierra Legal Defence Fund

Sierra Legal Defence Fund engages in direct legal challenges in environmental and resource issues. Sierra Legal Defence Fund has no funding program to assist First Nations in processes such as environmental assessments. However, depending upon your circumstances and the importance of the situation, they may be able to help you obtain funds from private foundations. They will also provide summary advice and research support on legal and procedural issues associated with EA.

West Coast Environmental Law Association

The West Coast Environmental Law Association provides summary advice to First Nations on legal and procedural issues related to EA. The association has a fund called the Environmental Dispute Resolution Fund, managed by one of their legal staff. Financial aid is sometimes available for individuals or organizations to pursue environmental issues, including for technical or legal assistance. There is an application process.

CONTACT INFORMATION

The British Columbia contact for both RAN and RPP programs is:
Jack Gibson, Manager
Environmental Protection
and Natural Resources
Lands and Trusts Services
DIAND
Phone: 1-604-666-0596

For an overview of funding services within DIAND's BC office, see:
<http://www.ainc-inac.gc.ca/bc/ecdev/>

The contact at Eagle is:
Cheryl Sharvit
Phone: 1-604-536-6261
E-mail:
csharvit@eaglelaw.org
Website:
<http://www.sierralegal.org/eagle.html>

For more info on Sierra Legal Defence Fund see:
<http://www.sierralegal.org/aboutsierralegal.html>
or
<http://www.sierralegal.org/contact.html>

Contact for
Environmental Dispute
Resolution Fund:
Andrew Gage
Phone: 1-800-330-9235
<http://www.wcel.org/aboutus/contact/>

Contact for
Tides Canada:
Lesley Anderson
Phone: 1-604-647-6611
Lesley@tidescanada.org

Tides Canada

Tides Canada is a foundation that puts donors together with charitable organizations to conduct projects or programs aimed at improving society. There are no dedicated funding programs for First Nations or environmental protection. However, the foundation has a broad scope and in unique and special circumstances it has been instrumental in assisting First Nations with environmental issues.

STRATEGIES FOR EFFECTIVE PARTICIPATION

The following sections describe approaches or strategies and key steps to consider when planning your participation in an environmental assessment.

IDENTIFYING YOUR GOALS AND OBJECTIVES

One of the first things that your First Nation will have to determine are your goals and objectives in relation to the proposed project.

These may include:

- encouraging economic development that is consistent with community goals
- securing employment for community members
- preventing adverse environmental impacts in your traditional territory
- avoiding or mitigating impacts on existing land use, including traditional land use
- understanding how the proposed project may impact future resource planning and management

It is worth spending some time discussing your community's goals within your community. The more clearly you can define your goals and objectives and articulate your First Nation's values in relation to a project, the easier it will be to determine the best strategies and approaches to use in your participation in an EA. Specific goals and objectives may evolve as you learn more about the project and as your negotiations with the proponent and government agencies proceed. It is worthwhile to revisit your First Nation's overall goals and specific objectives, in relation to the project, as you gain more information about the proposed project.

PROJECT ASSESSMENT FROM YOUR FIRST NATION'S PERSPECTIVE

As you participate in the environmental assessment, keep in mind that your First Nation will need to make a decision on the overall acceptability of the project from your perspective – this can be called a “project assessment”. Ultimately, and through your participation in an EA, your First Nation will decide to either support or reject/oppose a project.

In making this decision, there are at least three main aspects of the EA to consider:

- the vulnerability of the First Nation culture, Aboriginal rights and title and treaty rights and the potential for the project to impact those interests and the impacts of future generations
- the project's environmental acceptability (impacts to environment and/or sustainability)
- the potential benefits that your First Nation can realistically gain from the project

The acceptability will be from your First Nation's perspective and it may come to a different conclusion than others involved in the EA process. This may result in your First Nation requiring agreement on certain terms and conditions to be in place before the project could be determined as acceptable. Some of the things you may consider evaluating are the potential impacts of the project on the environment, your culture, your Aboriginal rights or title, any treaty rights that you may have, traditional land uses, socio-economic activities and the health and safety and overall social health (crime rates, alcohol and drug use, family fragmentation) of the community.

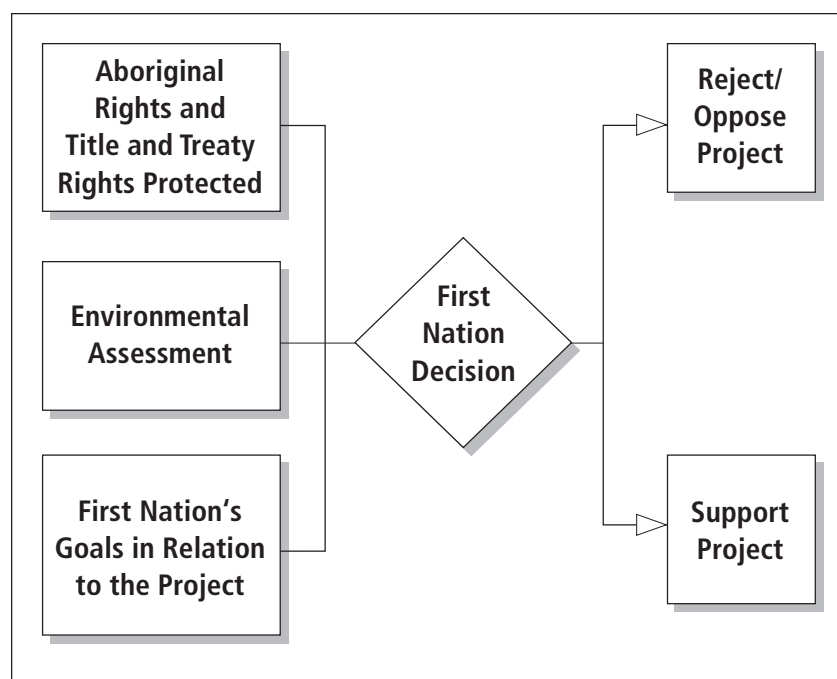
Your First Nation may also consider examining the project from the perspective of sustainable development. One definition of sustainable development is "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs." However, your community may have its own definition or

vision of sustainability (see Section 2 – EA Basics, Section 5 - Canada's Environmental Assessment Process and Section 12 – Detailed Case Study-Tulsequah Chief Project for further discussion on EA and sustainability). Participating in an EA may provide an opportunity for your community to develop and articulate its guidelines or requirements for sustainability assessments.

Evaluating benefits might include discussions with the proponent regarding potential socio-economic or other opportunities. It would also include research into the needs and skills of the community to become more involved in project EA and development activities.

It can be beneficial to have different people or groups focusing on each aspect of your community's assessment of the project's acceptability:

- determining potential impacts on your Aboriginal rights and title and treaty rights



- assessing the environmental acceptability
- evaluating potential benefits to your community

It is important to take these factors into account in the ultimate decision that is made by your First Nation to participate in the EA and ultimately the decision to support or oppose the project.

QUICK TIP

EA is a process to predict and mitigate the environmental effects of projects. Therefore, EA is not likely to address all of your First Nation's concerns or interests related to a project. Some of your First Nation's broader issues may be more appropriately addressed in other processes, such as cooperative land use planning, community planning or development agreement negotiations.

ENGAGING THE PROPONENT

It is important to engage the proponent as early as possible to ensure it is aware of your First Nation's interests. The proponent is an important source of information about the proposed project. Interacting with the proponent is essential to get a sound understanding of the project. It may be the only way to ensure that you receive the most current information available. In addition, there may be opportunities to discuss your concerns and issues directly with the proponent. Clear communication with the proponent about community consultation needs and policies can allow you to influence the pace of the EA and the design and mitigation of the project. Your initial interactions with the proponent will also give you a sense of whether developing a long-term relationship with the proponent will be beneficial to your First Nation.

Initial Discussions

Matters to discuss in your initial interaction with proponents could include:

- how the proponent can assist your First Nation in participating effectively in the environmental assessment, including access to information regarding the project and funding required
- what options are being considered by the proponent for designing the proposed project and its operations
- what information the proponent can provide to your First Nation
- potential requirements for your First Nation and the proponent to cooperate to conduct traditional knowledge or traditional use studies funded by the proponent
- opportunities for your First Nation to direct, conduct or participate in environmental baseline studies, such as fish or wildlife studies
- incorporating your First Nation's traditional knowledge into the EA
- the importance of fish and wildlife to your culture and the potential impacts of the project to your First Nation's Aboriginal rights and title and treaty rights

Project Information

Often the proponent will offer to provide information sessions for your community about the project. This can be very helpful. There are many ways to do this and it is important to inform the proponent about the most appropriate ways to provide information to the community.

Some of the options to consider include:

- open-houses where the proponent provides displays, maps and photos explaining the project
- community meetings that include formal or informal presentations from the proponent and/or community members
- meetings between the proponent and specific groups such as community leadership, Elders, traditional land users, traditional knowledge holders, First Nation’s businesses and others
- site visits
- newsletters about the project
- any other activities that would be acceptable and suitable for your community
- ensuring that you have “official” First Nation representatives at all official information meetings between the proponent and members of the First Nation

Interim Agreements

It may be beneficial to enter into an initial agreement with the proponent to formalize the working relationship between your First Nation and the proponent. An interim agreement is a short-term agreement that defines the working relationship between the parties up to the point where a longer-term arrangement, if desired, can be established.

Interim agreements are sometimes called:

- framework agreements
- memorandums of understanding (MOUs)
- participation agreements

The interim agreement could have the following purposes:

- define an interim working relationship between the parties
- ensure the timely delivery of all relevant information to each party from the other
- provide a degree of certainty to both parties about how the review will be conducted
- provide the First Nation with funding to participate in the EA

Consider including the following in a interim agreement:

- communication protocol (set of rules)
- funding arrangements
- protocols for traditional knowledge studies and traditional use studies
- provisions for access to relevant First Nation information by the proponent under terms and conditions acceptable to both parties, and the converse
- provisions for the First Nation government to make a conditional decision about the environmental acceptability of the proposed project
- provision of clear and certain acknowledgement from the proponent that entering into the agreement does not prejudice the ability of the First Nation to oppose the project

SAMPLE LETTER TO PROPONENT REQUESTING NEGOTIATED AGREEMENT

This letter assumes that you have had some initial conversations with the proponent and have received general information about the project.

Dear Sir or Madam

I am writing to request a meeting with you about your proposal to develop the ____ (project name) in our territory. You are likely aware of the _____ (First Nation) Aboriginal rights and title to the proposed project area. It is this First Nation's responsibility to ensure that those rights and interests are recognized and protected. In this spirit we invite you to discuss your proposal with us. If you are serious about initiating a project in our territory, I suggest that we discuss a formal arrangement with you to span the life of the project.

We appreciate the effort you have made to date in keeping us informed about the project. It is our government's objective to have resource development proceed in our traditional territory as long as the environment and our interests in the land are properly protected and our people benefit directly from the activity. The challenge for us is to accurately understand what these costs and benefits are with any new projects and to make responsible decisions in respect of such projects.

In considering development proposals, our First Nation places the sustainability of our environment and community ahead of short-term economic benefits. We are able to support an industrial project in our territory if it can be demonstrated to have an acceptable level of impact to our culture and land-based interests.

On behalf of the First Nation, I would like to set up an initial meeting to discuss an agreement that would cover the EA period associated with your project's development. This interim arrangement is intended to provide the framework for coordinating the activities of both parties during the EA and set out matters for future negotiations. The agreement will provide certainty to each of our organizations as to how our assessment will be conducted. It will set out the process for negotiating any longer-term agreements, clarify funding arrangements and set out procedures for communication and coordination between our organizations.

If you are agreeable to the approach suggested here, please contact me at your earliest convenience so that we may establish a date for our first meeting.

Signed

Chief, _____ First Nation

- protocol for any future negotiations
- provision for individual First Nation members or private businesses to take advantage of existing employment or business opportunities that the proponent may offer during the project assessment period or before it is permitted or licensed to proceed

Development Agreements

Any arrangement between your First Nation and the proponent that allows a project to proceed should be formalized through a negotiated, development agreement (sometimes called an impacts and benefits agreement) between the two parties. An impacts and benefits or development agreement is the principal means of establishing a relationship between the proponent and your First Nation over the life of the project (see **Section 10 – Development Agreements**).

WORKING WITH GOVERNMENT AGENCIES

Participation in an environmental assessment process may involve working with federal, provincial or local government agencies. Each of these levels of government may be a source of assistance and information to your First Nation during the review. See **Getting Information** on page 29 of this section for specific government departments that may be a source of environmental information. Some government agencies may also be potential allies in an environmental assessment (see next section).

BUILDING ALLIES

Consider forming alliances with other groups who share the same goals or specific objectives with respect to the

proposed project. For example, if your First Nation is concerned about impacts to ungulate populations (deer, moose, caribou) or salmon, and your community relies heavily on the harvest opportunities, it may be important to find allies to assist in ensuring adequate data collection and analysis. Other groups that are interested in sustainability and wilderness protection are possible allies. These might include neighbouring First Nations, environmental organizations, commercial fishing companies and trade organizations, outdoor recreationists, tourism companies and government agencies.

Building strategic alliances can:

- add weight to advocacy efforts
- assist in building awareness of issues important to your First Nation
- demonstrate a broad base of concern
- offer an opportunity to share costs of hiring experts
- improve access to complete and timely information from the proponent and government agencies
- improve access to participant assistance
- provide support for legal challenges, where appropriate

QUICK TIP

As your First Nation is developing a working relationship with the Crown or the proponent, ensure that the appropriate people are involved in specific tasks.

Some examples are:

- high level decision-making meetings should be attended by decision-makers (for example, your Chief would meet with company president)
- your First Nation's technical staff should meet with the government or the proponent's technical level staff
- negotiations should take place with designated negotiators who have a mandate to conduct negotiations

GETTING EXPERT LEGAL AND TECHNICAL ASSISTANCE

Why Hire an Expert?

There may be times during an environmental assessment where it would be beneficial to get legal or technical assistance. For the purposes of this discussion, legal assistance refers legal advice from a practising lawyer and technical assistance is assistance from someone with either general expertise in environmental assessment procedures and methods and/or specific training in an aspect of environmental assessment (e.g., fisheries biologist, air quality modelling expert).

In all industrial projects and their associated environmental assessments there are complex issues and processes. Having high quality technical representation in an EA is important. Experts will have designed the proposed project and EA specialists usually conduct the environmental studies and impact analyses. Both proponents and government regulatory agencies will use legal or technical experts, where needed, to assist them. Therefore, your First Nation must also choose to use legal or technical experts to help ensure that your interests are protected and that you have the appropriate information for community decision-making.

When to Use Legal Assistance

Legal assistance can be valuable in many aspects of EA participation, but in particular in the following situations:

- when you are negotiating agreements or contracts including:
 - framework agreements with a proponent
 - development agreements or impacts and benefits agreements with a proponent
 - revenue-sharing arrangements with a proponent
 - EA participation agreements with federal or provincial agencies
 - hiring technical experts
 - hiring researchers to conduct studies such as traditional knowledge, traditional land use, socio-economic or other community-based studies
- when considering how to protect your traditional knowledge and other important community information
- if you need advice about statutory or procedural issues
- to help you prepare for hearings or review panels
- if your First Nation is considering challenging an EA decision through a court action

When to Use Technical Experts

A technical expert can provide your First Nation with an independent viewpoint and help you to determine if the information provided in the environmental assessment is adequate to predict and manage effects of the project. Technical experts can assist you in determining if an EA addresses issues raised by your First Nation and meets your community's needs. Information from technical experts can also assist you in determining the mitigation measures and conditions that would protect your First Nation's interests and provide benefits to your community.

Consider hiring technical expertise in the following situations:

- if you do not have the time or the expertise to evaluate a technical aspect of the EA or project application
- when there is potential for significant community economic, social, health or cultural impacts
- when there is potential for significant impacts to your First Nation's land use patterns and harvesting activity
- when the EA predicts impacts on key aspects of the environment such as wildlife and fish habitats
- when there are aspects of the impact assessment that you feel are lacking information or do not provide information to alleviate your community's concerns or protect your First Nation's interests
- the proposed project has new or unproven technology

Here are some examples of key questions to ask about the proposed project to help you determine if technical assistance may be valuable:

- Will the proposed project be located in an area with high natural ecological values that is relatively undisturbed by development? If so, an expert in wildlife, terrestrial and/or aquatic impacts may be helpful.
- Is the proposed project likely to produce hazardous or toxic wastes? If so, you may want to find an expert in this field to review the proponent's waste management plans and potential impacts to your community's health and safety.
- Does the project require significant access construction, such as new roads or railways, pipelines or power lines, which may affect current land use or future agreements for land and resource extraction or management planning in the territory? If so, you may want to obtain the help of land and resource management planners or wildlife, fish or vegetation biologists.
- Does the proposed project require using new technology? If the project involves new or untested technology, consider hiring an expert who is familiar with the issues posed by the project. The expert ought to have experience to predict and assist in assessing the potential risks associated with using the said technology in the appropriate environmental setting (e.g., road construction in tundra or other unstable settings).
- Are the proposed mitigation measures proven and easily implemented or are they undemonstrated and complex? If the mitigation measures are unproven and the effects of the project are potentially serious, then an expert opinion is required. It is important to note that "the courts" will rarely get involved in a technical debate among experts on an issue.

How to Use a Technical Expert

There are many aspects of an environmental assessment process where expert assistance can be valuable. However, expert assistance is expensive, so it is beneficial to be as focused as possible in the ways you use an expert.

Here, presented generally in order of increasing cost, are some of the main tasks that you can ask a technical expert to do:

- respond to focused, specific questions that you identify
- attend technical meetings where the relevant issues are being discussed
- review and comment on relevant parts of the application, supporting documents or the environmental assessment report
- review the entire project application documentation
- provide expert testimony in hearings
- prepare independent technical reports on behalf of your First Nation, if you determine that the proponent's studies are deficient or do not appropriately protect your First Nation's interests or address your concerns

When using an expert, focus their assignment by asking them to:

- identify any deficiencies in the work produced by the proponent
- offer an opinion as to whether the assessment work done by the proponent is reliable
- assess and classify (broadly at least – low, medium, high) the potential risks in relation to the issues and interests your First Nation has raised in the EA
- identify areas where further work or particular requirements are needed to narrow uncertainties and risk to the environment, your First Nation's activities and your Aboriginal rights and title and treaty rights
- suggest terms and conditions for regulatory approvals, if the project is to proceed, that will address your concerns or address risks
- submit his or her findings in a clear and easily understandable written document, recommending follow-up tasks for your First Nation, with any required positions clearly defined

It is unlikely that you will find an expert who knows everything about a complex project. If you feel you need major outside help, consider hiring someone who is a generalist in EA procedures and has the skills to know when a particular expertise is required on a technical issue. This could be a more efficient use of your resources in an EA process than hiring several specialists.

SAMPLE LETTER TO HIRE A TECHNICAL EXPERT

Dear Dr. Smith
Re: Dry Gulch Gold Mine Project

Further to our telephone conversation, I would like to confirm that we would like you to proceed with a technical review of water quality and potential downstream aquatic effects of the proposed Dry Gulch Gold Mine Project. Your assignment is to review the enclosed material (see list of documents below) and prepare a short report to the First Nation on your findings.

In particular, we want you to focus your review on the following aspects of the Dry Gulch Gold Mine Project:

1. aquatic impacts during mine construction and operation according to the proponent's predictions of water quality discharges into receiving environment
2. aquatic impacts following closure and abandonment of the mine
3. recommendations for further research required [a] prior to approving the project, and [b] for monitoring and mitigation as a condition of project approval
4. recommendations for terms and conditions that would improve the environmental management of the project
5. any additional areas of concern that you identify during your review.

The attached material is from two sources. Material from the Addendum is the most recent, and replaces or supplements earlier material from the EA Application. You should review both sets of information, but where inconsistencies exist between the two, use the Addendum information. The complete set of documents on this project is located in our administration building, and you can contact our _____ (name or title) if you need to view additional material on the Dry Gulch Gold Mine Project.

As you know, Jones Engineering has also been retained by us to examine water quality issues on-site (particularly those relating to acid rock drainage and metal leaching) and Dr. Brown of Western Hydrology Inc. will be examining the water balance model and the risk assessment conducted by the proponent. You are encouraged to share information with them and coordinate your work, where appropriate. Please copy us on all communication you have with these consultants.

The work is to be completed by the end of February.

We understand that your rate is \$800 per day and we estimate that you will need about 5 days to complete this work. If, upon reviewing the attached material, you find that you will need more time, please contact our _____ (name or title) before proceeding. Please mail your invoice directly to me upon completion of the review.

Your contact person for this project is _____ (name), who you can reach at the phone number above.

We greatly appreciate you making yourself available to undertake this assignment.

Sincerely

Materials provided: (list)

How to Find an Expert

Finding the appropriate expert is sometimes challenging. The following approaches can be helpful in finding a suitable person:

- Use your existing contacts – check with consultants, engineers or other professionals who your First Nation has worked with in the past for their recommendation as to who might be appropriate.
- Check with other First Nations who have been involved in EAs, ideally with similar projects, to see if they can recommend experts.
- Check project registries to see what experts have been used by proponents, government agencies or First Nations in EAs that have reached a decision or that are currently involved in an EA.
- Other organizations, such as environmental non-governmental organizations may be able to recommend someone (see organizations listed under **Other Funding Sources** on page 17 of this section).
- The BC Environmental Assessment Office or the Canadian Environmental Assessment Agency may be able to recommend consultants or technical experts who could help you with specific issues.

Once you have identified a potential candidate, contact the person and explain what you are looking for and inquire about other organizations that they have recently worked with in conducting an EA.

Asking the following questions may be helpful:

- Is the scope of work you are requesting within their area of expertise?
- What are their specific qualifications?
- Have they worked on similar projects?
- Are they familiar with the area and environmental setting involved?
- Have they had experience working for First Nations?
- Are they interested and available to do the work and are they able to provide the required deliverables by the date you will need to submit comments?
- What is their fee and how long their review might take (so that you can develop a budget for the work)?
- If they are not available, is there someone else they could recommend?

If it seems like the person might be appropriate for your assignment, indicate that you would like to pursue the possibility of hiring them. It is important to check the qualifications of anyone you are considering hiring. You can ask them to provide a resume, descriptions of related work and references. It is also important that the expert is acceptable to the community and you can ensure this by involving your leadership in the selection process.

Once you have completed the initial contact, formalize the assignment with a follow-up letter and a contract that includes the following:

- scope of work and specific tasks to be conducted

- how the information is to be presented
- budget and billing information
- timeline
- confidentiality requirements, if appropriate

DISPUTE RESOLUTION AND COURT PROCEEDINGS

Negotiations and Court Proceedings

Your First Nation can always consider entering into a participation agreement for an EA process which includes mediation provisions. Or, at any time, you can request a government agency or proponent involved in an EA to mediate regarding your Aboriginal rights or title or treaty rights or other interests.

Judicial Review

If your First Nation feels that an assessment or the decision to allow a project to proceed under *BCEAA* or *CEAA* did not properly consider relevant information, considered irrelevant issues or was procedurally flawed, it is possible to request a judicial review by the BC Supreme Court or Federal Court Trial Division for decisions made under the legislation. This could be based on your Aboriginal rights or title or treaty rights or environmental or other impacts of a project. Actions taken under *BCEAA* or *CEAA* may be subject to judicial review according to applicable legislation allowing judicial review and the general principles of administrative law. The format of the application and grounds for a judicial review will depend on the applicable statutory provisions and the issues raised in your submission. For example, the scope of the judicial review will

depend on the degree of discretion provided for in the relevant provisions of *BCEAA* or *CEAA*.

PARTICIPATING IN SPECIFIC ASPECTS OF THE PROCESS

GETTING INFORMATION

The primary way of getting informed about a project is through direct contact with the proponent and government agencies involved in the assessment. If you are actively participating in the review process, project information will likely be made readily available to you by the proponent and government agencies.

All documented project information such as the terms of reference, EA application or report

QUICK TIP

It is key that your First Nation retain legal counsel (if not already in place) and get sound legal advice before proceeding with a judicial review.

Judicial reviews can be costly and time consuming and the outcome is uncertain.



First Nation protest at fish farm operations. Photo courtesy of Connie McIvor, Musgamagw Tsawataincuk Tribal Council.

and any written submissions will be publicly available. Documents related to a *BCEAA* assessment are available at the Project Information Centre and for an assessment

The Project Information Centre for projects reviewed under BCEAA is located at:
2nd Floor - 836 Yates St.
Victoria BC

Phone: (250) 356-7441
Fax: (250) 356-7440
Toll free calls, through Enquiry BC
Victoria (250) 387-6121
Vancouver (604) 660-2421
Elsewhere in BC
1-800-663-7867

Hours 8 am to 5 pm
Monday to Friday

Mailing Address:
Project Information Centre
Environmental Assessment Office
P.O. Box 9426
Stn. Prov. Gov.
Victoria BC V8W

EAO website
www.eao.gov.bc.ca

Canadian Environmental Assessment Agency website:
www.ceaa-acee.gc.ca
General Inquiries
613-957-0700

The Canadian Environmental Assessment Registry
www.ceaa-acee.gc.ca/050/index_e.cfm

under CEAA they are available on the Public Registry on Canadian Environmental Assessment Agency's website. For joint assessments, check with the government agency representatives to find out which system information is being posted on.

In addition to the main sources of information, your First Nation may chose to look for additional baseline information about the area and for information about EAs for similar types of projects.

Government Agencies

Valuable baseline information related to the EA of a proposed project may be available from government agencies.

Examples of information held by provincial government ministries include:

- wildlife studies from the Ministry of Water, Land and Air Protection
- digital and paper maps and air photos from Land Data BC
- map sheets converted onto Terrain Resource Information Management (TRIM) bases from the Terrestrial Information Branch, Ministry of Sustainable Resource Management
- hydrological studies from the Ministry of Sustainable Resource Management
- archaeological information from the Ministry of Sustainable Resource Management
- recreational management data from the Ministry of Water, Land and Air Protection
- land tenure information from British Columbia Assets and Land Corporation and the Ministry of Forests
- mineral tenure information from the Ministry of Energy and Mines
- traditional use studies conducted for other purposes
- information related to human health protection from the Ministry of Health
- resource inventories from the Ministry of Forests and Ministry of Sustainable Resource Management

Examples of information held by federal government departments include:

- fish and fish habitat data, as well as a wide range of data and mapping information related to oceans and oceans management from the Department of Fisheries and Oceans (http://www.dfo-mpo.gc.ca/home-accueil_e.htm)
- climate data and information from the National Climate Data and Information Archive (http://www.climate.weather_office.ec.gc.ca/Welcome_e.html)

- Environment Canada's National Surface Water Data Archive for information on streamflow, water level, sediment concentration (http://www.climate.weatheroffice.ec.gc.ca/rel_arch/index_e.html)
- Information on a wide variety of migratory birds from the Canadian Wildlife Service (http://www.cws-scf.ec.gc.ca/index_e.cfm)
- Natural Resources Canada has a number of programs under its responsibility, such as the Geological Survey of Canada, with a large number of web-based data sets (http://www.nrcan-rncan.gc.ca/inter/index_e.html).

World Wide Web

The World Wide Web (the web) is an important source of information. A great deal of information is readily available through the web, including a wide variety of scientific and technical information, government publications, standards, policy statements and legislation. Further information on many of the topics discussed in this toolkit is available on the web. See the **Additional Information** box at the end of each main section of this toolkit for links to useful websites.

Access to the web and the ability to find and retrieve information can be a good tool for gathering information. However, since it is easy to place information on the web, there is also information on the web that is not well supported by science or has not been the subject of peer review. This information may not be suitable for use in an environmental

assessment process. Make sure the information you get is from a reliable source and, if it is scientific or technical information, that it contains appropriate references to the source material.

PREPARING SUBMISSIONS

Written

During an environmental assessment, a number of opportunities will exist for your First Nation to make written submissions about the proposed project, assessment process, potential impacts of the project and other issues important to your First Nation. See **Section 4** and **Section 5** for opportunities to provide written submissions during reviews under *BCEAA* and *CEAA*.

Written submissions are important because they:

- clearly describe the concern and issues that are important to your First Nation
- can be effective for documenting and demonstrating your First Nation's historical and current land and resource use and Aboriginal rights and title
- form a permanent record of the input from your First Nation
- are publicly available and therefore, may be helpful in identifying and building alliances with other parties involved in the environmental assessment

Relevant topics to incorporate in your written submissions might include:

- your First Nation's traditional territory and traditional land use information

KEY DEFINITION

Traditional Territory

Not all First Nations refer to their territory as “traditional territory”. The term traditional territory is commonly used and that is why it is used in the toolkit. For this term and any other terms used in this toolkit, use the term that is appropriate and meaningful to your First Nation.

- the potential impacts of the proposed project on your First Nation’s traditional territory and traditional uses of your land
- the potential impacts of the project on your First Nation’s Aboriginal rights and title and treaty rights
- implications for future land use planning and securing a meaningful treaty for your First Nation
- the potential impact of the proposed project on the sustainability of your First Nation
- issues regarding potential environmental, economic, social, health and cultural impacts of the proposed project
- issues or suggestions that you may have identified with respect to any mitigation plans that have been developed by the proponent
- specific comments on the proponent’s written submissions
- studies that you want considered in relation to potential impacts, such as impacts on waterbodies, air quality and wildlife
- community economic objectives (clear articulation of whether the project contributes to or diminishes those objectives)
- alternatives to the proposal to be considered during the EA
- any cumulative impacts (induced by the project directly or indirectly) of concern

In preparing written submissions, consider working with legal or technical experts and anyone from your community who has experience participating in an environmental review. Experts can provide valuable assistance in reviewing technical and scientific material and preparing an effective response.

It is also important to take notes at any meetings you attend in relation to the EA and to verify any notes or minutes taken by others that will be part of the official record to make sure they reflect your understanding of the meeting.

Oral Submissions

There may be opportunities in an assessment process to make oral presentations. However, formal oral submissions generally only occur during federal panel reviews, which are quite uncommon.

It is important to be prepared to make oral presentations, as required, since they are an important and effective tool for communicating the First Nation concerns and interests on specific and general matters. Sometimes it is the only way to truly hear what an interest is in relation to the project. In addition, the oral presentation (especially if done with an Elder) must be well prepared and specific to the project and issues intended to be addressed in the presentation.

Therefore, where possible, take advantage of opportunities to make oral presentations. For instance, oral presentations can often be made at open houses and public information meetings regarding the project.

The topics covered during oral submissions are generally the same as those covered in written submissions. It is a good idea to provide a written version of any comments made orally during an environmental assessment. This reduces the possibility of having your comments overlooked or interpreted in a way that is different from what you intended.

PARTICIPATING IN EA STUDIES

The extent to which your First Nation participates in EA studies will relate to your interest and availability to be involved in particular studies, the funding that you can secure to participate, the scope of the EA and the potential for the project to impact your First Nation's interests, concerns and Aboriginal rights and title and treaty rights (see **Section 4** and **Section 5** for opportunities for your First Nation to be involved in the scoping of the EA requirements under *BCEAA* and *CEAA*).

Some studies that the proponent may be required to conduct as a component of their EA may require information from your First Nation. These typically include socio-economic, cultural, traditional land use and traditional knowledge studies. There may be other studies of particular interest to your community such as wildlife and fish baseline studies and archaeology studies. These may be studies that your First Nation chooses to

complete independently or in cooperation with the proponent. Negotiate protocols and secure funding for these studies directly with the proponent, the appropriate regulatory agency or the BC Environmental Assessment Office.

See **Section 7- Traditional Knowledge and Environmental Assessment** for a discussion of traditional knowledge studies including legal and policy considerations, your right and responsibility to protect your TK and some possible ways you may choose to use TK in an EA process.



TRTFN Fish Habitat Assessment Crew. Your First Nation may choose to participate in or conduct your own selected baseline studies. Photo courtesy Jason Williams, Fisheries Manager, Taku River Tlingit First Nation

QUICK TIP

It is important to review EA reports for projects in your territory and to state in writing whether an EA report and/or the EA process has addressed all of your First Nation's concerns about the project. See Section 8 – Reviewing EA Reports for more information.

REVIEWING AN EA REPORT FROM A FIRST NATION PERSPECTIVE

The environmental assessment report or application will likely be the largest document that you will need to review. In most EA processes you will be able to provide formal written comments on the EA report and it is valuable to do so. In most cases, the government reviewers make their recommendations to the decision-makers largely based on their review and interpretation of the EA report. Therefore, it is important to review the EA report from your community's perspective with a view to ensuring that your issues have been addressed and that you agree with the conclusions. See **Section 8 – Reviewing Environmental Assessment Reports** for things to consider when reviewing an EA report on behalf of your First Nation.

CONDUCTING AN INDEPENDENT ENVIRONMENTAL ASSESSMENT

There are some situations where your First Nation may want to conduct its own environmental assessment, either of the entire proposed project or of specific components. Your assessment would be conducted in addition to the reports that are prepared and submitted by the proponent. Only in certain situations would it be necessary or advisable to do this. For instance, if you have concerns about the integrity of the proponent's work and you have not been able to resolve those concerns through the EA process or in direct dealings with the proponent, you might consider doing your own assessment of particular components of the project.

If you decide to conduct your own assessment there are certain steps that must be taken (see **Section 2 -EA Basics**). This is a situation where assistance from technical experts is absolutely necessary. Submissions must be based on generally accepted principles for conducting assessment work and scientific study and be scientifically defensible. Costs for doing your own studies can be high, so it is important to get adequate funding if you choose to go this route.

Accessing Information

Even if you choose to do your own studies, it is still important to have access to the most current information that has been collected and is being used in the proponent's EA. In this way, you can conduct your own analysis and draw your own conclusions – independent of the proponent's – from the same data sets.

There are clear risks in submitting your own reports and doing your own assessment work. But it is clear from other First Nation experiences that there are definite advantages to being prepared to do and submit your own studies. If the science being produced by the proponent or government is substandard you have to be prepared to highlight that to decision-makers.

CASE STUDY – CONDUCTING AN INDEPENDENT ASSESSMENT

Tli Cho (Dogrib) First Nation

Independent Assessment of the Diavik

Diamond Mine In 1999, a comprehensive study was conducted under the *Canadian Environmental Assessment Act (CEAA)* for the proposed Diavik diamond mine in the Northwest Territories.

As a requirement of the comprehensive study, the proponent conducted a brief examination of the possibility of mining underground as an alternative means to the proposed open-pit mine. The proponent, Diavik Diamond Mines Inc., argued that underground mining was not economically viable.

One of the Aboriginal groups, the Dogrib Treaty 11 Council, did not participate in the federal EA, but instead conducted its own independent assessment of the project, including an examination of the underground alternative. A project director was hired, and a 12-member resource team from the Tli Cho communities was assembled to guide the Dogrib's year-long independent assessment. A number of experts were engaged for focused reviews on specific aspects of the project. Also, since the proceedings of the *CEAA* review were posted on a public registry, technical material developed during the comprehensive study was available to the Tli Cho process.

The Tli Cho review showed that there was a difference in the environmental risks associated with the two options proposed by the proponent, and that in their view, the underground option was economically viable.

In their independent EA, which the Dogrib submitted to the Minister of the Environment, they noted that approval for the mine was premature since a number of issues had not been properly resolved (including the alternatives means of conducting the project) and that the project application should go to a panel review. The minister did not take up this recommendation. Ultimately, the project was approved and production planned for 2003.

Thus, while the Dogrib's independent assessment went to the minister, it did not change his recommendation to approve the project. This case study highlights the risks of doing an independent assessment without also participating in the formal EA process.

CASE STUDY – TAKU RIVER TINGLIT FIRST NATION – PARALLEL ASSESSMENT OF THE TULSEQUAH CHIEF PROJECT

The Taku River Tlinglit First Nation (TRTFN) participated actively in the environmental assessment process for the Tulsequah Chief Project. The detailed case study in Section 12 of this toolkit describes the EA process and TRTFN’s participation in detail.

In addition to their active participation in the joint federal and provincial environmental assessment of the mine re-opening, the TRTFN also negotiated an interim agreement with the proponent that included funds that allowed the TRTFN to conduct an independent environmental review. In return, the proponent received access to land use information that TRTFN had, which it needed to complete its environmental assessment.

TRTFN carried out a coordinated independent assessment of some materials provided in the EA. They retained as many as five technical experts who were contracted for specialized, focused work. The five technical reports served to support TRTFN’s participation in the EA meetings and were referred to in submissions made by the First Nation throughout the process.

In addition to numerous submissions, TRTFN eventually submitted their own Recommendations Report to the EAO and ministers. Neither the EAO nor the ministers took these recommendations into account in their assessment of the project or their decision to grant the environmental assessment certificate. However, in a subsequent court action (a judicial review at the BC Supreme Court), both the active participation of the TRTFN throughout the process and their clearly stated concerns in their Recommendations Report influenced the court ruling in favour of the TRTFN.

This case study illustrates the potential for an independent assessment to significantly contribute to a First Nation’s effectiveness in a complex EA process. The decision of the courts validated the approach or strategy of continued “participation” throughout the established EA processes, including commenting on any recommendations reports to be submitted to decision-makers. For more details, see **Section 12**.

View the TRTFN Recommendations Report at: http://www.eao.gov.bc.ca/epic/output/html/deploy/epic_document_72_2674.html

Continued participation in an established EA will enhance the strength of your First Nation's submission and the requirement of the decision-makers to seriously consider the material you are submitting. Not participating and submitting material may result in it not being fully considered by a decision maker. The best potential for protecting your Aboriginal rights and title and treaty rights may be to fully participate. It is advisable to stay involved in the EA even if your concerns are not being addressed. You need to stay for a number of reasons including those discussed earlier in this section.

Examples of project assessments where First Nations conducted independent assessments include:

- the Diavik Diamond Mine where the Tli Cho (Dogrib) First Nation opted out of the federal process and conducted an independent EA
- the Tulsequah Chief Project where the Taku River Tlingit First Nation conducted several independent studies and made their own recommendation to the ministers while also continuing their participation in the formal EA process

See the case studies on page 35 and 36 in this section for further details.

POST-APPROVAL PROCESSES

Project approvals, especially in the provincial EA process, will usually be issued with terms and conditions.

These may include:

- applications for additional permits and authorizations that the proponent may require for the project

- monitoring and follow-up programs
- compliance monitoring and enforcement
- on-going consultation

Negotiate or at least clarify the need to negotiate your First Nation's involvement in post-approval processes. Agreements with regulatory agencies and proponents in the early part of the EA process should reference post-approval processes and set out the need to have your First Nation involved. The extent of your involvement in post-approval processes will likely be linked to the criteria used for determining the level and scope of your First Nation's participation in an EA. Agreements are typically negotiated prior to project approval. See **Section 10 – Development Agreements** for a discussion of terms to consider negotiating with proponents for the post-approval stage and throughout the life of the project.

See **Section 9 – Follow-up Programs** for details on participating in monitoring and follow-up programs.

See **Post-certificate Activities** on page 19 of **Section 4 – British Columbia's Environmental Assessment Process** for processes that occur under *BCEAA*. See **Follow-up** on page 18 and 23 of **Section 5 – Canada's Environmental Assessment Process** for specifics of *CEAA* post-approval processes.

▶ DEVELOPING YOUR OWN EA PROCESS

WHY DEVELOP YOUR OWN PROCESS?

After your First Nation has participated in a federal, provincial or joint EA, you may decide to develop your own EA process or policy, based on your experience. The process or policies can be used for subsequent decision-making regarding activities in or near your territory. Developing your own process helps to maintain the capacity that was developed through participating in an EA process. It can also help to increase capacity by creating awareness in the community.

Developing your own EA process can also provide clarity and consistency for First Nation's leadership about how to effectively conduct project assessments. Having a formal, documented process can also be helpful to proponents, as it can provide them with some understanding of your community's process and how best to initiate consultation. In turn, it can be beneficial for your community to develop effective working relationships with proponents. Be aware that your First Nation's EA process can evolve over time – or will likely be refined as new lessons are learned.

STEPS TO DEVELOPING YOUR OWN PROCESS

The following is an outline to help you translate your experience into a policy framework that could be adopted by your First Nation government for assessing new projects.

1. Document the steps you went through including:
 - what you did
 - how much time it took
 - resources you required
 - the product or outcome of the process

2. Think about the lessons you learned and evaluate the process you followed. It may help to ask the following questions:
 - At what stage of the EA process did your First Nation become involved and did this influence your effectiveness?
 - What were the timelines and were you able to work effectively within the timelines?
 - Was communication and consultation within your community effective, and what particular aspects or consultation activities worked the best?
 - Did you develop an interim agreement with the proponent? If you did, did it meet your First Nation's needs and provide adequate protection of your interests? What should you do differently next time? Would there be any differences for a different type of project.

- Did you negotiate a development agreement with the proponent? If you did, how successful is its implementation to date? What worked and didn't work?
 - Did you negotiate the details of your First Nation's participation in the provincial, federal or joint review process? What worked or didn't work about your involvement in the review process?
 - Did you have the appropriate resources to participate effectively? If not, what type of resources would have enhanced your involvement and ability to protect your interests?
 - Did you provide written or oral submissions and were they effective in representing your issues and concerns? How could those submissions be strengthened?
 - Did you work with allies and were those alliances helpful to furthering your interests?
 - If you hired technical or legal assistance, was it valuable and in what ways? If you did not have this type of assistance, were there areas where you would have found it helpful?
 - Were your First Nation's interests adequately represented and addressed in the project decision and the terms and conditions of the project approval? Why or why not?
 - Overall, which strategies worked most effectively?
3. Evaluate whether any of the strategies you used during a particular step in the process requires a different approach.
 4. Refine your description of the process based on your evaluation and then prepare a written draft policy statement for conducting project assessments.
 5. Distribute the draft policy statement for internal review to individuals or groups within your First Nation (technical staff, leadership and community members, as appropriate), and seek their feedback for refining the draft.
 6. Evaluate feedback and revise the draft to reflect the feedback received.
 7. Submit the draft policy to the community leadership for further action.

OTHER OPTIONS FOR DEVELOPING YOUR OWN EA PROCESS

There are a number of opportunities for BC First Nations to develop formal EA laws that would have application in a range of contexts.

Treaty Negotiations

In the BC treaty process, environmental assessment law-making may be included as a topic for negotiation. In a treaty, a First Nation's EA law-making provisions would apply on treaty settlement lands, and would exist alongside federal or provincial environmental

assessment laws in BC. To date, only the Nisga'a have negotiated a treaty that contains EA law-making provisions; these will take effect on Nisga'a Lands, once the Nisga'a have enacted their EA legislation. (See the Nisga'a Lisims Government website for additional information on the Nisga'a treaty <http://www.nisgaalisims.ca/treaty.html>)

First Nation Land Management Framework Agreement

In 1998, 14 First Nations and Canada entered into A Framework Agreement on First Nation Land Management (the *Framework Agreement*). In 1999, Canada ratified the *First Nations Land Management Act (FNLMA)*, which is the formal legislation that brings into effect the *Framework Agreement*. In May 2003, the *FNLMA* was amended to include 22 more First Nations. Five of the original 14 signatory First Nations, and eleven of the 22 First Nations who were added in 2003, come from BC (total of 16 signatories from BC).

Under the *FNLMA*, a First Nation will have authority over natural resources and revenues on its reserve land base. To give effect to the *Framework Agreement*, each signatory First Nation is required to adopt a land code that will empower them to enact their own laws in areas such as environmental assessment and to enforce those laws.

Thus, the opportunity for a First Nation to enact its own EA laws exists for First Nations who have opted into the *FNLMA*, who have ratified a land code and who have subsequently enacted an environmental assessment process. See page 9 of Section 6 for more information on the *FNLMA*.

Section 59(1) of the Canadian Environmental Assessment Act

Under section 59(1) of the new *Canadian Environmental Assessment Act*, Band Councils can develop environmental assessment regulations for projects on reserve. For example, regulations could cover "on-reserve" proposed projects initiated by independent businesses, Aboriginal corporations or where provincial funding is involved. In addition, under section 59(1), different regulatory regimes to be developed for different Band Councils depending on their preferences, circumstances, location and capacity. Contact the Canadian Environmental Assessment Agency for more information on developing EA regulations for on-reserve projects under section 59(1) of *CEAA* (www.ceaa-agce.ca).

SUMMARY

This section describes elements that are common to effective First Nation participation in federal or provincial EA processes conducted in BC. When deciding on your First Nation's level of participation in an EA it is important to consider the potential impacts that the proposed development will have on your First Nation's current and historical land use. You will also need to consider the extent of impacts to your First Nation and the potential for the project to limit your First Nation's Aboriginal rights and title and treaty rights. In addition, your First Nation must also consider the benefits, limitations, risks, costs, responsibilities and capacity issues. These should be looked at in relation to your community's over all goals and objectives and specifically in relation to the project being reviewed.

Early involvement is important since your First Nation will have more opportunities to articulate your concerns, interests and Aboriginal rights and title and treaty rights that will be impacted by the project. In addition, early involvement provides your First Nation early opportunity to communicate your requirements for involvement in the EA and therefore influence the process.

Early engagement with the proponent is also important in terms of scoping for the EA and the potential effects of the project. This will also provide opportunities for your First Nation to influence the design and mitigation. It is key that your First Nation have clear information about potential impacts and benefits for your community. The most current

information will be available from the proponent and relevant government agencies. An interim agreement with the proponent can help to define a good working relationship throughout an EA for a project.

It is important to secure adequate funding to effectively participate in an EA. Funding may be available from proponents, government funding programs for specific regulatory processes, DIAND programs and through alliances with non-profit organizations. Consider forming alliances with groups or organizations that have similar goals – this may improve funding opportunities and contribute to the overall effectiveness of your participation. Legal and technical assistance can also be very helpful in various aspects of the process.

As you participate in the EA process it is important to assess both the environmental acceptability of the project and the potential benefits from your community's viewpoint. Keep these two perspectives in mind as you negotiate and consult with the proponent and government agencies, in your review of EA materials and in your written and oral submissions to the process.

Once an EA is completed it is valuable to document your experience for the benefit of your First Nation representatives, decision-makers and broader community members. Developing a formal policy can help you to maintain and build capacity and will provide an effective decision-making tool for use in future assessments.

▶ ENVIRONMENTAL ASSESSMENT FROM A FIRST NATION PERSPECTIVE – CHECKLIST

FUNDING FOR PARTICIPATION

Investigate potential funding sources:

- proponent
- BC Environmental Assessment Office (for provincial or joint federal-provincial assessment)
- Canadian Environmental Assessment Agency participant funding program (for CEAA comprehensive studies, mediations, panel reviews and joint federal-provincial reviews)
- DIAND Programs
 - Resource Access Negotiation Program
 - Resource Partnerships Program
- Non-Governmental Organizations
 - Environmental-Aboriginal Guardianship through Law and Education (EAGLE)
 - Sierra Legal Defense Fund
 - West Coast Environmental Law Association
 - Tides Canada
- consider alliances with non-governmental organizations and other First Nations in applying for funding

Budget Considerations

- dedicating one or more staff to coordinating your First Nation's involvement in the EA including:
 - coordinating community meetings and information sessions
 - coordinating technical and legal advisors as needed
 - coordinating First Nation decision-making meetings
 - fundraising for EA participation
 - coordinating and fundraising for additional studies
 - travel for meetings
- development agreement negotiations
- participation in field studies associated with the EA
- reviewing studies conducted by the proponent or government agency in relation to the project
- participating in and conducting traditional use and traditional knowledge studies
- site visits (can be a substantial cost if project location is isolated)

- honorariums or wages for First Nation representatives,
- administration costs, office space etc... if new role created

STRATEGIES FOR EFFECTIVE PARTICIPATION

Consider including the following strategies:

- identify your First Nation's goals and objectives
- conduct a project assessment from your First Nation's perspective
- engage the proponent
- work with government agencies
- build strategic alliances
- get expert legal assistance when needed – situations to consider legal help include:
 - when you are negotiating agreements or contracts including:
 - interim agreements with a proponent
 - development agreements or, impacts and benefits agreements with a proponent
 - revenue-sharing arrangements with a proponent
 - EA participation agreements with federal or provincial agencies
 - hiring technical experts
 - hiring researchers to conduct studies such as traditional knowledge, traditional land use, socio-economic or other community-based studies
 - when considering how to protect your traditional knowledge and other important community information
 - if you need advice about statutory or procedural issues
 - to help you prepare for hearings or review panels
 - if your First Nation is considering challenging an EA decision through a court action
- get expert technical assistance when needed – situations to consider technical help include:
 - if you do not have the time or the expertise to evaluate a technical aspect of the EA or project application
 - when there is potential for significant community economic, social, health or cultural impacts
 - when there is potential for significant impacts to your First Nation's land use patterns and harvesting activity
 - when the EA predicts impacts on key aspects of the environment such as wildlife and fish habitats

[ENVIRONMENTAL ASSESSMENT FROM A FIRST NATION PERSPECTIVE]

- when there are aspects of the environmental impact assessment that you feel are lacking information or do not provide information to alleviate your community's concerns or protect your First Nation's interests
- the proposed project has new or unproven technology
- consider dispute resolution, when needed
 - negotiation
 - judicial review

PREPARING SUBMISSIONS

Consider including the following in your written submissions:

- the potential impacts of the proposed project on your First Nation's territory and traditional uses of your land
- the potential impacts of the project on your First Nation's Aboriginal rights and title, future land use planning and ability to negotiate a meaningful Treaty
- the potential impact of the proposed project on the sustainability of your First Nation
- issues regarding potential environmental, economic, social, health and cultural impacts of the proposed project
- issues or suggestions that you may have identified with respect to any mitigation plans that have been developed by the proponent
- specific comments on the proponent's written submissions
- studies that you want considered in relation to potential impacts, such as impacts on waterbodies, air quality, wildlife
- community economic objectives (clear articulation of whether the project contributes to or diminishes those objectives) in relation to the proposed project
- alternatives to the proposal to be assessed or considered
- any cumulative impacts (induced by the project directly or indirectly) of concern

ENGAGING THE PROPONENT

Consider discussing the following in your initial meeting with the proponent:

- how the proponent can assist your First Nation in participating effectively in the environmental assessment, including access to information regarding the project and funding required
- what options are being considered by the proponent for designing the proposed project and its operations
- what information the proponent can provide to your First Nation at present and during the course of the environmental assessment

[ENVIRONMENTAL ASSESSMENT FROM A FIRST NATION PERSPECTIVE]

- potential requirements for your First Nation and the proponent to cooperate to conduct traditional knowledge or traditional use studies funded by the proponent
- opportunities for your First Nation to direct, conduct or participate in baseline studies, such as fish or wildlife studies that recognize and incorporate your First Nation's local and traditional knowledge
- the importance of fish and wildlife to your culture and the potential impacts of the project to your First Nations Aboriginal rights and title

Consider asking the proponent to provide information forums for community members. Here are some possible ways:

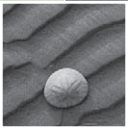
- open houses
- community meeting
- meetings with specific groups in the community (e.g. Leadership, Elders, First Nation businesses)
- site visits
- written project descriptions

If you are negotiating an interim agreement with a proponent consider including the following:

- communication protocol (set of rules)
- funding and protocols for traditional knowledge studies and traditional use studies
- provisions for access to relevant First Nation information by the proponent under terms and conditions acceptable to both parties, and the converse
- provisions for the First Nation government to make a conditional decision about the environmental acceptability of the proposed project
- provision of clear and certain acknowledgement from the proponent entering into the agreement does not prejudice the ability of the First Nation to oppose the project
- a negotiating protocol for a longer-term development agreement
- provision for individual First Nation members or private businesses to take advantage of existing employment or business opportunities that the proponent may offer during the project assessment period or before it is permitted or licensed to proceed

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 4 – BRITISH COLUMBIA'S ENVIRONMENTAL ASSESSMENT PROCESS



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

▶ **Section 4 – British Columbia’s Environmental Assessment Process**

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

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Cover photo courtesy of Tourism Victoria

This section describes the EA review process that is prescribed under the *British Columbia Environmental Assessment Act (BCEAA)*. It outlines when a review is required and the specific steps required for the *BCEAA* process. Consultation requirements and opportunities for funding First Nation participation are described as well as opportunities and strategies for participating effectively in the provincial process. Decision-making in the provincial process and strategies for protecting First Nations' interests in a project decision are described. Activities that take place after a proponent receives an environmental assessment certificate are also discussed.

This section includes the following:

- What is *BCEAA*?
- Steps in a *BCEAA* Assessment
- First Nation consultation
- Provincial funding for participation
- First Nation participation in a provincial review process
- Project decision
- Post-certificate activities

Flow Chart of Project Review Process 13

BC Environmental Assessment Office contact information:

www.eao.gov.bc.ca

Victoria
250-356-7441

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1-800-663-7867

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▶ WHAT IS THE *BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT (BCEAA)*?

QUICK TIP

It is important for your First Nation to request, negotiate and clearly define your participation in an assessment in which you choose to be involved (see *Negotiating Participation* on page 12 of this section).

The *British Columbia Environmental Assessment Act (BCEAA)* requires environmental assessments for certain types of projects. If a proposed project is covered by the *Act*, the proponent must conduct an environmental assessment and submit an EA application for an environmental assessment certificate. The environmental assessment certificate, if issued, sets out the terms and conditions under which the project may proceed.

A provincial government agency, the Environmental Assessment Office (EAO) coordinates *BCEAA* project reviews. The Environmental Assessment Office reports to the Minister of Sustainable Resource Management.

The *Guide to the British Columbia Environmental Assessment Process*, prepared by the Environmental Assessment Office, identifies four main elements of environmental assessment:

- opportunities for all interested parties to identify issues and provide input
- technical studies of the potential environmental, social, economic and other effects of the proposed project
- identification of ways to prevent or minimize undesirable effects and enhance desirable effects
- consideration of the input of all interested parties in compiling the assessment findings and making decisions about project acceptability

BCEAA was originally proclaimed in July 1995 but it has since been repealed and a new *Act* was proclaimed in December 2002. Prior to 1995, industrial projects in BC were reviewed by different processes and regulatory agencies. *BCEAA* allows for a coordinated review. The 1995 *Act* also differs from the new *Act* with regard to First Nation participation. In the original *Act*, there was a statutory requirement and specific procedures as to how First Nations were to be consulted, including participation in a government-to-government Project Committee. In the revised *Act*, there is no statutory responsibility for First Nation consultation. There is however, a provincial First Nation consultation policy which all government agencies must follow (see *First Nation Consultation* on page 9 of this section). The updated *Act* gives more discretion to the Environmental Assessment Office project director in determining the procedures of each assessment so any procedures related to First Nation participation or consultation may be included in a formal procedural order and derive statutory status. Therefore, it is important for your First Nation to request, negotiate and clearly define your participation in an assessment in which you choose to be involved (see *Negotiating Participation* on page 12 of this section).

WHEN IS AN EA REQUIRED?

The following is a description of the EA process under *BCEAA*. For your reference, when *BCEAA* or regulations passed under that *Act* are referred to, the relevant section of the *Act* or regulation is noted in brackets. A copy of the *Act* and its regulations is available on the Environmental Assessment Office website (http://www.eao.gov.bc.ca/statreg/stat/E/02043_01.htm).

Reviewable Projects

Under *BCEAA*, an EA is required for projects that are classified as reviewable as defined in the Reviewable Projects Regulation (Reg. 370/2002) which classifies projects by type and size of the project.

Reviewable projects are within the following eight sectors:

- 1) industrial (chemical manufacturing, metals, forest products)
- 2) energy (power plants, transmission lines, pipelines)
- 3) mining (coal mines, mineral mines, sand and gravel pits)
- 4) water management (dams, groundwater withdrawal, diversions)
- 5) waste management (landfills, specialized waste facilities)
- 6) food processing (fish processing, meat processing and packing)
- 7) transportation (highways, ferry terminals, marine ports)
- 8) tourism (large golf courses, marinas and ski resorts)

A reviewable project includes the facilities at the main site of the project and any offsite facilities and activities related to the project that the Environmental Assessment

Office may designate as part of or within the scope of, the project.

A project is potentially reviewable if:

- it fits within one of the sectors described in the Regulation
- has the characteristics specified in the Regulation
- meets or exceeds the size threshold set out in the Regulation

However, the *Act* provides discretion to the Environmental Assessment Office to determine if the project will require a review.

In some cases, the Environmental Assessment Office may decide not to conduct an environmental assessment on a reviewable project even if it would fit within the criteria of the Reviewable Projects Regulation.

The Guide to the British Columbia Environmental Assessment Process states that this may occur if:

- The project is a relatively minor change to a project "grand-parented" under the former *BCEAA*.
- The project is a type where practices to address the primary impact concerns have been codified or standardized in regulations or rules of practice.



QUICK TIP

There are checklists at the back of many of the sections of this toolkit. These can be helpful for planning and tracking activities. Consider making your own checklists or modifying the checklists in the toolkit.

- The primary purpose of the project is to implement an environmental impact management strategy that has been required under another process. For example, if a project has been assessed under the *Canadian Environmental Assessment Act* and an outcome of that assessment is a mitigation measure (e.g., construction of additional water storage at a dam to assure minimum flows for fish) that is also a reviewable project.
- The Environmental Assessment Office considers that no significant adverse environmental, economic, social, heritage or health effects will result from the project with its planned mitigation.

If the Environmental Assessment Office decides against conducting an assessment, it can still attach conditions to the project. These might include requiring the proponent to undertake specified consultation measures before proceeding with the project or to provide specified information that would not otherwise be covered by regulatory requirements.

Project Referred to the Minister

The Environmental Assessment Office can also refer the project directly to the Minister of Sustainable Resource Management who then sets the scope, procedures and methods for the assessment. In these circumstances, the Environmental Assessment Office would not proceed with an EA unless under the direction of the minister.

This might occur when:

- another forum for conducting the assessment is considered more appropriate, such as an independent commission of inquiry
- if it would help harmonize the assessment with another level of government

Since the Environmental Assessment Office will rarely refer an EA to the minister, this section of the toolkit will refer only to the Executive Director or the Environmental Assessment Office as the body that conducts EAs. See Sections 14, 15 and 17 of *BCEAA* for further information on the process for an EA under the direction of the minister.

Minister Designates a Project as Reviewable

The Minister of Sustainable Resource Management also has the power to designate a project as reviewable under *BCEAA* even if it is not considered reviewable under the Reviewable Projects Regulation (*BCEAA* Section 6).

The minister may designate a project as reviewable if:

- the project has or may have a significant adverse effect
- the designation is in the public interest

The minister may only designate a project as a reviewable project if the project has not been substantially started at the time of designation. Therefore it is important to be aware of activities occurring within your traditional territory.

If your First Nation has concerns about the potential impacts of a project that does not appear to fall under the Reviewable Projects Regulation, you

can make a request in writing to the Minister of Sustainable Resource Management to have the project designated as “reviewable” under this section of the *Act* if the project has not been substantially started. The chances of being successful in such an application would likely be enhanced by having supportive allies such as local governments or interest groups.

Proponent Requests a Project to be Designated as Reviewable

The proponent of a project may apply to the Environmental Assessment Office to have the project designated as reviewable (*BCEAA* Section 7) even if the project is not considered reviewable under the Reviewable Projects Regulation or designated as a reviewable project by the minister (*BCEAA* Section 6). The Environmental Assessment Office will consider the reasons for the request and decide whether or not to make the designation.

For example, the Ministry of Transportation, the proponent for the Sea to Sky (Vancouver to Whistler) Highway Improvement Project, successfully applied to have the proposed project designated as a reviewable project. This project was undergoing a *BCEAA* review as of January 2004.

First Nation Requests a Project to be Designated as Reviewable

If your First Nation believes a project is “reviewable” under the Reviewable Project Regulation, but the Environmental Assessment Office is not conducting an EA, you should advise the Environmental Assessment Office in writing of the reasons you believe *BCEAA* applies

and ask the Environmental Assessment Office to reconsider whether the project is reviewable. You may also apply to the minister to designate the project as “reviewable” under *BCEAA*. (See page 4, **Minister Designates a Project as Reviewable**). If the Environmental Assessment Office or the minister still will not review the project under *BCEAA* you may consider obtaining legal advice on how to compel an EA under *BCEAA* through the BC Supreme Court.

Joint Reviews

In some circumstances, the Environmental Assessment Office may enter into an agreement with another jurisdiction to cooperatively conduct an EA of a project. The minister may enter into such an agreement under Section 27 of *BCEAA*. Section 27(2) of *BCEAA* allows the minister to enter into an agreement regarding any aspect of environmental assessment with any organization of British Columbia or other jurisdiction. Arguably, then, the Environmental Assessment Office or the minister could undertake an environmental assessment of a project jointly or cooperatively with a First Nation (under Section 27 of *BCEAA* or otherwise).

There is provision in *BCEAA* for a joint provincial-First Nation review with the Nisga’a Lisims Government under the *Nisga’a Final Agreement (BCEAA* Section 29). A joint review could occur once Nisga’a established its own EA laws and if a proposed project triggered *BCEAA* and also potentially affected Nisga’a lands.

See **Section 6 – Joint Review Processes** for further information.

QUICK TIP

If your First Nation thinks that an EA should be conducted for a specific project, you should clearly outline your reasons in writing. Reasons could include issues such as the likelihood of negative environmental impacts, impacts to harvesting activities and impacts to important cultural or spiritual sites.

QUICK TIP

If your community decides to participate in an EA under *BCEAA* it is important to provide your view on the potential “effects” of the project to the EAO as early in the process as possible.

Projects not Assessed under *BCEAA*

Projects not specified in the Reviewable Projects Regulation or those that are smaller in size than the threshold set out in the Regulation are not assessed under *BCEAA*. In addition, anything that is a forest practice as defined in the *Forest Practices Code of British Columbia Act*, including timber harvesting and silviculture operations, is specifically excluded from the EA process (*BCEAA* Section 5).

These projects must still comply with provincial and local government permitting, licensing and land use approval processes. Even if there is no environmental assessment under *BCEAA*, the common law and the Provincial Consultation Guide require the government agencies making decisions on these activities to consult a First Nation if an action might impact the First Nation’s Aboriginal rights or title or treaty rights. It may be worthwhile for your First Nation to provide comments on these types of applications, as it may be the only opportunity your First Nation has to express any concerns related to the proposed project.

WHAT “EFFECTS” NEED TO BE “ASSESSED”?

BCEAA does not define “environmental effect” or “effect”. The EAO is given the discretion under the *Act* to determine the scope of the EA including the potential effects to be considered in the assessment. (*BCEAA* Section 11[1]). Usually, this is decided after consultation with the proponent, First Nations, the public and other stakeholders. However, when deciding whether or not an environmental assessment certificate is required for a reviewable project, the EAO must determine if the reviewable project may have “significant adverse environmental, economic, social, heritage or health effects”. This suggests these are the types of effects that should be considered in an assessment under the *Act*. Impacts on Aboriginal or treaty rights or Aboriginal title are likely “social” or “heritage” impacts. First Nation communities will also have “economic” and “socio-economic” issues that should fall under this section. If your community decides to participate in an EA under the *Act* it is important to provide your view on the potential “effects” of the project to the EAO at the beginning of the EA process. Nevertheless, as discussed later in this section and in **Section 3 – Environmental Assessment from a First Nation Perspective**, impacts on Aboriginal interests need to be taken into account through consultation and accommodation discussions.

STEPS IN A *BCEAA* ASSESSMENT**STEPS IN THE PROCESS**

The steps in a typical EA under *BCEAA* are described below. If a project or activity undergoing an EA may impact your community, your First Nation should be given the opportunity to be involved at each step in the process. See the **First Nation Participation in a Provincial Review Process** on page 12 of this section for information on participation in each of these steps.

Pre Application Stage:**Step 1 – Determine if the Environmental Assessment Act Applies**

The proponent submits information to the Environmental Assessment Office about a proposed project. The Environmental Assessment Office confirms whether or not the project is a subject to review under the Reviewable Projects Regulation or *BCEAA*.

Step 2 – Determine the Review Path

The Executive Director of the Environmental Assessment Office determines whether an environmental assessment will be required for the proposed project (*BCEAA* Section 10).

Step 3 – Determine How the Assessment Will be Conducted

If an environmental assessment is required, the Environmental Assessment Office issues a procedural order determining the scope of the project and setting out procedures and methods for conducting the assessment (*BCEAA* Section 11).

Step 4 – Develop and Approve Application Terms of Reference

The proponent prepares draft terms of reference for the EA application consistent with the procedural order, setting out the information requirements and how they will be met. The Environmental Assessment Office approves the terms of reference.

Application Stage:**Step 5 – Prepare and Submit the Application**

The proponent prepares and submits an EA application for an environmental assessment certificate based on the terms of reference. The Environmental Assessment Office determines whether or not the EA application

contains the required information and, if it does, accepts the EA application for review (*BCEAA* Section 16).

Step 6 – Review the Application

The Environmental Assessment Office proceeds with the review of the EA application in accordance with its procedural order. Typically, this includes a comment period where First Nations and the public can comment on the EA application (*BCEAA* Sections 11 and 17).

Step 7 – Prepare the Assessment Report and Refer to Ministers

On completion of the review, the Environmental Assessment Office prepares an assessment report and recommendations and refers the proponent's EA application to the ministers (Ministers of Sustainable Resource Management and Water, Land and Air Protection and the responsible minister) for a decision (*BCEAA* Sections 17[1] and [2]).

Step 8 – Decide to Issue/Not Issue a Certificate

After considering the assessment report and the recommendations and any other information relevant to the public interest, the ministers must decide whether or not to issue the environmental assessment certificate or require further assessment (*BCEAA* Section 17[3]).

TIME LIMITS

Some of the activities in the *BCEAA* process have prescribed time limits and others are at the discretion of the Environmental Assessment Office or the minister.

The Prescribed Time Limits Regulation (Reg. 372/2002) identifies the following time limits:

- the Environmental Assessment Office to determine if the EA application is complete and, if so, decide whether or not to accept it for review under Sections 16(3) and (4) of *BCEAA* (30 days)
- Environmental Assessment Office to review EA application, complete assessment report and refer the application to the ministers under Section 16(5) of *BCEAA* (180 days)

QUICK TIP

There are several places in this toolkit where key points are bolded. Consider highlighting or making notes to indicate points that are important to you.

- decision by the ministers on the EA Certificate under Section 17 of *BCEAA* (45 days)
- the proponent to prepare the EA application (within 3 years from the terms of reference, Section 23[1] of *BCEAA*, Section 5 of the Prescribed Time Limits Regulation)
- information the Executive Director requires from the proponent for the EA application under Section 16(2) of *BCEAA* (within 3 years of an information request from the Environmental Assessment Office)

The public comment period on the EA application is not specified in regulation but is typically 30 to 75 days.

Discretion on Time Limits

The Environmental Assessment Office may suspend the time limit for reviewing the EA application if:

- it requires the proponent to provide additional information
- the review is delayed at the request of the proponent
- if the review is delayed because of an action taken or not taken by the proponent (*BCEAA* Section 24[2])

A suspension of the time limits may last up to three years, unless the Environmental Assessment Office orders a different suspension period (Section 6(1) of the Prescribed Time Limits Regulation (Reg. 372/2002). The Environmental Assessment Office (or the Minister of Sustainable Resource Management if an assessment has been referred to the minister) may suspend or terminate an EA if the proponent does not provide the required information requested from the EAO or minister within the prescribed time period (section 24[3]).

The minister may suspend an EA until the outcome of any other hearing, investigation, inquiry or other process that is material to the EA (*BCEAA* Section 30).

The minister may extend any of the time limits in the *Act*, even if the time in which a particular step must be completed has expired (*BCEAA* Section 24[4]). The minister may attach conditions to the extension.

Time extensions may be granted for the following reasons:

- to identify environmental impacts, resolve technical issues, or review effectiveness of mitigation measures
- to address First Nations concerns
- to ensure fair and effective assessment
- to resolve federal-provincial issues
- to allow the Environmental Assessment Office to consider public comments
- to allow ministers further time to consider the EA application or recommendations from the EAO

Requests for Extension of Time Limits

The Environmental Assessment Office is required to adequately consult with First Nations whose Aboriginal rights and title and treaty rights may be impacted by a project or activity undergoing an EA under *BCEAA* (see *First Nation Consultation* below and *Section 3 – Environmental Assessment from a First Nations Perspective*). An important part of this obligation on the Environmental Assessment Office is to ensure adequate time is provided for First Nation’s participation in the process. **If the timelines established for each step of the assessment process do not give enough time to participate effectively, your First Nation can request an extension of the timelines set by the Environmental Assessment Office (*BCEAA* Section 24[4]). Requests for extensions should be in writing and the reasons for the extension stated clearly.**

While time can be extended, the EAO is bound by legislated timelines and experience has shown that it is best to engage early so as to avoid conflicts over time.

Project Information

The Environmental Assessment Office maintains a Project Information Centre to provide public access to project information. It lists all projects under review and provides the status of each review. The executive director of the Environmental Assessment Office is responsible for deciding what information will be available

through the Project Information Centre and in what form the information will be made available (*BCEAA* Section 25).

Typical information at the Project Information Centre includes:

- public notification of reviews
- draft application terms of reference
- project applications
- review comments (both agency and public)
- proponent responses
- project review requirements
- time limits



COMMON LAW DUTY

There is a common law duty on the provincial government which is born by the Environmental Assessment Office to consult with First Nations when making decisions about any project or activity that may affect Aboriginal rights and title and treaty rights and to attempt to accommodate those Aboriginal interests in its decision under the *BCEAA*. Details on how these duties have been defined through the courts are described in detail under *Court Identified Requirements* on page 2 of *Section 3 – Environmental Assessment from a First Nation Perspective*.

This section of the toolkit, therefore, discusses only those consultation requirements set out in *BCEAA*, its regulations and government policy.

The Project Information Centre for projects reviewed under *BCEAA* is located at:
 2nd Floor - 836 Yates St.
 Victoria BC

Phone: (250) 356-7441
 Fax: (250) 356-7440
 Toll free calls, through Enquiry BC
 Victoria (250) 387-6121
 Vancouver (604) 660-2421
 Elsewhere in BC
 1-800-663-7867

Hours 8 am to 5 pm
 Monday to Friday

Mailing Address:
 Project Information Centre
 Environmental Assessment Office
 P.O. Box 9426
 Stn. Prov. Gov.
 Victoria BC V8W

EAO website
www.eao.gov.bc.ca

BC PROVINCIAL POLICY

British Columbia has prepared a *Provincial Policy for Consultation with First Nations* (October, 2002). This policy is based in part on BC's view of the court-identified requirements to consult First Nations if their rights or title may be infringed or limited. This policy requires that government agencies consult with First Nations about their Aboriginal interests unless a "pre-consultation assessment" indicates that consultation is not required. This policy applies to the Environmental Assessment Office conducting an EA under *BCEAA*.

The policy identifies consultation principles and sets out the following stages in the consultation process:



Lheidli T'enneh Community Treaty Council members and treaty office staff on a site tour of a proposed groundwater collector well project in Prince George in June 2003. Photo courtesy of Teresa Morris, BC Environmental Assessment Office

- Pre-consultation assessment of which First Nations may be affected by the Government decision.
- Stage 1 – Initiate consultation.
- Stage 2 – Consider the impact of the government-decision on Aboriginal interests.
- Stage 3 – Consider whether any likely infringement of Aboriginal interests could be justified in the event that those interests were subsequently proven to be existing Aboriginal rights and/or title.
- Stage 4 – Look for opportunities to accommodate Aboriginal interests and/or negotiate resolution.

Consultation methods are also identified, including:

- meetings and correspondence with First Nations
- exchanges of information related to proposed activities
- development and negotiation of consultation protocols
- site visits to explain the nature of proposed activities in relation to Aboriginal interests
- reviewing existing studies or conducting new ones, if appropriate
- participation in local advisory bodies
- combinations of the above

The Environmental Assessment Office applies this policy by involving First Nations that may be impacted by a project undergoing an EA in steps 3 to 7 of the EA process identified on page 7 of this section.

View the *Provincial Policy for Consultation with First Nations* (October, 2002) at http://www.gov.bc.ca/tno/down/consultation_policy_fn.pdf

BCEAA LEGAL AND POLICY CONSIDERATIONS

There is no specific provision in BCEAA regarding consultation with First Nations or accommodation of their Aboriginal interests in the EA process. The importance of consultation is recognized in the Act and the Environmental Assessment Office follows the *Provincial Policy for Consultation with First Nations* (see above).

In BCEAA assessments, the EAO applies the provincial policy for First Nation's consultation by:

- requiring the EAO and proponents to consult with First Nations
- notifying and sharing information with First Nations
- inviting First Nation participation in the review process
- providing funding for First Nation participation
- providing opportunities for comments on draft terms of reference for applications, applications and draft assessment reports
- possibly other accommodations (including project design and mitigation measures designed to prevent or reduce specific project impacts)

The provincial policy also recommends that proponents consult with First Nations. See the Environmental Assessment Office's document, *Supplementary Guidance to Proponents, Appendix 1, Guidance on Consulting with First Nations* (www.eao.bc.ca).

The Environmental Assessment Office also encourages the inclusion of traditional knowledge in environmental assessments (see

Section 7 – Traditional Knowledge and Environmental Assessment for further information).

BCEAA has a Public Consultation Policy Regulation (Reg. 373/2002) that the Environmental Assessment Office takes into account when making a procedural order about who will be consulted in an environmental assessment and how the consultation process will take place.

The Regulation establishes general policies governing:

- public consultation by the proponent
- giving public notice of the proponent's consultation activities
- access to information through the project information centre
- formal public comment periods

The Regulation does not contain any specific provisions about consulting First Nations in whose territory a proposed project will be located. However, the regulation provides a general structure for consultation and access to EA information.

PROVINCIAL FUNDING FOR PARTICIPATION

If your First Nation's Aboriginal rights and title and treaty rights may be affected by a project undergoing a review under BCEAA, consider seeking funding to enable your full participation. Appropriate funding can help your First Nation to enhance or develop your capacity to participate effectively in EA processes and to secure expert legal or technical advice, if needed.

QUICK TIP

If your First Nation has concerns about a proposed project, it is important to engage in the discussions associated with the project as early in the process as possible, preferably in the pre-application stage.

Funds are available and may be requested from the Environmental Assessment Office. Other potential sources of funds are the proponent, Indian and Northern Affairs Canada programs, non-governmental organizations and foundations. It is advisable to prepare an initial budget prior to requesting funds from these sources (see **Funding for Participation in Section 3 – Environmental Assessment from a First Nations Perspective** for a list of budget items to consider).


FIRST NATION PARTICIPATION IN A PROVINCIAL REVIEW PROCESS
NEGOTIATING PARTICIPATION

A key to effective participation in a provincial EA process is to get involved in the pre-application period. This means getting involved prior to the issuance of the procedural order by the Environmental Assessment Office. Early involvement gives you the opportunity to influence the way the assessment is done and how your interests are addressed.

Negotiations with the Environmental Assessment Office should occur parallel to discussions with the proponent. It is important to also consult directly with the proponent as early as possible in the EA process. See **Engaging the Proponent in Section 3 – Environmental Assessment from a First Nation Perspective** for information on initiating consultation with proponents. Also, see **Section 10 – Development Agreements** for details on developing long-term agreements with proponents.

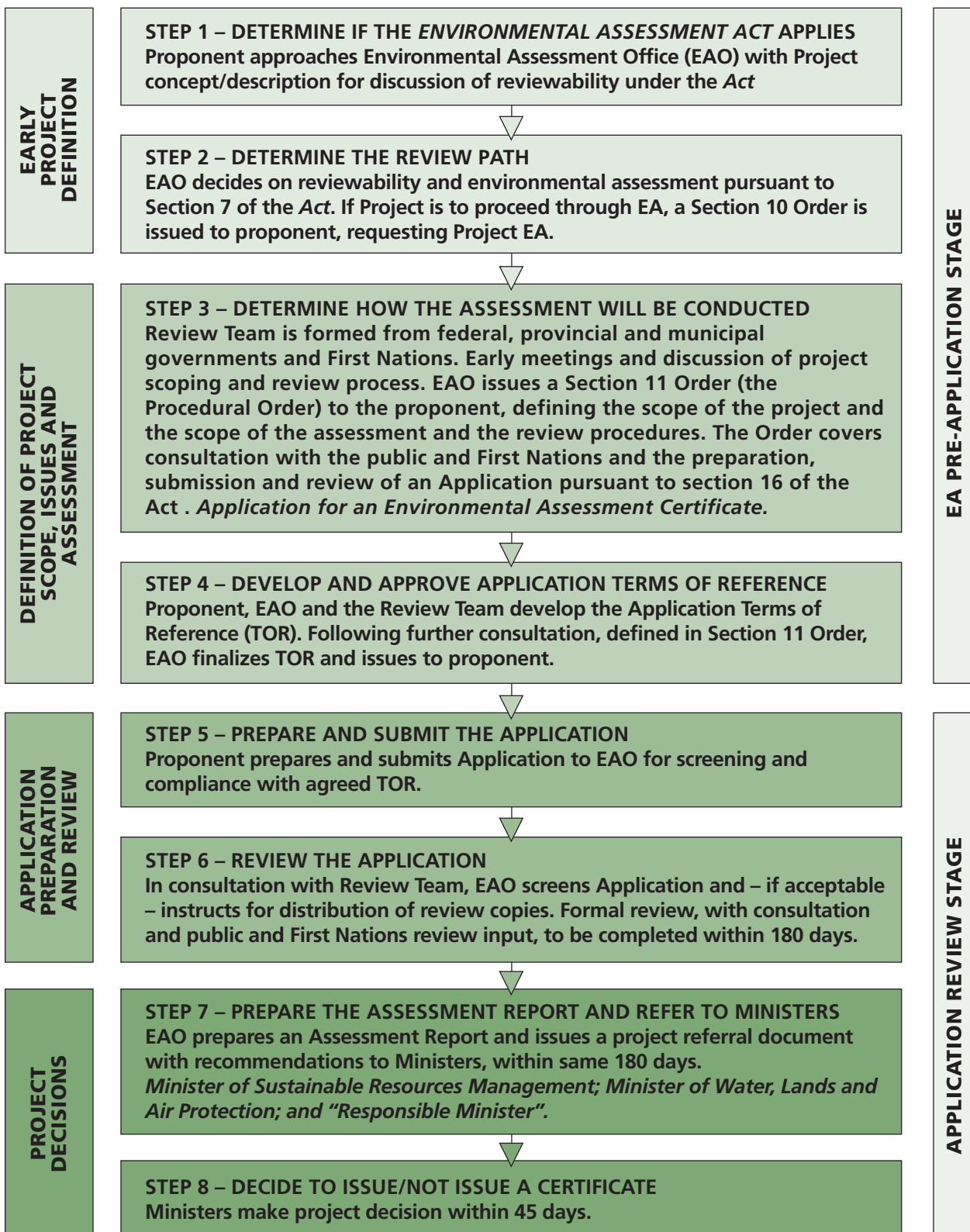
If you have decided to participate in an EA, inform the Environmental Assessment Office or the Minister of Sustainable Resource Management that you would like to negotiate the terms for your participation in the EA. The Environmental Assessment Office may enter into such arrangements informally or formally and in addition, Section 27 of *BCEAA* may provide another mechanism for doing so. You should document your agreed upon terms, either through a participation agreement or through terms set out in the procedural order.

You should also consider negotiating terms for participation that include funding and participation in specific aspects of the EA as described in the following sections (also see **Flow Chart of Project Review Process** on page 13 and checklist on page 24).

PROCEDURAL ORDER

The Environmental Assessment Office develops a procedural order that sets out the scope, procedures and methods to be used for a particular environmental assessment (*BCEAA* Section 11). The Environmental Assessment Office may change the procedural order in situations where the proponent modifies the project or if the Environmental Assessment Office believes a change is necessary to complete an effective and timely assessment (*BCEAA* Section 13).

BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT Flow Chart of Project Review Process



Adapted from BC Environmental Assessment Office flow chart.

QUICK TIP

If your First Nation is concerned about a proposed project in your traditional territory, ensure that you have input into the terms of reference for an application and EA review procedures (*BCEAA* section 11 - procedural order) for the EA of a project. This is one opportunity for you to ensure that the EA addresses your issues of concern and that timelines and review procedures are sufficient for your First Nation to conduct its own internal community consultation.

The level of detail contained in the procedural order will vary depending on the amount of information available at the time that the order is issued.

The procedural order may describe the following items:

- the on and off-site facilities and activities that comprise the reviewable project (the project "scope")
- the procedures and methods to be used in conducting the assessment
- the scope of the environmental assessment
- the potential effects to be considered in the assessment
- information required from the proponent in its EA application for an environmental assessment certificate
- information from sources other than the proponent, if any
- First Nations consultation requirements
- public consultation requirements
- time limits for activities in the assessment not otherwise covered by legislated time limits (*BCEAA* Section 11)

First Nations who may be affected by a project or activity that is being reviewed under *BCEAA* are usually invited to participate in the development of the procedural order or to provide their review comments. Typically, the Environmental Assessment Office will issue a draft procedural order for review and input. An effective way to participate is to provide written comments on the draft procedural order.

Consider including the following in your comments on the development or review of the procedural order:

- the geographic extent of your traditional territory
- the potential Aboriginal rights and title and treaty rights issues raised by the project
- the expectations of your First Nation about consultation with the Environmental Assessment Office and the proponent
- comments and suggestions on the facilities and activities that comprise the project
- comments and suggestions on the procedures and methods to be used in conducting the assessment
- comments and suggestions on potential effects to be considered in the assessment
- key issues and topics of interest to your First Nation that have not been noted
- any concerns you may have related to time limits

EA APPLICATION TERMS OF REFERENCE

In most cases the proponent will be required to prepare draft terms of reference for the environmental assessment.

The terms of reference are based on the procedural order and will set out the information that the proponent is required to include in the EA application including details of the following:

- project description
- project siting
- project rationale or purpose
- project alternatives
- regulatory framework
- consultation activities with First Nations
- use of traditional knowledge
- consultation activities with the public
- key issues and issue scoping
- baseline
- impact assessment methods
- spatial and temporal boundaries of the impact assessment
- measures to reduce or mitigate potential adverse effects
- operations plan
- closure plan
- environmental management plans
- cumulative effects assessment, if appropriate

The Environmental Assessment Office often provides opportunity for First Nations and the public to comment on the terms of reference for the EA application before they are finalized. It is worthwhile to provide written comments on the

terms of reference. This is an opportunity to get on the written record issues that are important to your community and your expectations regarding what should be covered in the EA application.

Examine the terms of reference to make sure that the level of detail required is appropriate and that all topics of interest to your community are covered.

It may be helpful to ask the following questions when reviewing the terms of reference:

- Is the level of detail requested for the project description appropriate?
- Are all project components listed?
- Is the level of analysis required for evaluating the project purpose or rationale appropriate?
- Is an evaluation of project alternatives required?
- Are the requirements for First Nation's consultation sufficient?
- Are there requirements to include traditional knowledge in the assessment and is your First Nation willing to contribute this information?
- Are all the baseline topics of interest included?
- Is there a requirement to assess all potential impacts of concern to your community?
- Do you agree with the spatial boundaries for the impact assessment?



Photo courtesy of Mark Connor, TRTFN.

QUICK TIP

Collaborating with the proponent on studies of interest to your First Nation is one way to ensure that acceptable studies are done and potential conflict and the need to do parallel or further studies is reduced.

- Do you agree with the temporal boundaries for the impact assessment?
- Is there an opportunity for your First Nation to be consulted regarding the determination of impact significance?
- Are there other existing or proposed projects in the area that could potentially cause a cumulative effect – and is a cumulative effects assessment required?
- Is sufficient detail required for the operation, closure and environmental management plans?
- Is there a requirement to describe proposed follow-up and monitoring programs?

See **Section 2 – Environmental Assessment Basics** for a discussion of key aspects of an EA including project description, project rationale, baseline description and impact assessment methods. Also, it would be helpful to review **Section 8 – Reviewing Environmental Assessment Reports**.

PARTICIPATING IN THE PREPARATION OF THE EA APPLICATION

The Environmental Assessment Office has stated in its *Guide to the British Columbia Environmental Assessment Process* that, in most cases, preparation of the EA application is developed through ongoing discussions between the proponent, the Environmental Assessment Office, other government agencies, First Nations, the public and other interested parties. See **Section 3** for a discussion of EA activities and **Section 7** for a discussion of TK Studies.

REVIEWING THE EA APPLICATION

Review of the EA application is your opportunity to examine the proposed project and its effects and determine how well the EA application addresses the concerns of your First Nation. If your community has not already made a decision on the acceptability of the project, this stage will provide information your community can use to come to a decision on the project. See **Section 8 – Reviewing EA Reports** for suggestions on how to review an application.

Typically, the Environmental Assessment Office establishes technical committees to assist with reviewing the EA application. First Nations should be, and usually are, invited to participate in these committees.

Submit your comments on the EA application and your First Nation's assessment of the acceptability of the project in writing to the Environmental Assessment Office. If there are still outstanding issues from your First Nation's point of view ensure that they are highlighted in your comments. Also work with the proponent and/or the Environmental Assessment Office to resolve these issues. If your disagreements can not be resolved informally at this point, consider a more formal dispute resolution process (see **Dispute Resolution** on page 19 of this section).

REVIEWING THE ASSESSMENT REPORT

After reviewing the EA application, the Environmental Assessment Office will prepare a draft assessment report, providing recommendations to the ministers for a decision on whether or not to grant the Environmental Assessment Certificate. The Environmental Assessment Office will likely ask First Nations who have been participating in the EA review, to comment on the draft assessment report prior to issuing the final assessment report and recommendation to the ministers.

Here are things to look for when reviewing the draft assessment report:

- Does the report reflect and address written comments your First Nation provided on the EA application?
- Does the report address issues and concerns that your First Nation raised during the course of the assessment?
- Do you agree with the conclusions and recommendations of the report?

Providing written comments on the draft assessment report ensures that your review is part of the public record of the EA.

If you feel that the draft assessment report does not adequately address your issues and rights consider a meeting with the Environmental Assessment Office to discuss your concerns.

If you find that your issues are not being effectively addressed, consider a more formal dispute resolution mechanism (see page 19). Another option is to consider writing your own assessment report and recommendations to the ministers.

PROJECT DECISION

WHO MAKES THE DECISION?

The Environmental Assessment Office refers the proponent's EA application and its assessment report to three Cabinet ministers for a determination on whether or not to issue an environmental assessment certificate or to require further assessment of the project (*BCEAA* Section 17).

The ministers are:

- the Minister of Sustainable Resource Management
- the Minister of Water, Land and Air Protection
- the responsible minister

The responsible minister is generally the minister with regulatory responsibility for the project sector within which a reviewable project falls. For example, if the proposed project is a mine, the Minister of Energy and Mines will be the responsible minister.

POSSIBLE OUTCOMES

Once the ministers have received a referral of an EA application, they must, within 45 days:

- issue an environmental assessment certificate and attach any conditions they consider necessary
- refuse to issue a certificate
- order that further assessment must be carried out according to the scope, procedures and methods specified by the ministers (*BCEAA* Section 17)

Before making their decision, the ministers must consider the assessment report and any recommendations accompanying

QUICK TIP

If you find that your issues are not being effectively addressed, consider a more formal dispute resolution mechanism (see page 19). Another option is to consider writing your own assessment report and recommendations to the ministers.

the report. However, recommendations of the Environmental Assessment Office are not binding on the ministers. Although not required to do so, the ministers may also consider any other matters they consider relevant to the public interest.

The Environmental Assessment Office must then notify the proponent of the minister's decision and deliver the environmental assessment certificate if it has been issued. The Environmental Assessment Office has indicated that it will also notify government agencies and First Nations involved in the review and make the decision and certificate documents available through the Project Information Centre.



Photo courtesy of Nisga'a Lisims Government

CONTENT OF THE DECISION

There is no requirement in *BCEAA* that the ministers give reasons for their decision. Under general administrative law principles, they usually do. In addition, the ministers may attach conditions to the environmental assessment certificate.

Examples of general conditions that may be included in the environmental assessment certificate are:

- carrying out the design, location, construction, operation, dismantling and abandonment of the project in accordance with identified specifications
- complying with all relevant legislation including obtaining all necessary approvals, permits and licences

If you have negotiated a development agreement with the proponent, consider requesting that the terms of the development agreement be required terms and conditions of the environmental assessment certificate. See **Content of Development Agreements in Section 10 – Development Agreements** for examples of specific provisions.

Even if the Environmental Assessment Office's assessment report deals meaningfully with your issues, the ministers are not bound to adopt the EA recommendations. It is important to review the ministers decision and the environmental assessment certificate terms and conditions.

Some questions to ask when reviewing the reports are:

- Did the Environmental Assessment Office and the ministers adequately consider significant materials before them?
- Did they adequately consider material submitted by your First Nation?
- Did the Environmental Assessment Office and ministers demonstrate an awareness that their decision to grant project approval might infringe your First Nation's Aboriginal rights and Aboriginal title and treaty rights and were they careful to ensure that they effectively addressed the substance of your First Nation's concerns?

- Do the terms and conditions in the environmental assessment certificate reflect the assessment report?
- Are post-certificate consultation, monitoring and compliance and enforcement described and is the description appropriate?
- Are the goals and objectives of your First Nation reflected in the decision and certificate?
- Are the terms and conditions of any development agreement that you have negotiated with the proponent included as terms and conditions of the certificate?

If after reviewing the decisions, you feel that your First Nation's interests were not appropriately addressed, consider meeting with the proponent, relevant government agencies and the minister to attempt to address any outstanding issues. If further discussions do not resolve your concerns, you may consider obtaining legal advice regarding judicial review of the decision (see discussion below).

DISPUTE RESOLUTION

Negotiation or Mediation

The BCEAA process provides no formal means of resolving disputes that may arise between your First Nation and the Environmental Assessment Office, the proponent or other regulatory agencies. **If you think that establishing some kind of dispute resolution process in advance of participating in the EA is important, then you should attempt to negotiate this in your participation agreement or the procedural order at the outset of the EA process.** Legal help is recommended here. The Environmental Assessment Office

may consider mediation – a non-adversarial, collaborative approach to solving disagreements.

Judicial Reviews

If your First Nation feels that an assessment or the decision to grant an environmental assessment certificate under *BCEAA* did not properly consider relevant information, considered irrelevant issues or was procedurally flawed, it is possible to request a judicial review by the BC Supreme Court of decisions made under the legislation. Actions taken under *BCEAA* may be subject to judicial review according to the general law and principles of administrative law. The availability of judicial review will depend on the degree of discretion provided for in the relevant provisions of *BCEAA*. See also **Section 3 – Environmental Assessment from a First Nation Perspective**, for a discussion of judicial review based on inadequate consultation or accommodation of Aboriginal rights or title or treaty rights, or infringements of Aboriginal rights or title or treaty rights.

POST-CERTIFICATE ACTIVITIES

A decision to issue an environmental assessment certificate concludes the EA process under *BCEAA*. However, some activities connected to the environmental assessment take place after the certificate has been issued. These include post-certificate consultation, monitoring, and compliance and enforcement. In addition, there are usually permits, licenses or other approvals required in addition to the environmental assessment certificate.

KEY DEFINITION**Concurrent Approval**

To shorten the permitting time, a proponent can request that other regulatory approvals (e.g., waste permits, road permits) proceed at the same time as the EA (BCEAA Section 23). This is called concurrent approval.

PERMITS, LICENCES AND OTHER APPROVALS

Once a project is approved, the proponent still needs to obtain specific permits, licenses or approvals required by regulatory agencies before constructing or operating the project.

Typical regulatory approvals that might be required in BC include:

- waste permits under the *Environmental Management Act*
- water licences under the *Water Act* for water diversion, use or storage
- licences or permits under the *Forest Act*, *Forest Practices Code Act* or *Forest and Range Practices Act* for road building or land clearing
- *Land Act* tenures or licences
- mine and road permits under the *Mines Act*
- road certificates and permits under the *Highway Act* or *Highway (Industrial) Act*
- aquaculture licences under the provincial *Fisheries Act*
- permits to alter an archaeological site under the *Heritage Conservation Act*
- consents, approvals and permits under the *Mining Right of Way Act*
- park use permits under the *Park Act*
- water works and sewage disposal system permits under the *Health Act*
- energy removal certificates under the *Utilities Commission Act*
- zoning or rezoning under the *Local Government Act*

To shorten the permitting time, a proponent can request that these regulatory approvals proceed at the same time as the EA (BCEAA Section 23). This is called concurrent approval. Provisions related to the timing and requirements for concurrent approval are set out in the Concurrent Approval Regulation (Reg. 371/2002). In the concurrent approval process, no authorizations may be issued until the EA is completed and an environmental assessment certificate is issued (BCEAA Section 9). However, applications are reviewed while the EA is ongoing.

FOLLOW-UP CONSULTATION

Follow-up consultation may be included as a condition of an environmental assessment certificate. For example, the proponent may be required to carry out certain project activities only after consultation or cooperation with First Nations or accommodation of a First Nation's Aboriginal interests. The proponent may be required to report on the results of those consultations. In addition, consultation may be required in relation to specific approvals required under other statutes.

The Environmental Assessment Office encourages proponents to keep First Nations and others informed about project activities and may suggest that a post-certification liaison committee be established to ensure that project implementation is managed effectively.

MONITORING, EVALUATION AND REPORTING

The environmental assessment certificate may also require:

- monitoring programs
- a comparison of the anticipated effects of the project, as set out in EA application, with the actual effects
- an evaluation of the adequacy of preventive or mitigation measures
- periodic reporting of monitoring and evaluation results to the Environmental Assessment Office or another government agency

Appropriate arrangements for liaison between the proponent, contractors, government, First Nations and the public may be a part of monitoring programs. See **Section 9 – Follow-up Programs** for more information about participating in and reviewing monitoring programs. Also, see **Section 7 – Traditional Knowledge and Environmental Assessment** for information on including TK in monitoring programs.

COMPLIANCE AND ENFORCEMENT

BCEAA prohibits certain activities and provides a variety of options to encourage and enforce compliance with its provisions.

The following provisions in *BCEAA* are designed to enhance compliance with its provisions:

- A person appointed by the Minister of Sustainable Resource Management may inspect the site of a reviewable project and any works or activities connected with the project (*BCEAA* Section 33).
- The minister may order that work on a reviewable project cease, in whole or in part, until an environmental assessment

certificate is issued (if the project has been initiated before an environmental certificate has been issued) or that work is carried out in accordance with an issued certificate (*BCEAA* Section 34). The minister can apply to the court to enforce the order (*BCEAA* Section 35).

- The minister may enter into voluntary compliance agreements with a proponent in which the proponent agrees to comply with the certificate as set out in the agreement (*BCEAA* Section 36).

The minister may suspend, cancel or amend an environmental assessment certificate if:

- the holder of the certificate (the proponent) does not substantially start the project within the time set out in the certificate
- the proponent is in default of an order by the minister or the court or the requirements of the certificate
- the proponent is convicted of an offence under *BCEAA*
- the proponent is in default of an order to pay costs associated with the environmental assessment (*BCEAA* Section 37)

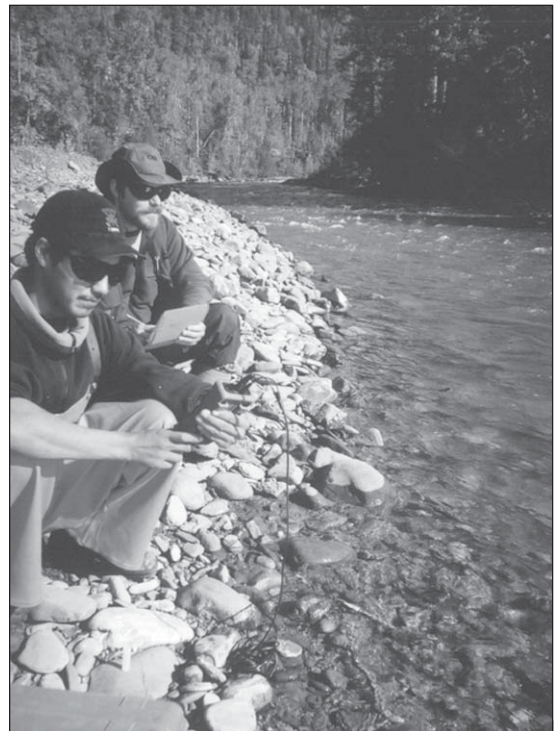


Photo courtesy of Mark Connor, TRTFN.

A person who proceeds with a reviewable project without an environmental assessment certificate or who does not comply with a certificate or an order of the minister suspending, cancelling or amending a certificate or who makes a false or misleading statement in a record filed in the EA about a material fact commits an offence (*BCEAA* Section 41).

There are considerable fines and possible imprisonment for committing an offence (*BCEAA* Section 43).

If your First Nation is concerned that a proponent is not complying with any aspect of the EA process, including the terms and conditions of its environmental assessment certificate, you may consider contacting the Environmental Assessment Office to request action under the compliance and enforcement provisions of *BCEAA* and/or obtain legal advice on how to proceed.

QUICK TIP

Active participation in the process can help to ensure that your First Nation's interests are reflected in the project decisions and terms and conditions of the environmental assessment certificate.

SUMMARY

An environmental assessment is required for projects designated or determined to be a reviewable project under *BCEAA* or the Reviewable Projects Regulation (Reg. 370/2002). Reviewable projects occur in the following sectors: industrial, energy, mining, water management, waste management, food processing, transportation and tourism. Proponents of reviewable projects must apply for an environmental assessment certificate. In most cases, the Environmental Assessment Office manages and coordinates the reviews. The main steps in a provincial review are as follows: early project definition; scope of project issues and assessment; application preparation and review; and project decision. The ministers who make the decision are the Minister of Sustainable Resource Management, the Minister of Water, Land and Air Protection and the minister responsible for the applicable sector.

The common law requires the Environmental Assessment Office to consult with First Nations whose Aboriginal rights and title and treaty rights may be impacted by decisions made under *BCEAA* and attempt to accommodate those interests in its decisions. To that end, the policy of the Environmental Assessment Office is to consult with First Nations whose rights and title could potentially be affected by the project and to encourage proponents do the same. Therefore, First Nations who may be impacted by decisions made under *BCEAA* should be involved in each step of the EA process if they wish. If your First Nation may be impacted by a project undergoing an EA under *BCEAA*, you should consider negotiating your First Nation's participation in all aspects of the EA. It is helpful to document the agreed upon consultation and participation process in the procedural order or through a participation agreement with the Environmental Assessment Office. Participation can include opportunities to review and comment on the draft procedural order, the draft EA terms of reference, the EA application and the draft assessment report. The Environmental Assessment office may also provide funding to support First Nation participation.

Consultation between your First Nation and the proponent can be done parallel to consultation with the Environmental Assessment Office. Early and continued engagement with both the proponent and EAO can be beneficial. Active participation in the process can help to ensure that your interests are reflected in the project decisions and terms and conditions of the environmental assessment certificate, and may be helpful for challenging any decisions that are adverse to your First Nation's interests.

BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT PROCESS Additional Information

GENERAL INFORMATION

British Columbia Environmental Assessment Office website at

<http://www.eao.gov.bc.ca/>

Guide to the British Columbia Environmental Assessment Process, March 2003, prepared by the Environmental Assessment Office, available at above link.

Supplementary Guide to Proponents (accompanies the Environmental Assessment Office's Guide to the British Columbia Environmental Assessment Process.) available at above link.

BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT ACT

available on the EAO website

http://www.qp.gov.bc.ca/statreg/stat/E/02043_01.htm

PRESCRIBED TIME LIMITS REGULATION

http://www.eao.gov.bc.ca/publicat/legislation_regulations.htm

ADDITIONAL INFORMATION ON TIMELINES

Sadler, B. Evaluation of British Columbia's Environmental Assessment Process: Final Report, prepared for the Environmental Assessment Office, November 1997.

REVIEWABLE PROJECTS REGULATION

http://www.qp.gov.bc.ca/statreg/reg/E/EnvAssess/370_2002.htm

PROJECT INFORMATION CENTRE

for projects reviewed under BCEAA is located at EAO website:

www.eao.gov.bc.ca

2nd Floor - 836 Yates Street, Victoria BC
Phone: (250) 356-7441 Fax: (250) 356-7440
Toll free calls, through Enquiry BC
Victoria (250) 387-6121 Vancouver (604) 660-2421
Elsewhere in BC 1-800-663-7867
Hours 8 am to 5 pm Monday to Friday

Mailing Address: Project Information Centre, Environmental Assessment Office
PO Box 9426 Stn Prov Gov, Victoria BC V8W 2V1

MEDIATION IN GENERAL

for educational materials & sources:

<http://adrr.com/>

<http://www.sustainable.org/creating/mediation.html>

for mediation training:

<http://www.fsin.com/Departments/Justice/training.html>

<http://www.disputeresolution.bc.ca/information/specialty.html>

BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT PROCESS – CHECKLIST

Also refer to checklist in Section 3.

PARTICIPATION

Have you done the following:

- Negotiated participation in a written agreement or procedural order
- Reviewed and provided written comments on the procedural order
- Reviewed and provided written comments on the EA application terms of reference
- Participated in EA studies of interest to your community
- Reviewed and provided written comments on the EA application
- Reviewed and provided written comments on the assessment report
- Reviewed the project decision and environmental assessment certificate terms and conditions

REVIEWING THE TERMS OF REFERENCE

It may be helpful to ask the following questions when reviewing the terms of reference:

- Is the level of detail requested for the project description appropriate?
- Are all project components listed?
- Is the level of analysis required for evaluating the project purpose or rationale appropriate?
- Is an evaluation of project alternatives required?
- Are the requirements for First Nation's consultation sufficient?
- Are there requirements to include traditional knowledge in the assessment?
- Are all the baseline topics of interest included?
- Is there a requirement to assess all potential impacts of concern to your community?
- Do you agree with the spatial boundaries for the impact assessment?
- Do you agree with the temporal boundaries for the impact assessment?
- Is there an opportunity for your First Nation to be consulted regarding the determination of impact significance?
- Is a cumulative effects assessment required?
- Is sufficient detail required for the operation, closure and environmental management plans?
- Is there a requirement to describe proposed follow-up and monitoring programs?

REVIEWING THE DRAFT ASSESSMENT REPORT

Here are things to look for when reviewing the draft assessment report:

- Does the report reflect and address written comments your First Nation provided on the EA application?
- Does the report address issues and concerns that your First Nation raised during the course of the assessment?
- Do you agree with the conclusions and recommendations of the report?
- Have you provided written comments on the report?

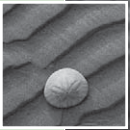
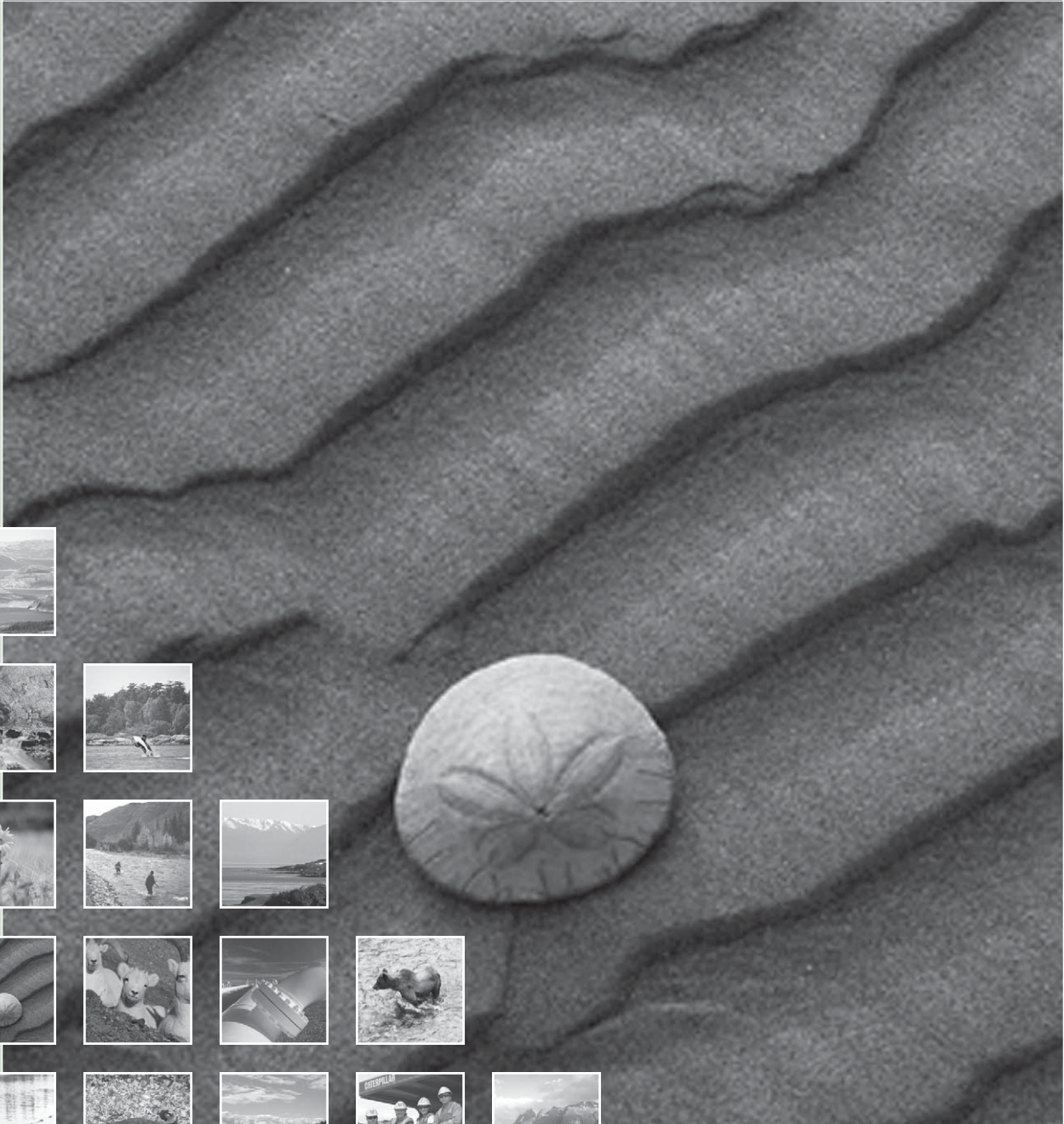
REVIEWING THE DECISION AND ENVIRONMENTAL ASSESSMENT CERTIFICATE TERMS AND CONDITIONS

Some questions to ask when reviewing the reports are:

- Did the Environmental Assessment Office and the ministers adequately consider significant materials before them?
- Did they adequately consider material submitted by your First Nation?
- Did the Environmental Assessment Office and ministers demonstrate an awareness that their decision to grant project approval might infringe Aboriginal rights, Aboriginal title or treaty rights and were they careful to ensure that they effectively addressed the substance of your First Nation's concerns?
- Do the terms and conditions in the environmental assessment certificate reflect the assessment report?
- Are post-certificate consultation, monitoring and compliance and enforcement described and is the description appropriate?
- Are the goals and objectives of your First Nation reflected in the decision and certificate?
- Are the terms and conditions of any development agreement that you have negotiated with the proponent included as terms and conditions of the certificate?

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 5 – CANADA'S ENVIRONMENTAL ASSESSMENT PROCESS



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

 **Section 5 – Canada’s Environmental Assessment Process** 

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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phone (250) 417-3474, fax (250) 417-3475, e-mail ccrifc@cyberlink.bc
FNEATWG coordinator, phone (250) 651-2188, e-mail scarlick@trtfn.com

Cover photo courtesy of Adobe

Your First Nation is most likely to encounter the federal EA process when projects proposed to take place on reserve land are assessed under the *Canadian Environmental Assessment Act (CEAA)*, but you may also have an interest in participating – or be asked to participate – in *CEAA* assessments of projects or activities proposed in your traditional territory.

This section provides an overview of the environmental assessment requirements of the *CEAA*. *CEAA* applies to all projects for which the federal government has a decision-making role, either as proponent, funder, land administrator or regulator.

This section includes the following:

- What is the *Canadian Environmental Assessment Act*?
- Steps in a *CEAA* assessment
- Public participation in *CEAA* assessments
- First Nations' interests in *CEAA* assessments

CEAA Steps 5

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Canadian Environmental Assessment Agency contact information:

www.ceaa-acee.gc.ca

Phone: 613-957-0700

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INTRODUCTION

QUICK TIP

At the end of each section of the toolkit there are additional information sources. It may be helpful to follow some of the links provided.

In BC, there are two regulatory environmental assessment (EA) processes, the federal EA process as set out in *Canadian Environmental Assessment Act (CEAA)*, and the provincial EA process as set out in the *BC Environmental Assessment Act (BCEAA)*. There may also be situations where proposed projects are subject to both *CEAA* and *BCEAA*, and are assessed jointly.

This section provides an overview of the federal EA process and opportunities for First Nation involvement in *CEAA* assessments.

Details on the regulatory aspects of EA processes and specific opportunities for First Nation participation in provincial and joint EAs are described in other sections of the toolkit:

- Section 4 – British Columbia's Environmental Assessment Process
- Section 6 – Joint Review Processes

A more general overview of the EA process, and the features that are common to most EAs, can be found in **Section 2 – EA Basics** section of this toolkit. If you are interested in learning more about EA from a First Nations' perspective, turn to **Section 3** of this toolkit.

WHAT IS THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT (CEAA)?

CEAA is the legal basis for the federal EA process. *CEAA* sets out the responsibilities for the environmental assessment of projects where federal government decision-making is involved.

A number of regulations have been established under the *Act*. Some are essential to the function of the *Act*. Others apply in special circumstances.

The four essential regulations are the:

- **Inclusion List Regulations.** Specifies projects that are not physical works that are subject to *CEAA*. An example of a physical activity that is not a physical work is ocean dumping or low-level flying.
- **Law List Regulations.** Sets out the regulatory triggers of *CEAA*. For example, an authorization to disrupt fish habitat required under the Fisheries Act is a law list trigger.
- **Exclusion List Regulations.** Specifies the types of projects that do not require an assessment under *CEAA*. These are small projects not likely to cause significant impacts, such as housing renovations.
- **Comprehensive Study List Regulations** describes those projects for which a more detailed assessment is required. These tend to be large projects that are likely to have significant adverse environmental effects.

CEAA first came into force in 1995. Since then, it has undergone a Five Year Review, which included extensive public and First Nations' consultation about the *Act*. Following the review, *CEAA* was amended by Bill C-9, an Act to amend the *Canadian Environmental Assessment Act*, which received Royal Assent on June 11, 2003, and came into force on October 30, 2003.

WHAT ARE THE PURPOSES OF CEAA?

The purposes of *CEAA* (Section 4[1]) are to:

- ensure that the environmental effects of projects are reviewed in a careful and precautionary manner before federal authorities take action in connection with them so that projects do not cause significant adverse environmental effects
- encourage federal authorities to take actions that promote sustainable development
- promote cooperation and coordinated action between federal and provincial governments on environmental assessments
- promote communication and coordination between federal authorities and Aboriginal peoples
- ensure that development in Canada or on federal lands does not cause significant adverse environmental effects in areas surrounding the project (including other countries)
- ensure that there is an opportunity for public participation in the environmental assessment process

WHAT IS THE CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY?

The Canadian Environmental Assessment Agency (the Agency) is an independent federal government agency that administers the federal environmental assessment process. It is accountable to parliament through the Minister of the Environment.

Key responsibilities of the Agency include:

- coordinating screenings that are also subject to the assessment process of another jurisdiction and all comprehensive studies
- promoting, monitoring and facilitating compliance with the *Act* and its regulations
- providing training, guidance and research related to environmental assessment
- maintaining responsibility for the Quality Assurance Program (that includes mechanisms to monitor compliance with the *Act* and the quality of assessments) for assessments conducted under the *Act* and its regulations
- assisting parties in building consensus and resolving disputes
- providing advice to the Minister of the Environment in the exercise of the minister's responsibilities

WHAT IS THE ROLE OF THE MINISTER OF THE ENVIRONMENT?

The Minister of the Environment is the minister responsible for the implementation of *CEAA*.

What about... the Five Year Review?

During the Five Year Review, 22 Aboriginal groups, including three from British Columbia, made a number of submissions about the ways in which *CEAA* could be strengthened to better serve the needs of First Nations (see http://www.acee-ceaa.gc.ca/013/001/0002/0004/0004/process_e.htm for the submissions made by Aboriginal groups). The British Columbia First Nation Environmental Assessment Technical Working Group also made a submission to the Five Year Review, it can be found at <http://www.acee-ceaa.gc.ca/013/001/0002/0004/0004/bcfn.pdf>.

What is ... sustainable development?

CEAA defines sustainable development as, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

The Canadian Environmental Assessment Agency has a sustainable development strategy that acknowledges the inter-relationships between society, environment and economy and the importance of balancing these in decision-making. The goal of the strategy is to further sustainable development by improving the federal environmental assessment process and better addressing the environmental aspects of decision-making. The sustainable development strategy can be found at http://www.ceaa-acee.gc.ca/017/0011/index_e.htm. See the case study of the Red Hill Creek Expressway and Voisey's Bay in this section for information on the application of sustainable development principles to EA.

The minister's responsibilities include:

- establishing a review by a mediator or a panel at any stage of a screening, under certain circumstances and in consultation with a federal authority
- deciding early on in a comprehensive study whether the project should be referred to a mediator or review panel
- requiring further information or action to address public concerns following a comprehensive study
- issuing an environmental assessment decision statement following a comprehensive study which may include requirements for mitigation measures or a follow-up program
- appointing the mediator or panel members and, in consultation with the federal authority responsible for the project, establishing its terms of reference
- appointing a mediator or review panel where a project may cause significant adverse environmental effects that cross onto federal lands or occur across provincial boundaries or international borders

STEPS IN A CANADIAN ENVIRONMENTAL ASSESSMENT ACT (OR AGENCY) ASSESSMENT

There are a number of steps common to all *CEAA* assessments.

These include:

- Step 1 – determine whether *CEAA* applies
- Step 2 – determine the type of assessment that is to be conducted
- Step 3 – determine the scope of the project and the assessment
- Step 4 – conduct the environmental assessment
- Step 5 – the environmental assessment report
- Step 6 – the environmental assessment decision
- Step 7 – follow-up

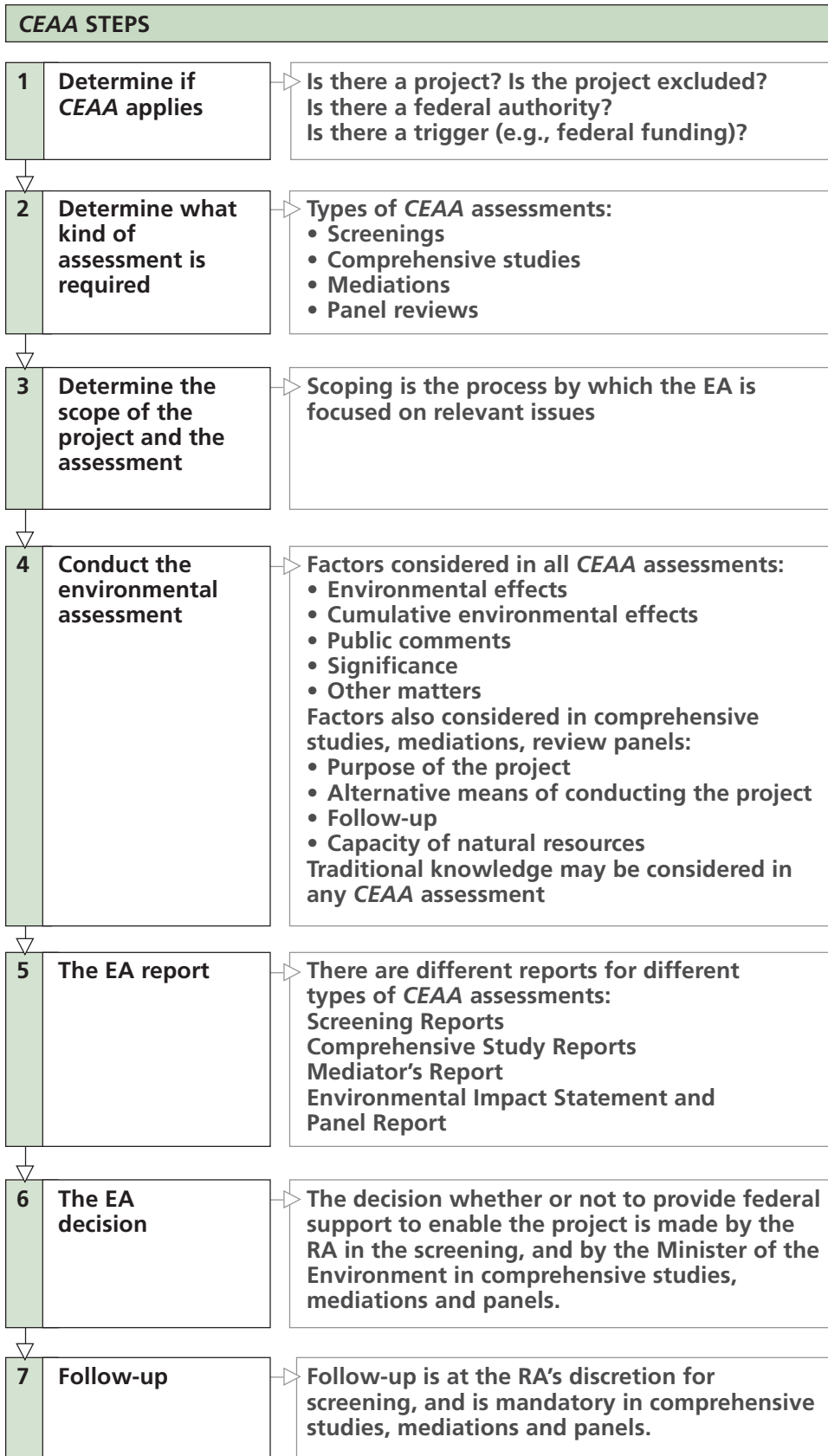
Each of these steps is discussed in more detail below. See also **Section 2 – Environmental Assessment Basics**, for a more general description of the various steps in an EA.

STEP 1 – DETERMINE WHETHER *CEAA* APPLIES

CEAA does not apply to every project. Determining whether or not *CEAA* applies requires asking four questions:

Is there a Project?

The first step is to determine if there is a project, as defined by *CEAA*. Under *CEAA*, a project is either an undertaking in relation to a physical work, or an undertaking not relating to a physical work.



Physical works are things that are constructed and have a fixed location. Any undertaking in relation to a physical work could be a project for the purposes of *CEAA*; that is construction of a new structure or operation, modification, decommissioning or abandonment of an existing structure.

KEY DEFINITION

Responsible Authority

Under *CEAA*, a responsible authority (RA) is a federal authority whose actions or powers trigger the environmental assessment of a particular project.

An undertaking not relating to a physical work refers to projects that may not be constructed or have fixed locations, but nonetheless may have adverse environmental effects. Examples of projects that are physical activities include low-level military flying and ocean dumping. The Inclusion List Regulations describes those activities that are not physical works, but are still projects for the purposes of *CEAA*.

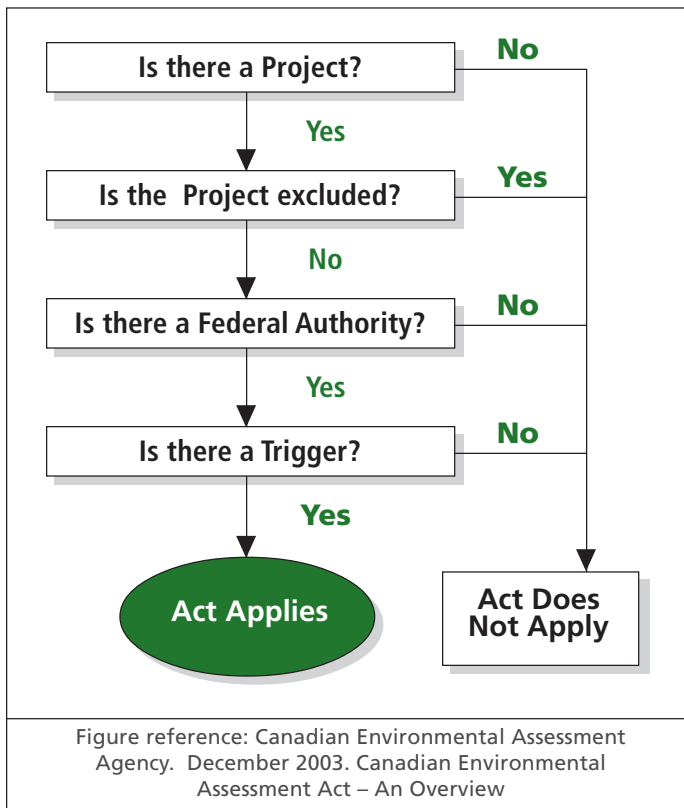
Is the Project Excluded?

The Exclusion List Regulations specify which projects may be exempted from *CEAA*. Excluded projects are those that are likely to have insignificant effects, such as renovations or additions to a house. A project may also be excluded if it is necessary for reasons of national security or in response to national emergencies.

Is there a Federal Authority?

If it is determined that there is a project that is not excluded, the next step is to determine whether a federal authority is involved.

The *Act* specifies what a federal authority is and what it is not. Under the *Act*, a federal authority is: a federal Minister, an agency of the federal government, any federal department or agency, or any other body prescribed in the *Act*. A federal authority is not: a territorial government, a council or band under the *Indian Act*, a First Nation government, a Harbour Commission, or a Crown Corporation.



Is there a Section 5(1) Trigger?

The final step is to determine whether or not Section 5(1) of *CEAA* has been “triggered”. *CEAA* is triggered whenever a federal authority has a specified decision-making responsibility in relation to a project. There are four possible triggers.

CEAA is triggered if a federal authority:

- proposes a project
- provides financial assistance to a proponent to enable a project to be carried out
- sells, leases or otherwise transfers control or administration of federal land to enable a project to be carried out

- provides a licence, permit or an approval that is listed in the Law List Regulations that enables a project to be carried out

Other Possible Reasons for Carrying out a Federal EA – the Transboundary Provisions

If a project does not involve any of the “triggers” of the Act, an environmental assessment under the Act may still be possible. In other words, even if CEAA has not been triggered, under sections 46 to 54 of CEAA, the Minister of the Environment may refer a project to a mediator or panel under special circumstances set out in the transboundary provisions of CEAA (for more information on panel reviews, see Step 2 below, this section of the toolkit).

For instance, if the Minister of the Environment receives a petition from an individual or interested party requesting a project be referred to a mediator or review panel, and if the minister considers that the project has the potential to cause significant adverse transboundary environmental effects between non-federal and federal lands, or across provincial or international boundaries, then the minister has the authority to require an assessment of the transboundary effects in some circumstances. Some of the transboundary provisions relate specifically to First Nation lands. Section 48(1) of CEAA establishes that if CEAA is not otherwise triggered, and if the minister is of the opinion that the project may cause significant adverse environmental effects on (among other things) reserve lands, treaty settlements lands or traditional territory the Minister may refer the project to a mediator or a panel.

So, if your First Nation is concerned that a project not subject to CEAA will have significant adverse environmental effects either on your reserve lands or your treaty settlement lands, you should write to the minister and seek to have a panel review conducted under CEAA.

STEP 2 – DETERMINE THE TYPE OF ASSESSMENT TO BE CONDUCTED

Once it has been determined that the Act applies, the next step in the CEAA process is to determine what level of assessment will be required.

Because CEAA applies to very small projects (e.g., stream crossings or culverts) and to very large projects (e.g., mines or port developments), the Act aims to ensure that the appropriate level of effort is applied to the environmental assessment of a project. Thus, there are four types of assessments that may be conducted under CEAA, depending on the scale, complexity, and potential environmental effects of the proposed project.

Types of CEAA assessments include:

- screenings (including model class and replacement class screenings)
- comprehensive studies
- mediation
- review panels

Presented within Step 2 is a general overview of the different kinds of assessments conducted under CEAA. The specific requirements of the different kinds of CEAA assessments are covered in more detail within this section. For

What are...

the responsibilities of the RA?

The responsible authority must ensure that an environmental assessment of the project is conducted as early as possible in the planning stages of the project and before the responsible authority makes any decisions or undertakes any action that would allow the project to proceed.

If there are two or more responsible authorities for a project, CEAA requires them to try to work together and to carry out their responsibilities in a coordinated manner that eliminates unnecessary duplication. To achieve this, one of them may be designated as the lead responsible authority for the project and assume primary responsibility for ensuring that the environmental assessment complies with CEAA.

instance, the various factors that are to be considered in all *CEAA* assessments, and the additional factors that must be considered in comprehensive studies, mediations and panels, are discussed in **Step 4 – Conduct the Environmental Assessment** (page 11).

Screenings

Screenings are conducted for projects where the environmental effects are well understood and mitigation measures to prevent or minimize effects are well known and reliable. Almost all (99%) of environmental assessments conducted under *CEAA* are screening level environmental assessments.

Typically, projects undergoing a screening will be relatively simple and straightforward. Examples of projects that might undergo a screening would be construction of a new bridge or installation of a culvert.

Screenings are carried out by a wide variety of officials across the country (e.g., Department of Fisheries and Oceans, Parks Canada, Coast Guard) and for a wide variety of projects. Therefore, there is some variation in the way they are done.



Photo courtesy Mark Connor, TRTFN.

Class screenings

A class screening is a special type of screening that can help streamline the environmental assessment of certain types of projects. These types of projects are not likely to cause significant adverse environmental effects, providing that the design standards and mitigation measures described in the class screening report are applied. There are two types of class screenings provided for in *CEAA*: model class screenings and replacement class screenings.

A model class screening provides a generic assessment of all projects within a class and within a specified location. For example, Model Class Screening for Routine Fish Habitat Restoration and Enhancement Projects in British Columbia and Yukon. The responsible authority uses information contained in a model class screening report, but also prepares an individual screening report for the project containing location-specific or project-specific information.

A replacement class screening provides a generic assessment of all projects within a class, but location-specific or project-specific information is not needed. The RA does not need to prepare project-specific screening reports, but must ensure that the design standards and mitigation measures are implemented.

A few are listed below:

- Model Class Screening Report for Routine Projects in the Town of Banff and Proximate Outlying Areas
- Model Class Screening Report for the Importation of European Honeybees
- Model Class Screening Report for Routine Fish Habitat Restoration and Enhancement Projects in British Columbia and Yukon

Comprehensive Studies

Although the vast majority of proposed projects covered by the *Act* require a screening, some projects are required to have additional factors considered in the assessment of their environmental effects. These projects are included on the Comprehensive Study List. The Comprehensive Study List is established by regulation and is intended to deal with projects that are likely to result in significant adverse environmental effects. These projects usually are large scale, complex and environmentally sensitive and frequently generate significant concern for First Nations and other communities.

Examples of proposed projects on the Comprehensive Study List include:

- large mining projects
- large industrial plants such as pulp and paper mills
- major electrical generation projects
- large oil and gas developments
- major pipelines

Early on in a comprehensive study, the Minister of the Environment has to decide whether the project should continue to be assessed as a comprehensive study or whether it should be referred to a mediator or review panel. If the minister decides the project should continue as a comprehensive study, the project can no longer be referred to a mediator or review panel.

Before making this decision, the minister must provide the public and First Nations an opportunity to comment on the ability of a comprehensive study to address issues relating to the project. As part of this public consultation process, the responsible authority must ensure the public and First Nations are provided an opportunity to comment on the scope of the project, the factors to be considered and the scope of those factors. The responsible authority must also ensure the public and First Nations are provided with an opportunity to participate in the environmental assessment of the project. A final opportunity to comment on the comprehensive study report is also provided before the minister makes a decision on the project.

KEY DEFINITION

Common Law

Common law is law that is established by the courts rather than through a legislative process. The law is found in court decisions rather than in statutes and regulations. The common law can change over time with new court decisions. Common law, like other laws, can govern the actions of government.

QUICK TIP

CEAA and the Common Law

An impact to your First Nation's Aboriginal rights and title or treaty rights does not trigger *CEAA*. Whether or not *CEAA* has been triggered, the federal government has a "fiduciary" duty if an action or decision of the federal Crown may infringe Aboriginal rights and title or treaty rights. Also, even though there is no statutory requirement in *CEAA* to consult with First Nations, the common law still applies. In other words, an action of the Crown that triggers *CEAA* (such as the provision of federal funding to a project) may also infringe your Aboriginal rights and title or treaty rights. In this case, the responsible authority must fulfil both the requirements of *CEAA*, and its fiduciary obligations.

What about ... First Nations' involvement in scoping?

In a screening, the responsible authority has the discretion to determine if public (including First Nation) participation is "appropriate". If public participation is determined to be "appropriate", the RA will provide the public with an opportunity to examine and comment on – among other things – the scope of the project and the assessment. This information will be available on the Canadian Environmental Assessment Registry (http://www.ceaa-acee.gc.ca/050/index_e.cfm) or through the RA.

continued on page 11

Mediations

Mediation is a voluntary process of negotiation, where an impartial mediator helps interested parties resolve their differences. Under *CEAA*, the Minister of the Environment can appoint a mediator if the environmental effects of a project are uncertain or potentially significant – or if First Nation or public concern warrants it. The minister will consult with the responsible authority and the parties to determine if mediation is a suitable course of action. Mediation can be used independently or in combination with panel reviews to address specific issues.

Mediation is intended to be a non-adversarial, collaborative approach to solving problems and generating agreements. It may be an appropriate process for resolving issues when all of the interested parties have been identified and are willing to participate, and a consensus appears possible. Groups or individuals having a direct interest or being directly affected by a proposed project would be involved in mediation. To date, a formal mediation has not taken place under *CEAA*.

Panel Reviews

A panel review is a review conducted by an impartial panel of experts. A panel review can only be established by the Minister of the Environment. The Minister of the Environment may refer a project to a review panel when:

"it is uncertain whether the project is likely to cause significant adverse environmental effects; or the project is likely to cause significant adverse environmental effects and it is uncertain whether these effects are justified in the circumstances; or public concerns warrant it."

The panel solicits input from a wide variety of groups and individuals and involves many opportunities for public input. A panel review includes public hearings where the proponent, government regulators, First Nations, the public and other interested parties can present their evidence, concerns and information.

The Minister of the Environment may refer any project undergoing a screening to a panel review at any time, whether or not the screening has been started. As noted in the discussion of the comprehensive study, once the minister decides that a comprehensive study is the appropriate means of undertaking an environmental assessment for a project on the Comprehensive Study List, the project cannot later be referred to a panel review. If your First Nation is particularly concerned about the possibility that a proposed project may cause significant adverse environmental effects, you may wish to press the minister to refer the project directly to a panel review.

STEP 3 – DETERMINE THE SCOPE OF THE PROJECT AND SCOPE OF THE ASSESSMENT

Once it has been determined that *CEAA* applies, and what kind of assessment process will be followed, the next step is to determine the “scope” of the project and the environmental assessment.

Scoping is the process by which the environmental assessment is focused on the relevant issues for the proposed project. There are three basic parts to scoping.

The first establishes the scope of the project. In other words, which physical works and activities related to the project will be considered in the environmental assessment? For example, if the project is a pulp mill, the scope of the project would include other aspects such as the construction of any access roads to the mill. The scope of the project is determined by the responsible authority for screenings and comprehensive studies, and by the Minister of the Environment for a mediation or review panel stage.

The second part of scoping sets out the factors that will be considered in an environmental assessment. These are set out in the *Act*, and are discussed in more detail in the section below called, Factors to be Considered in a *CEAA* Assessment. In general, the factors that will be required in a *CEAA* assessment will depend on the type of assessment being conducted. Factors that may be considered would include such things as environmental effects, mitigation, significance and follow-up.

The third part of scoping establishes the scope of the factors that are to be considered. In other words, if one of the factors to be considered is a cumulative effects assessment (CEA), the scoping process would set out which other projects may be considered in the CEA. Or, the scope of factors to be considered might specify which wildlife species will be included in the environmental assessment. The scope of the factors to be considered is determined by the responsible authority for screenings and comprehensive studies, and by the Minister of the Environment for a mediation or review panel stage.

See **Section 2 – Environmental Assessment Basics** for general information about scoping. See also the Canadian Environmental Assessment Agency’s website for Agency guidance on scoping (http://www.ceaa-acee.gc.ca/013/0002/scoping_e.htm).

STEP 4 – CONDUCT THE ENVIRONMENTAL ASSESSMENT

All environmental assessments, whether they are screenings, comprehensive studies, mediations, or panels, must consider a number of factors. The factors for each of these types of assessments are set out in Section 16(1) for screenings and 16(2) of *CEAA*, for comprehensive studies, mediations and panels.

What about ... First Nations’ involvement in scoping?

continued from page 10

In comprehensive studies, mediations and panels, public-including First Nation-consultation is required in determining the scope of the project, the factors, and the scope of the factors to be considered.

Whether or not public input into the scoping exercise is sought by the RA, your First Nation may contact the RA or the minister at any time and ask for input into scoping. In addition, you may provide the RA with any comments you may have on the project’s scope, and whether it adequately addresses those factors that your First Nation considers relevant. See also the common law consultation requirements described in Section 3 – Environmental Assessment from a First Nation Perspective.

What are... cumulative environmental effects?

A cumulative environmental effect is an effect on the environment, after mitigation measures are applied, which results from effects of a project when combined with those of other past, existing and imminent projects and activities. These may occur over a certain period of time and distance.

See the case study of the Sunpine Project on page 15 of this section for a discussion of scoping cumulative effects.

Factors to be Considered in all CEAA Assessments

Every EA conducted under CEAA – whether it is a screening, comprehensive study, mediation or panel review – must include a consideration of the following factors:

- the environmental effects of the project, including the environmental effects of accidents and malfunctions
- the cumulative environmental effects of the project
- public comments
- the significance of any environmental effects
- mitigation measures
- any other matter that the RA (in a screening or comprehensive study), or the minister (in a mediation or panel) considers relevant

Environmental Effects

All environmental assessments done under CEAA must consider the environmental effects of the project.

Under CEAA, “environmental effect” is defined as any change that the project may cause in the environment. This is known as a **direct effect**. For example, a **direct environmental effect** may include impacts on water quality or wildlife populations, in particular a listed-wildlife species, its critical habitat or its residences as set out in the Species at Risk Act.

In addition, an EA must include a consideration of **indirect effects** of a project.

In other words, the EA must include a consideration of a change in the environment caused by the project and the effect of any such change on:

- health conditions
- socio-economic conditions
- physical and cultural heritage
- the current use of lands and resources for traditional purposes by Aboriginal persons
- any structure, site or thing that is of historical, archaeological, paleontological or architectural significance

Finally, an EA must also include a consideration of any change to the project that may be caused by the environment, whether any such change occurs within or outside Canada.

It is important to bear in mind that under CEAA, the socio-economic effects of a project may or may not be considered in a CEAA assessment. If a socio-economic effect such as job losses is caused by a change in the environment, such as loss of fish habitat, which is in turn caused by the project, then the socio-economic effect is an environmental effect within the meaning of the Act. If the socio-economic effect is not caused by a

CASE STUDY - EA AND SUSTAINABILITY

The Canadian Environmental Assessment Act (CEAA) identifies sustainability as one of the stated purposes of the Act: “to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy.”

Two projects that underwent CEAA panel reviews where sustainability issues were specifically addressed were the Red Hill Creek Expressway in Ontario and the Voisey's Bay Nickel Mine in Labrador and Newfoundland.

Both the Red Hill Creek Expressway and the Voisey's Bay federal panels required that projects' effects on a number of sustainability criteria be evaluated, including:

- the extent to which biological diversity would be affected by the project
- the capacity of renewable resources that would likely be affected by the project to meet the needs of present and future generations
- the extent to which the precautionary principle would be applied in the project

Both panels interpreted sustainability to require the following:

- the preservation of ecosystem integrity, including the capability of natural systems to maintain their structure and function and to support biological diversity
- the attainment of durable and equitable social and economic benefits
- respect for the right of future generations to the sustainable use of renewable resources

These criteria and interpretations led the panels to evaluate their respective projects for the following factors:

- the extent to which the project contributes positively to the attainment of community and ecological sustainability, both at the local and regional levels
- the requirement that contingency plans explicitly address worst-case scenarios and include risk assessment and evaluations of the degree of uncertainty
- the requirement for monitoring programs to be designed to ensure rapid response and correction where adverse effects are detected
- liability and insurance regimes that hold the proponent accountable for adverse effects and associated damage throughout the life of the project, including decommissioning and reclamation

See the Canadian Environmental Assessment Agency's website for additional information on sustainable development at http://www.ceaa-acee.gc.ca/017/0011/index_e.htm

For further information on the Voisey's Bay Nickel Mine review, see the detailed case study in Section 11 of this toolkit.

change in the environment, but by something else related to the project, such as an influx of outside workers to the area, then the socio-economic effect is not an environmental effect within the definition of *CEAA* and its consideration is not mandatory in the EA.

What is... mitigation?

According to *CEAA*, mitigation is the elimination, reduction or control of adverse environmental effects of a project and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means.

If your First Nation decides to participate in an EA under *CEAA* it is important to provide your view on the potential environmental effects of the project during the scoping process and during the conduct of the actual environmental assessment analysis. Despite the fact that *CEAA* is concerned only with direct impacts to the environment, and indirect impacts on such things as socio-economic conditions, you should still inform the proponent or the RA of your concerns. In other words, just because *CEAA* does not require that an environmental effect that you are concerned with be considered, does not preclude this effect from being included if concern is high enough. This is especially true in panel reviews, where the terms of reference may be very broad indeed. If you express your concerns early, there is a greater chance they will be included in the assessment.

Note that you should also inform the RA if you believe that the project is likely to infringe your Aboriginal rights or title or treaty rights. Even though *CEAA* does not require the consideration of the effects of projects on Aboriginal rights, the Crown's fiduciary duty to consult and accommodate Aboriginal rights exists along side *CEAA*.

See **Section 2 – Environmental Assessment Basics** for a detailed description of some of the methods for assessing the environmental impacts of projects. See also **First Nations' Interests in *CEAA* Assessments** (page 26) for additional information on First Nations' input in the context of environmental impacts.

Cumulative Effects

Under *CEAA*, environmental assessments must consider the cumulative environmental effects that are likely to result from the project in combination with other projects or activities. That means that the environmental effects of other projects and activities that are likely to interact with the environmental effects of the project in question should be included in the assessment. For example, if the construction of a bridge affects the water quality in the river it crosses, then other stressors or impacts on the same water quality parameters, such as those from a nearby mill could be included in the cumulative effects assessment.

Under *CEAA*, the significance of any cumulative effects must also be considered.

The process for conducting a cumulative effects assessment (CEA) is set out in more detail in **Section 2 – Environmental Assessment Basics**. See also the Agency's website for guidance on the consideration on cumulative environmental effects in *CEAA* assessments (http://www.ceaa-acee.gc.ca/013/0001/0008/guide1_e.htm#Reference_Guide)

CASE STUDY - SUNPINE PROJECT - SCOPING AND CUMULATIVE EFFECTS

In August 1995, Alberta Environmental Protection approved a submission for a new road to transport logs to a mill at Strachan, Alberta. Approval was subject to several environmental conditions. In December 1995, the proponent, Sunpine Forest Products Ltd., submitted an application for approval under the *Navigable Waters Protection Act* to construct bridges along the road corridor. The *Canadian Environmental Assessment Act (CEAA)* was triggered.

The Canadian Coast Guard acted on behalf of the Minister of Fisheries and Oceans as the responsible authority to carry out the environmental assessments. The Coast Guard limited the scope of the project's environmental assessment to the bridges. Once the Coast Guard determined the scope of a project as the bridges, it then conducted its environmental assessment in respect of various aspects of the project as scoped, in this case, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to the bridges. The Coast Guard determined that the proposed bridges were not likely to cause significant adverse environmental effects and issued the appropriate approvals.

An environmental non-governmental organization (ENGO) took the Coast Guard to court over its decision with respect to the scope of the project. In the ENGO's view, the Coast Guard should have included the road and proposed forestry operations of Sunpine in the scope of the project.

Ultimately, the court concluded that the Coast Guard had properly defined the scope of the project as the bridges only. However, the court also found that the Coast Guard did not consider cumulative effects correctly.

In its defence, the Coast Guard stated that it had not taken the road and the forestry operations into account because they were outside the scope of the project and they were outside federal jurisdiction. The court found that the nature of a cumulative effects assessment broadens the factors to be considered beyond the project as scoped.

The court pointed out that because a federal project does not create adverse environmental effects itself, that does not mean that it could not contribute to the adverse effects of other projects (in this case, the road and the forestry operation). The accumulation of a series of insignificant effects might result in significant cumulative effects. For this reason, even though a responsible authority determines that a project will have insignificant effects, the responsible authority must still consider the cumulative effects from other projects or activities, even those outside the scoped projects or outside federal jurisdiction.

See Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [2000] 2 F.C. 263, 31 C.E.L.R. (N.S.) 239 (C.A.); application for leave to appeal dismissed (S.C.C.)

Significance

Deciding whether a project is likely to cause significant adverse environmental effects is central to the concept and practice of environmental assessment. Whatever adverse environmental effects are addressed and whatever methods are used, the focus of environmental assessment always narrows down to a decision about whether the project is likely to cause significant adverse environmental effects.

The central test in *CEAA* is therefore whether a project is likely to cause significant adverse environmental effects. This determination is an objective test, which means that all decisions about significance must be supported by findings based on the requirements set out in the *Act*.

When an RA or the minister makes a determination of whether or not significant adverse environmental effects are likely, it involves a three step process:

- deciding whether the environmental effects are adverse
- deciding whether the adverse environmental effects are significant
- deciding whether the significant adverse environmental effects are likely

When your First Nation is participating in a *CEAA* process it is important to be aware of the approach that was taken in determining significance. It is also important to put forward your community's interpretation of significance, especially for environmental effects of concern to your First Nation. See **Section 2 – Environmental Assessment Basics**, for general information on significance. See **The Environmental Assessment Decision** on page 21 for the way that significance is factored into decisions made under *CEAA*, and refer to the Canadian Environmental Assessment Agency's website for Agency guidance on the determination of significance (http://www.ceaa-acee.gc.ca/013/0001/0008/guide3_e.htm#Reference%20Guide).

Mitigation

Every environmental assessment conducted under *CEAA* must consider technically and economically feasible measures that would mitigate any adverse environmental effects of the project.

In addition, if the responsible authority provides federal support to a project and the project proceeds, it is required under *CEAA* to ensure that all appropriate mitigation measures are implemented. Furthermore, responsible authorities may also have powers other than those given under *CEAA*, such as permitting powers, the holdback provisions of funding arrangements and contractual arrangements, to ensure that mitigation measures are implemented.

Below are some methods that may be used by responsible authorities to ensure implementation of appropriate mitigation measures:

- compliance statements
- conditions of approval in contract with project proponent
- performance bonds by proponent
- site visits

If your First Nation is participating in a *CEAA* review, examine the mitigation measures proposed and provide your comments on their acceptability. See page 19 of **Section 2 – Environmental Assessment Basics** for additional information on mitigation and mitigation measures. See also page 15 of **Section 8 – Reviewing Environmental Assessment Reports** for things to look for when reviewing mitigation measures.

Factors to be Considered in Comprehensive Studies, Mediations and Panels

In addition to those factors listed above, **Section 16(2) of CEAA** establishes that every comprehensive study, mediation or panel review must also include a consideration of the following:

- the purpose of the project
- alternative means to carrying out the project
- the need for, and the requirements of, any follow-up programs
- the capacity of renewable resources that are likely to be significantly affected by the project

While not required for screenings RA's may also consider the above, especially for large or complex projects that are undergoing a screening.

The following describes the specific interpretation and application of these factors as part of *CEAA*. See **Section 2 – Environmental Assessment Basics** for a general description of these factors.

The Purpose of the Project

"Purpose of" the project is essentially a statement by the proponent about what is to be achieved by carrying out the project. For example, "the purpose of a specific power generation project is to generate 500 mega watts of electricity". The purpose is generally stated from the perspective of the proponent and provides the context for the project.

In addition to the purpose of the project, the RA is strongly encouraged to consider the "need for", or fundamental rationale for the project (*CEAA* Section 16 [1e]). In the example of a power generation project, the "need for" might be "to provide power for consumers on Vancouver Island". See the **Case Study – Vancouver Island Generation Project** on page 8 of **Section 2 – Environmental Assessment Basics** for an example of when a First Nation challenged the proponent's "need for" and "purpose" of the project. This project was reviewed under *BCEAA*, not *CEAA*, but is a good example of these concepts.

For further information, see Canadian Environmental Assessment Agency's Operational Policy Statement, *Addressing "Need for", Purpose of", "Alternatives to" and "Alternative Means" under the Canadian Environmental Assessment Act*, OPS – EPO/2 – 1998 (http://www.ceaa-acee.gc.ca/013/0002/addressing_e.htm).

QUICK TIP

If your First Nation is providing input to the scoping of a *CEAA* review, note which alternative means are expected to be examined and the criteria being used to evaluate them. Provide your comments on the appropriateness of the criteria and the alternatives that are being evaluated; describe other alternatives if necessary.

Alternative Means to Carrying out the Project

Alternative means to carrying out the project is a description of the technically different or economically feasible ways that the project could be carried out. Examples of alternative means might include alternative routes for a pipeline or locations for a tailings pond. Alternative means also includes different ways of implementing the project or different mitigation measures. For example, a mine could be developed using open-pit or underground mining methods or an oil refinery could be developed using either of two types of technology.

The technical and economic feasibility of the alternative means must be assessed and compared against criteria set out prior to the evaluation. The environmental effects of the alternative means also need to be assessed and taken into account in the decision.

If your First Nation is providing input to the scoping of a *CEAA* review, note which alternative means are expected to be examined and the criteria being used to evaluate them. Provide your comments on the appropriateness of the criteria and the alternatives that are being evaluated; describe other alternatives if necessary.

For additional information see *CEAA's Operational Policy Statement* (http://www.ceaa-acee.gc.ca/013/0002/addressing_e.htm) and the discussion on **Project Alternatives** on page 10 of **Section 2 – Environmental Assessment Basics**.

Follow-up

The purpose of follow-up under *CEAA* is to verify the accuracy of the environmental assessment and to determine the effectiveness of mitigation measures. For proposed projects that have been assessed and approved through a comprehensive study, mediation or review panel, the responsible authority must design the program and ensure the implementation of the program. For screenings, the responsible authority must determine if a follow-up program is appropriate under the circumstances and, if so, design it and ensure it is implemented.

The Responsible Authority's Guide (<http://www.ceaa-acee.gc.ca>) recommends a follow-up program for screenings where:

- the project involves a new or unproven technology
- the project involves new or unproven mitigation measures
- an otherwise familiar or routine project is proposed for a new or unfamiliar environmental setting
- the assessment's analysis was based on a new assessment technique or model, or there is otherwise some uncertainty about the conclusions
- changes in project scheduling could result in environmental effects

There are no formal requirements for the public or First Nation's involvement in follow-up and monitoring programs. However, you may be able to negotiate an agreement with the RA and/or proponent to be

involved in the review and design of a follow-up program. See **Section 9 – Follow-up Programs** for more information on participating in follow-up and monitoring programs.

The Capacity of Renewable Resources

The potential effect of the project on the capacity of renewable resources to meet present and future needs is an important factor to assess. Therefore, potential for both short-term and long-term effects must be addressed. Examples of the capacity of renewable resources would be long-term forest productivity, and the sustainability of fisheries and wildlife populations.

The assessment of capacity of renewable resources would likely overlap with many of the concerns your First Nation might have about effects to the land. Therefore, pay close attention to the assessment of the capacity of renewable resources to determine if the resources of particular interest to your First Nation are being properly assessed.

Traditional Knowledge

In addition to the factors that must be considered in all *CEAA* assessments, and those additional factors that must be considered in comprehensive studies, mediations or panel reviews, *CEAA* also gives the RA the discretion to consider Aboriginal traditional knowledge (ATK) in any environmental assessment. Section 16(1) of *CEAA* states that

“Community knowledge and Aboriginal traditional knowledge may be considered in conducting an environmental assessment.”

This means that the inclusion of your traditional knowledge in a *CEAA* assessment is not mandatory. The RA may contact your First Nation seeking to include your TK in a *CEAA* assessment. However, your First Nation has the discretion to decide if this would be appropriate. In other words, **inclusion of your First Nations' TK in a federal environmental assessment is not mandatory and requires your consent.**

Alternatively, your First Nation may decide it is interested in having its TK considered in a federal environmental assessment of a project. If that is the case, you can contact the RA and request that your TK be considered in the assessment. In addition, you can include TK in any submission that you make within the environmental assessment process, at any time.

For further information on including TK in environmental assessments see **Section 7 – Traditional Knowledge and Environmental Assessment.**

QUICK TIP

If your First Nation negotiates a traditional knowledge study agreement with the responsible authority and/or proponent, make sure to take steps to protect your knowledge. See page 9 in Section 7 – Traditional Knowledge and Environmental assessment for more information.

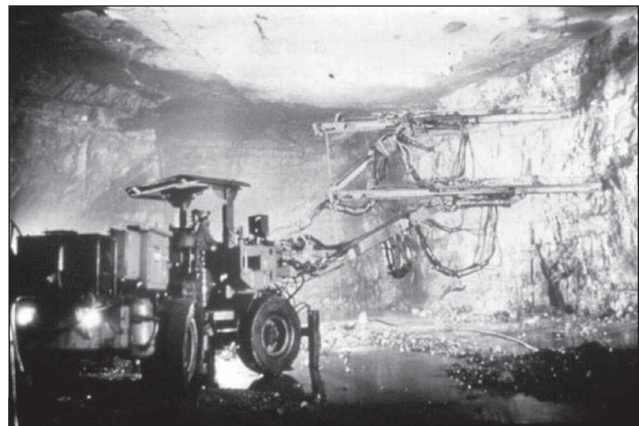


Photo courtesy BC Minerals Association.

STEP 5 – THE EA REPORT

Reports are required for all types of *CEAA* assessments. However, the reporting requirements differ, as do the requirements for public input and review of the reports. See **Section 8 – Reviewing Environmental Assessment Reports** for suggestions on what to look for when reviewing an EA Report.

The Screening Report

Following the completion of a screening, the RA or the proponent prepares a screening report which addresses all of the factors identified during the scoping exercise, including those factors outlined in **Factors to be Considered in all *CEAA* Assessments** on page 12.

The screening report may or may not be made available for formal public comment. Under *CEAA*, the responsible authority has the discretion to determine if formal public comment on the screening report is required. If the RA determines that formal public comment is appropriate, the RA determines how this public input will be sought. However, the screening report can be obtained directly from the RA, whether there is a formal public comment period or not.

It is worthwhile for your First Nation to provide your comments on the screening report, whether or not a formal public comment period is conducted. You should contact the RA for a copy of the screening report.

The Comprehensive Study Report

In a comprehensive study, the findings of the study are compiled into a comprehensive study report. The matters that must be covered in the comprehensive study report are:

- the scope of the project, the factors to be considered in the assessment, and the scope of those factors
- public concerns about the project
- the project's potential to cause significant adverse environmental effects
- the ability of the comprehensive study to address issues relating to the project

The factors to be considered in a comprehensive study (Step 4 in this section) may relate directly to your First Nation's interests (e.g., current use of lands and resources by Aboriginal people). Therefore, consider becoming involved in the aspects of the comprehensive study that relate directly to your interests. This would involve negotiating study agreements with the responsible authority and/or the proponent, such as, for traditional use or traditional knowledge studies.

Comprehensive study reports are available for formal public comment. It is key for your First Nation to provide written comments on the comprehensive study report. Prior to making a decision on the project, the Minister of the Environment must take into consideration any public comments received during the formal public comment period.

For more information about comprehensive studies, see the Agency's Guide to the Preparation of a Comprehensive Study for Proponents and Responsible Authorities, May 1997, at http://www.CEAA-acee.gc.ca/0011/0001/0003/comps_e.htm

The Panel Report

In a panel review, the proponent of the project is required to prepare an environmental impact statement (EIS). The EIS is prepared at the request of, and according to guidelines drafted by, an environmental assessment panel. The guidelines may include requirements for the proponent to collect information. The EIS is available for public comment.

As with a comprehensive study, consider negotiating your First Nation's involvement in the EIS studies of interest to your community. As well, conduct a detailed review of the EIS. It's a good idea to provide written comments on the EIS as well as to provide an oral submission to the panel (see **Public Participation in Panels** on page 25 of this section).

STEP 6 – THE ENVIRONMENTAL ASSESSMENT DECISION

The EA Decision in Screenings

Following the completion of a screening, the responsible authority must determine the significance of the adverse environmental effects of the project. This determination governs whether the responsible authority can take action that will enable the project to proceed.

If the project is not likely to cause significant adverse environmental effects, following the application

of mitigation, the responsible authority can enable the project to proceed. For example, if there are no significant adverse environmental effects associated with a bridge crossing, Transport Canada[S5] may issue a permit, under the *Navigable Waters Protection Act*.

If the screening has identified that further review is necessary, the responsible authority must ask the Minister of the Environment to refer the project to a mediator or a review panel.

Further review is necessary when:

- it is uncertain whether the project is likely to cause significant adverse environmental effects
- the project is likely to cause significant adverse environmental effects and it is uncertain whether these effects are justified in the circumstances
- public concerns warrant it

Note that the responsible authority **cannot take any action that enables the project to proceed**, if, after taking into account any appropriate mitigation measures, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances.

The EA Decision in Comprehensive Studies

Following the completion of a comprehensive study, the Minister of the Environment issues an environmental assessment decision statement. This decision statement includes the minister's opinion about the significance of the adverse environmental effects of the project and sets out any mitigation measures or follow-up program the minister considers appropriate.

QUICK TIP

A First Nation needs to ensure that the RA or government decision-maker is aware of any potential impacts on Aboriginal rights and title and treaty rights and considers these impacts when making their decision.

What about ... participant funding?

CEAA's Participant Funding Program can provide funding for participation in comprehensive study reviews, review panels and mediation. Funding is available to Aboriginal organizations, individuals and non-profit organizations that can demonstrate that they meet at least one of the following criteria:

- have a direct, local interest in the project, such as living or owning property in the project area
- have community knowledge or Aboriginal traditional knowledge relevant to the environmental assessment
- plan to provide expert information relevant to the anticipated environmental effects of the project

An independent funding review committee is established to review funding proposals. The funding review committee will give higher priority to expenses associated with:

- supporting the participation of local parties
- the provision of value-added expertise by other parties

Once the committee reviews the funding proposals, they make recommendations to the Canadian Environmental Assessment Agency. The president of the Agency reviews the recommendations and decides on the funding allocation.

For more information see:
http://www.ceaa-acee.gc.ca/012/013/participant-funding_e.pdf

The Minister of the Environment also has the power to request additional information or require that public concerns be addressed before issuing the environmental assessment decision statement. Once the environmental assessment decision statement is issued, the minister refers the project back to the responsible authority for action.

If the minister's decision statement indicates that significant adverse environmental effects are not likely, following the application of mitigation measures, the RA can take an action that enables the project to proceed. For example, Industry Canada can provide funding to the project.

If the minister's decision statement determines that significant adverse effects are likely, even after the application of mitigation, and if these effects are justifiable (e.g., there is significant public support for the project or the economic benefits outweigh the environmental effects), the RA may recommend that the project proceed. However, the RA must have Cabinet approval before a project can be allowed to proceed if there are justifiable significant adverse environmental effects.

As with a screening, a project will not be enabled to proceed if, following mitigation, significant adverse environmental effects are determined to be likely, and if these effects can not be justified in the circumstances.

The EA Decision in Panels and Mediations

Once a review panel has completed the public hearings and its analysis, or a mediation is concluded, the review panel or mediator must prepare an environmental assessment report that summarizes the rationale, conclusions and recommendations and includes a summary of comments received from the public. This report is submitted to the responsible authority and the Minister of the Environment who then makes it public.

The responsible authority must take the review panel's report into consideration before making any decision with regard to the project. If, following mitigation:

- significant adverse environmental effects are **not** likely, or
- if significant adverse environmental effects are likely, but are justifiable in the circumstances

the RA may make a decision to enable the project to proceed. However, whatever course of action the RA takes, it must have the approval of Cabinet.

If, on the other hand, significant adverse effects are likely – following the application of mitigation measures – and these effects are not justifiable in the circumstances, the RA may not make any decision that will enable the project to proceed.

STEP 7 - FOLLOW-UP

For screening assessments under CEAA, the RA determines whether follow-up is necessary. If the RA determines that follow-up is required, the RA must design the follow-up program and ensure its implementation. The RA must also post a notice on the Canadian Environmental Assessment Registry (CEAR) stating whether or not a follow-up program is considered appropriate for the screening of a project.

For comprehensive studies, mediations and panels, follow-up is mandatory. The RA must design a follow-up program and ensure its implementation. Relevant material about the follow-up program must also be placed on the CEAR website.

The CEAA requirements for “public participation” also apply to your First Nation. There are also specific provisions under CEAA that relate directly to First Nations and First Nation involvement. These are discussed in the **First Nation Interests in CEAA Assessments** on page 26 of this section. In addition, the duty of consultation also applies to Crown decisions that may infringe your Aboriginal rights or title or treaty rights (see page 2 in **Section 3**).

If your First Nation is concerned about a project undergoing an environmental assessment under CEAA, it is important to inform the RA or the minister of your interests in the assessment as early as possible, and to negotiate your participation (see page 9 in **Section 3 – EA From a First Nation Perspective**).

KEY DEFINITION

Public Participation

Within CEAA assessments, First Nations are included in all references to public participation. In other words, you will not find specific references regarding First Nation participation.

PUBLIC PARTICIPATION IN CEAA ASSESSMENTS

The public participation requirements of CEAA differ depending on the type of assessment that is being conducted.

The following different requirements are discussed:

- public participation in screenings
- public participation in comprehensive studies
- public participation in mediations
- public participation in panel reviews

In addition, the public registry requirements of CEAA are described under the heading, **Canadian Environmental Assessment Registry**, in this section.

PUBLIC PARTICIPATION IN SCREENINGS

Public involvement in a screening is at the discretion of the responsible authority and depends on factors such as the nature of the project, its environmental setting and public concerns.

If the responsible authority decides to solicit public comment as part of the environmental assessment, this input will be taken into consideration when the responsible authority decides the next step in the environmental assessment process. Where the responsible authority has determined that public participation is appropriate, it must provide an opportunity for the public to examine and comment on the screening report. If the screening report is made available for comment, it is worthwhile for your First Nation to provide written comments.

There are no statutory duties for the RA to consult with First Nations regarding a screening. However, there are common law and fiduciary duties for the RA to consult with First Nations if the proposed project could potentially affect First Nation's Aboriginal rights or title or treaty rights (see also the **Fiduciary Duty of Consultation** on page 26 in this section).

Canadian Environmental
Assessment Agency
website:
www.ceaa-acee.gc.ca
General Inquiries
613-957-0700

The Canadian
Environmental
Assessment Registry
www.ceaa-acee.gc.ca/050/index_e.cfm

PUBLIC PARTICIPATION IN COMPREHENSIVE STUDIES

Under *CEAA*, the responsible authority must provide opportunities for public participation throughout the comprehensive study. The public (including First Nations) has an opportunity to participate in the comprehensive study before the Minister of the Environment makes a decision on whether the project should proceed as a comprehensive study or be referred to a mediator or review panel. This public input must be taken into account by the Minister of the Environment when issuing the environmental assessment decision statement.

The public also has an opportunity to review the comprehensive study report before any decisions are made on the project. Funding is available to assist the public to participate in a comprehensive study.

Comprehensive studies are required for the types of projects (e.g., mines, pulp mills) that may generate significant concerns for your First Nation. It is worthwhile to participate in the formal opportunities for public comment by submitting written submissions. See **Preparing Submissions in Section 3 – Environmental Assessment from a First Nation Perspective** for suggestions on what to include in your submissions.

PUBLIC PARTICIPATION IN MEDIATIONS

Individuals and organizations having a direct interest in or who are directly affected by a proposed project would be involved in the mediation. A public information program, in which the general public is kept informed of the progress of talks, would form part of the mediation process.

If mediation does not successfully resolve the issues under negotiation, the Minister can order its conclusion. The mediator will provide the Minister of the Environment and the responsible authority with a report of the results of the mediation.

Funding is available to assist the public in participating in an assessment by mediation.

If a proposed project where your First Nation is potentially directly affected is being referred to mediation, your First Nation would likely be asked to be involved. If not, it is important to inform the minister of your community's interest in being involved in the mediation.

PUBLIC PARTICIPATION IN PANELS

In environmental assessments by review panels, members of the public may participate in scoping meetings to identify issues that need to be addressed. There are also opportunities later in the process to appear before the review panel in public hearings to present evidence, concerns and recommendations.

Note that participant funding is available to assist the public in participating in an assessment by a review panel.

In addition to the requirement for public participation opportunities, the Agency has prepared Procedures for a panel review stating that:

- the process does not limit Aboriginal rights
- Aboriginal participation in panel reviews may require review panels to develop different procedures, which take into account Aboriginal culture and values

If your First Nation feels that a proposed project undergoing a panel review could potentially affect your interests, consider attending the public scoping meeting to ensure your issues get incorporated into the scoping. Alternatively, contact the Agency or the executive secretary of the panel to request a meeting between representatives from your community and the panel to make submissions about the scope of the assessment. It is a good idea to prepare written submissions (See **Section 3 – Environmental Assessment from a First Nation Perspective** for a discussion of written and oral submissions during an EA process).

Presenting your First Nation's interests and concerns at the public hearing can be a very effective way of communicating and participating in the process. **The results of the hearing form the basis of the panel's report to the minister; so, involvement in the public hearings is key to effective representation.** Since the procedures for a panel review include consideration of Aboriginal culture and values, there is an opportunity to adapt the process, if needed, to accommodate your First Nation's interests. If the panel is satisfied that release of information provided by First Nations would result in specific harm to the environment (e.g., destruction of a culturally modified tree or desecration of a sacred site), the panel can protect that information.

Consider including traditional knowledge in your presentations to the panel as this can be a very effective forum for communicating your First Nation's understanding of the land and the potential impacts from the project. See **Section 7 – Traditional Knowledge and Environmental Assessment** for a suggested approach to including TK in a presentation to a panel. As well, see the **Section 11– Voisey's Bay Nickel Mine** for an example of incorporating TK into an EA.

THE CANADIAN ENVIRONMENTAL ASSESSMENT REGISTRY

The Agency maintains the Canadian Environmental Assessment Registry (the Registry) to provide public access to information about proposed projects undergoing environmental assessment under *CEAA*. The Registry includes a website where

QUICK TIP

If the panel is convinced that the release of information provided by First Nations would result in specific harm to the environment (e.g., destruction of a culturally modified tree or desecration of a sacred site), the panel can protect that information.

What about ... TK in *CEAA* assessments?

The Canadian Environmental Assessment Agency has developed interim principles for considering Aboriginal TK in environmental assessments conducted under *CEAA* for EA practitioners. These are available on the Agency's website, at http://www.ceaa-acee.gc.ca/012/atk_e.htm

QUICK TIP

While there are no statutory duties for an RA to consult with First Nations under *CEAA*, the fiduciary duty of consultation still exists.

important information about all projects under review is available. There is a link to the public registry from the *CEAA* website (www.ceaa-acee.gc.ca/050/index_e.cfm).

Typical information posted on the website includes:

- the type of review and its status
- the project name, location, basic description and proponent contact information
- the responsible authority's contact information
- notices relating to follow-up programs
- screening reports (if an opportunity for public review has been determined by the RA)
- comprehensive study reports

The responsible authority also keeps a paper project file of all records related to the environmental assessment.

The project file includes:

- copies of all information posted to the Registry website
- reports related to the EA
- public comments
- records related to design and need for follow-up programs
- records related to mitigation measures

Copies of information in the project file are available on request from the RA. In some cases, records or parts of records may not be included in the project file to comply with the *Access to Information Act* and the *Privacy Act*.

▶ **FIRST NATIONS' INTERESTS IN *CEAA* ASSESSMENTS**

FIDUCIARY DUTY OF CONSULTATION

While there are no statutory duties for an RA to consult with First Nations under *CEAA*, the fiduciary duty of consultation still **exists**. When a decision of the federal Crown in relation to a *CEAA* assessment may infringe your Aboriginal rights or title, or treaty rights, the Crown must justify any infringement, mitigate impact and/or attempt to accommodate those interests.

Details on how the fiduciary duty of consultation have been defined through the courts are described in detail in **Section 3 – Environmental Assessment from a First Nation Perspective** under the sub-section **Court-Identified Requirements**.

FEDERAL EA ON RESERVE

First Nations considering developing their reserve lands, will need to consider whether or not their project would require an environmental assessment under *CEAA*. If federal funding is used, *CEAA* is automatically triggered. So most projects on reserve trigger a *CEAA* assessment.

The federal government, primarily, but not exclusively, Indian and Northern Affairs Canada (INAC), has a responsibility for screening many on reserve projects across Canada each year because First Nations reserve lands, on the whole, are considered federal lands under *CEAA*.

Some examples of projects that would require an environmental assessment:

- designating, leasing or permitting reserve lands for economic development
- development of a community centre or other capital project with funding through INAC
- a new housing project with INAC funding
- a new solid waste landfill or transfer station
- a timber harvesting operation
- sand and gravel extraction
- exploration for oil and gas
- explorations for minerals

In some instances, an EA may be required on a reserve when it would not be required off reserve.

It is important that the need for EA and that the requirements of the EA process be considered within the overall design of the project as early in the project planning stages

as possible. Each federal department that may be triggered under the *CEAA* has guidelines and expertise available to communities to assist in completing any environmental assessment that is required.

Often, projects on reserve have more than one trigger. Proponents should be aware that for each project planned only one environmental assessment is required. Again, federal departments can assist proponents in ensuring that any review requirements are coordinated between departments. A listing of these federal departments can be obtained from the Canadian Environmental Assessment Agency or through the Regional Environmental Manager, Indian and Northern Affairs.

As with any form of EA, it is important to consult with your community.

OPPORTUNITIES FOR THE DEVELOPMENT OF FIRST NATION EA PROCESSES

Your First Nation may develop an informal EA regime at any time. In addition, your First Nation may develop a more formal EA process either through treaty negotiations, self-government discussions, under Section 59(1) of *CEAA*, or through the *First Nations Land Management Act* Framework Agreement. See **Section 3 – Environmental Assessment from a First Nation Perspective** for information on establishing First Nation's EA process.

SUMMARY

CEAA applies to projects where the federal government has decision-making authority, whether as a proponent, land manager, source of funding or regulator. There are four main types of *CEAA* assessments: screenings and class screenings, comprehensive studies, mediations and panel reviews. Almost all assessments conducted under *CEAA* are screening level assessments.

Screenings and class screenings apply to projects where the environmental effects are well understood and effective mitigation measures are known. Comprehensive studies are required for large, complex projects that are listed in the Comprehensive Study List Regulation. Both screenings and comprehensive studies are undertaken by the Responsible Authority.

In contrast, mediations and review panels, which are established by the Minister of the Environment, are independent bodies that undertake the assessment and then provide recommendations to the Minister and the Responsible Authority. Where the adverse environmental effects of a project are uncertain, likely to be significant or where there is significant public concern, a mediator or a review panel may be appointed by the Minister of the Environment to conduct the EA.

There are six steps to all *CEAA* assessments: determine if *CEAA* applies, determine the type of assessment, determine the scope of the project and the scope of the assessment, conduct the environmental assessment, the EA report, the EA decision. A seventh step, follow-up, may be required for screenings and is mandatory for comprehensive studies, mediations and panels.

Factors to be considered during the conduct of all *CEAA* assessments include: environmental effects, cumulative effects, significance, and mitigation measures. Comprehensive studies, mediations and panel reviews also require the following to be assessed: the purpose of the project, alternative means to carry out the project; the need for, and requirements of, any follow-up programs; and the capacity of renewable resources that are likely to be significantly affected by the project. In addition, Section 16(1) of *CEAA* gives the RA the discretion to consider Aboriginal traditional knowledge (ATK) in any environmental assessment. **Note that traditional knowledge can only be considered with the consent of your First Nation.**

Opportunities for public participation (includes First Nations) depend on the type of assessment. Funding for participation is available for comprehensive studies, mediations and panel reviews. Public participation in screening assessments is at the discretion of the responsible authority. Comprehensive studies have opportunities for participation in scoping of the assessment, assessing project impacts and reviewing the comprehensive study report. Mediations include directly affected parties and provide updates to the public. Panel reviews involve

the most potential for direct input and include public scoping meetings, an opportunity to review the environmental impact statement and public hearings where presentations from First Nations and the public are welcomed.

In addition to the requirements for public participation that First Nations can access, the federal government also has a fiduciary duty to consult with First Nations about any decisions which might affect Aboriginal rights or title or treaty rights. If project occurs on a reserve, it may be subject to *CEAA*. Keep in mind that at any time, your First Nation may decide to develop an "internal" EA decision making process of policy. See **Developing Your Own EA Process** in **Section 3 – EA From a First Nation Perspective** for a discussion of options for a First Nation to develop its own EA process.

CANADA'S ENVIRONMENTAL ASSESSMENT PROCESS

Additional Information

GENERAL INFORMATION ABOUT CEAA

CEAA website at

<http://www.ceaa-acee.gc.ca>

Responsible Authority's Guide prepared by Canadian Environmental Assessment Agency
Canadian Environmental Assessment Act: An Annotated Guide. Aurora, Ont.: Canada Law Book.

Class Screening

Using the Class Screening Process under the Canadian Environmental Assessment Act, Operational Policy Statement OPS - EPO/4 - 2000, located at

http://www.ceaa-acee.gc.ca/013/002/ops_csp_e.htm

Comprehensive Studies

Preparation of a Comprehensive Study for Proponents and Responsible Authorities, May 1997, at

http://www.ceaa-acee.gc.ca/013/0001/0003/comps_e.htm

Review Panel

Procedures for an Assessment by a Review Panel: A guideline at

http://www.ceaa-acee.gc.ca/013/0001/0007/panelpro_e.htm#MEDIATION%20AS%20PART%20OF%20AN%20ASSESSMENT%20BY%20A%20REVIEW%20PANEL

Cultural Heritage Resources

The Reference Guide on Physical and Cultural Heritage Resources:

http://www.ceaa-acee.gc.ca/017/images/cea_2e.pdf

Funding

For more information see Participant Funding Program

http://www.ceaa-acee.gc.ca/010/0001/0002/index_e.htm

Project Purpose, Need for and Alternatives

Canadian Environmental Assessment Agency. Addressing "Need for", Purpose of", "Alternatives to" and "Alternative Means" under the Canadian Environmental Assessment Act, Operational Policy Statement OPS - EPO/2 - 1998, October, 1998, located at

http://www.ceaa-acee.gc.ca/013/0002/addressing_e.htm

Aboriginal Traditional Knowledge – in CEAA Assessments

http://www.ceaa-acee.gc.ca/012/atk_e.htm

Sustainable Development

The sustainable Canadian Environmental Assessment Agency's sustainable development strategy can be found at

http://www.ceaa-acee.gc.ca/017/0011/index_e.htm

1998 Report of the Commissioner of the Environment and Sustainable Development, Chapter 6: Environmental Assessment - A Critical Tool for Sustainable Development, Main Points.

Cumulative Environmental Effects

Canadian Environmental Assessment Agency. Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, Operational Policy Statement OPS - EPO/3 - 1999, March, 1999.

The Operational Policy Statement provides background on the development of the Cumulative Effects Assessment Practitioners Guide, and highlights certain differences between the Guide, the Act and previous Agency guidance (A Reference Guide for the Environmental Assessment Act) on the subject.

The Cumulative Effects Assessment Working Group and AXYS Environmental Consulting Ltd. Cumulative Effects Assessment Practitioners Guide, February 1999.

Canadian Environmental Assessment Agency. A Reference Guide for the Canadian Environmental Assessment Act: Addressing Cumulative Environmental Effects, November 1994 (previous Agency guide on cumulative environmental effects).

Significant Effects

Reference Guide: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects.

http://www.ceaa-acee.gc.ca/013/0001/0008/guide3_e.htm

Aboriginal Group's Submissions during CEAA 5-year review

Aboriginal groups made a number of submissions about the ways in which CEAA could be strengthened to better serve the needs of First Nations. See

http://www.acee-ceaa.gc.ca/013/001/0002/0004/0004/process_e.htm

The British Columbia First Nation Environmental Assessment Working Group, March 7, 2000 Workshop Report, is located at

<http://www.acee-ceaa.gc.ca/013/001/0002/0004/0004/bcfn.pdf>

Environmental Assessment Agreements between CEAA and other jurisdictions

http://www.ceaa-acee.gc.ca/013/agreements_e.htm#3

CANADA'S ENVIRONMENTAL ASSESSMENT PROCESS – CHECKLIST

PARTICIPATING IN A SCREENING

Have you done the following:

- Checked the *CEAA* registry to find out as much information as you can about the project you are interested in
- Contacted the responsible authority to indicate your interest in participating in the screening review
- Informed the responsible authority if you think the project is likely to infringe on your First Nation's Aboriginal rights and/or title and/or treaty rights
- Regularly checked the *CEAA* Registry for information updates
- Provided written comments on the scope of the project and the assessment
- Reviewed and provided written comments on the screening report

PARTICIPATING IN A COMPREHENSIVE STUDY

Have you done the following:

- Checked the *CEAA* registry to find out as much information as you can about the project you are interested in
- Contacted the responsible authority to indicate your interest in participating in the comprehensive study review
- Informed the responsible authority if you think the project is likely to infringe on your First Nation's Aboriginal rights and/or title and/or treaty rights
- Applied for participant funding
- Regularly checked the *CEAA* Registry for information updates
- Provided written comments on:
 - The scope of the project
 - Factors to be considered in the comprehensive study
 - The scope of the factors to be considered in the comprehensive study
- Negotiated study agreements with the RA or the proponent for aspects of the comprehensive study that are of interest to your First Nation (e.g., traditional land use and traditional knowledge studies)
- Participated in aspects of the comprehensive study that are of interest or concern to your First Nation
- Reviewed and provided written comments on the comprehensive study report

PARTICIPATING IN A PANEL REVIEW

Have you done the following:

- Contacted the Canadian Environmental Assessment Agency or the executive secretary of the panel to indicate your interest in participating in the panel review
- Informed the Canadian Environmental Assessment Agency or the executive secretary of the panel if you think the project is likely to infringe on your First Nation's Aboriginal rights and/or title and/or treaty rights
- Applied for participant funding
- Negotiated a participation agreement with the Canadian Environmental Assessment Agency or the executive secretary of the panel
- Regularly checked the CEAA Registry for information updates

SCOPING

- Participated in public scoping meetings to ensure that your issue and concerns are incorporated in the scoping and/or
- Contacted the Canadian Environmental Assessment Agency or the executive secretary of the panel to request a meeting between your First Nation and the review panel to make submissions on the scoping
- Provided your written comments on the scoping to the review panel Environmental Impact Statement (EIS)
- Negotiated participation in aspects of the EIS that are of interest and concern to your First Nation
- Participated in the EIS
- Provided written comments on the EIS

PUBLIC HEARING

- Participated in and presented your First Nation's interests and concerns at the public hearing. Consider the following:
 - Presenting oral submissions
 - Providing a written submission to the panel that summarizes your oral submission
 - Including traditional knowledge, if appropriate (See Presenting TK to a Review Panel in Section 7 – Traditional Knowledge and Environmental Assessment)
 - Taking steps to protect your traditional knowledge or any other sensitive information (see Section 7 – Traditional Knowledge and Environmental Assessment, under the heading Protecting Traditional Knowledge)

PARTICIPATING IN A MEDIATION

If a proposed project in your First Nation's traditional territory is being referred to a *CEAA* mediation, have you:

- Informed the Minister of the Environment in writing of your First Nation's interest in being involved in the mediation and if you think the project is likely to infringe on your First Nation's Aboriginal rights and/or title and/or treaty rights
- Applied for funding to participate in the mediation
- Participated in the mediation
- Provided your written comments on the mediation report

PARTICIPATING IN AND/OR COMMENTING ON THE SCOPE OF ANY *CEAA* ASSESSMENT

Opportunities for comment on the scope of a *CEAA* assessment is discretionary in screenings and mandatory in comprehensive studies, mediations and panels. Therefore, if you would like to comment on the scope of any *CEAA* assessment in a screening, you should contact the RA.

When reviewing the scope of a *CEAA* assessment, here are some factors to keep in mind:

- Has the scope of the project been clearly defined, and do you agree?
- Have the factors to be considered been clearly identified, and do they meet the requirements of the *Act*?

These factors are considered in all *CEAA* assessments:

- Environmental effects
- Cumulative environmental effects
- Public comments
- Mitigation measures
- Other factors

These factors are considered in comprehensive studies, mediations and review panels:

- The purpose of the project
- Alternative means to carrying out the project
- The need for and requirements of any follow-up program
- The capacity of renewable resources that are likely to be affected by the project
- Have the scope of the factors to be considered been set out clearly, and do you agree? For instance, are there any species that are not listed that are of concern to your First Nation?
- Have any requirements for First Nation consultation or participation been set out in the scoping document, and are they sufficient?

TRADITIONAL KNOWLEDGE

The inclusion of traditional knowledge in a *CEAA* assessment is at the discretion of the responsible authority. Therefore, if your First Nation would like its traditional knowledge considered, you must inform the RA in writing.

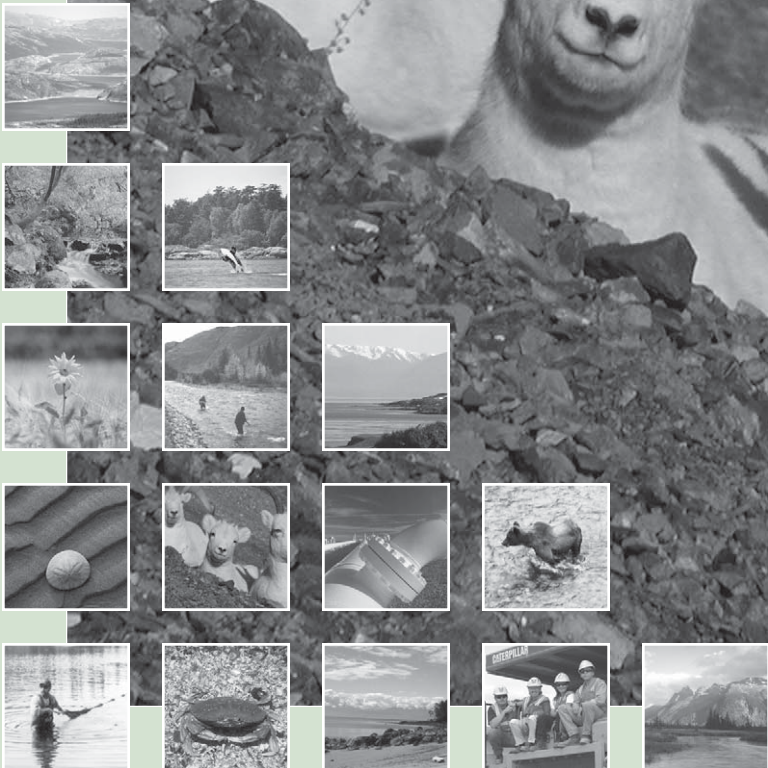
If your First Nation's TK will be considered in a *CEAA* assessment, have you followed the checklist set out at the end of Section 7—Traditional Knowledge and Environmental Assessment?

REVIEWING *CEAA* REPORTS

- When reviewing screening reports, comprehensive study reports, mediation or panel reports, consider following the detailed checklist in Section 8 – Reviewing EA Reports.

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 6 – JOINT REVIEW PROCESSES



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

 **Section 6 – Joint Review Processes** 

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

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Cover photo courtesy of Round River Conservation Studies

This section provides an overview of joint review processes that occur when an environmental assessment is required by more than one regulatory agency, such as Canada and British Columbia. It also discusses situations where joint reviews are conducted between First Nation governments and federal or provincial agencies. Strategies for participating in joint review processes are discussed.

This section includes the following:

- What is a joint review process?
- Joint federal-provincial assessments
- Other joint government agency assessments
- Participating in a joint federal-provincial assessment
- Joint First Nation-crown assessments

Case Study – Federal-Provincial Review of the Kamloops Groundwater Project 3

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▶ WHAT IS A JOINT REVIEW PROCESS?

A joint review may occur when a proposed project triggers an environmental assessment under more than one regulatory jurisdiction. Rather than conducting two separate environmental assessments, effort is made to coordinate both reviews so that one environmental assessment will meet the requirements of both processes.

The most common type of joint review in British Columbia (BC) is a joint federal-provincial review. This occurs when a proposed project triggers an environmental assessment under both the *BC Environmental Assessment Act (BCEAA)* and the *Canadian Environmental Assessment Act (CEAA)*. Joint

assessments can also be conducted between other government agencies, for example, under *CEAA* and National Energy Board legislation.

In some circumstances, a First Nation and a federal or provincial government agency may conduct a joint review. Sometimes these joint reviews include all three parties.

This section of the toolkit provides an overview of the different types of joint review processes and discusses strategies for participation in joint reviews. General strategies for participation in EAs described in **Section 3 – Environmental Assessment from a First Nation Perspective** are also relevant to joint reviews.



Mining projects may be subject to review under *CEAA* and *BCEAA*. Photo courtesy of BC Minerals Association.

▶ JOINT FEDERAL-PROVINCIAL ASSESSMENTS

CANADA-WIDE ACCORD ON ENVIRONMENTAL HARMONIZATION

Environmental management is an area of shared authority. Both the federal and provincial governments have authority to legislate with respect to the environment, including environmental assessments.

In 1998, the Canadian Council of Ministers of the Environment (CCME), with the exception of Quebec, signed the Canada-Wide Accord on Environmental Harmonization (the Accord). The Accord is a framework agreement that establishes objectives and principles to encourage cooperation and coordination between governments on a number of environmental topics. It also governs the development and implementation of sub-agreements on specific topics.

Under the Accord, all governments retain their legislative authorities. If a consensus is not achieved in any given area, governments are free to act within their existing authorities. Governments are also free to introduce more stringent environmental measures, if needed.

The Accord and sub-agreements do not affect Aboriginal rights and title and treaty rights, which are constitutionally protected. The Accord states that working cooperatively with Aboriginal people and their governance structures is necessary for an effective environmental management regime.

CASE STUDY – FEDERAL-PROVINCIAL REVIEW OF THE KAMLOOPS GROUNDWATER PROJECT

In November 2000, the City of Kamloops applied for a project approval certificate under *BCEAA* to install and operate a groundwater collector well. Since Western Economic Diversification Canada (WED), a federal government agency, was considering supplying funding for the project the project also triggered a federal assessment under *CEAA*. The responsible authority, WED, in consultation with the Canadian Environmental Assessment Agency, concluded that a comprehensive study was required.

The proponent, the City of Kamloops, filed one application, which served as the *BCEAA* environmental assessment application for project approval and the comprehensive study report under *CEAA*. A cooperative environmental assessment of the project was undertaken by federal and provincial agencies, coordinated by the provincial Environmental Assessment Office.

The main components of the project included:

- construction, development and test pumping of a groundwater collector well
- construction of a pumphouse with disinfection and fluoridation systems
- construction of a water main to connect the well to the existing water distribution system
- connection of the facility to the nearest electrical power line

On January 30, 2001, the federal Minister of the Environment announced the approval of the project. The minister concluded that, with the implementation of the mitigation measures identified in the EA report, the project would not likely cause significant adverse environmental effects. A follow-up program under *CEAA* will be implemented to monitor the effectiveness of mitigation measures. This project was approved by BC on April 13, 2004.

CASE STUDY – FEDERAL-PROVINCIAL REVIEW OF SOUTHERN CROSSING PIPELINE PROJECT

The Southern Crossing Pipeline Project is an example of a project involving joint federal and provincial environmental assessments with involvement by several First Nations.

BC Gas proposed a 312 kilometre natural gas pipeline between Yahk and Oliver. The project required a review under *BCEAA* and a screening level assessment under *CEAA*. A cooperative review was undertaken according to the Canada/British Columbia Agreement on Environmental Assessment Cooperation. The Department of Fisheries and Oceans (DFO) and Department of Indian Affairs and Northern Development (DIAND) were identified as the responsible authorities under *CEAA*. DIAND's involvement was triggered by the need for a permit under the Indian Timber Regulations to authorize the cutting of timber on reserves for sale off reserve. DFO's involvement was triggered because authorizations were required under the *Fisheries Act*.

A project committee was established under the former *BCEAA*. First Nations involved in the project committee included the Osoyoos Band, the Upper Similkameen Band and the Lower Similkameen Band. Prior to its submission of an application for review under the provincial legislation, BC Gas met with the Osoyoos Band to discuss the project. This resulted in an agreement between BC Gas and the Osoyoos Band for a change to the originally proposed route of the pipeline across the Band's reserve.

Because the project was subject to both *CEAA* and *BCEAA*, one benefit of the joint review was that the cumulative environmental effects of the project were addressed under *CEAA*. The cumulative effects review under *CEAA* focused on fish, vegetation, wildlife and trapping, inter-montane valleys, forest land and water quality. The cumulative effects assessment was accepted by the project committee and also satisfied federal *CEAA* review requirements.

QUICK TIP

The glossary at the back of the toolkit can be helpful place to get information on meanings of specific terms.

SUB-AGREEMENT ON ENVIRONMENTAL ASSESSMENT

The Sub-Agreement on Environmental Assessment (the EA Sub-Agreement) is one of three sub-agreements developed under the Accord.

The EA Sub-Agreement applies to situations where two or more governments are required by law to assess the same proposed project. It does not apply where environmental assessment processes have been established as part of Aboriginal land claim or self-government agreements (see *Joint First Nation – Crown Assessments* on page 9 of this section).

Where the EA Sub-Agreement applies, a single assessment and review process takes place, designed to meet the requirements of all the governments involved. The sub-agreement is aimed at reducing delays in the process.

The EA Sub-Agreement provides the framework for specific agreements between the federal government and a province. Agreements covering harmonization of environmental assessment processes have been reached between Canada and the provinces of British Columbia, Alberta, Saskatchewan and Manitoba.

CANADA-BRITISH COLUMBIA AGREEMENT ON ENVIRONMENTAL ASSESSMENT COOPERATION

The current agreement, Canada-BC Agreement on Environmental Assessment Cooperation (2004), was signed in March 2004 (See <http://www.eao.gov.bc.ca/publicat/canada-bc-agreement/home.htm> to view the agreement). The agreement will be in force for five years and may be renewed. It may also be revised at any time, if both parties agree.

The Canada-BC Agreement sets out a cooperative approach for conducting environmental assessments of projects that are subject to the requirements of both *BCEAA* and *CEAA*. The agreement is intended to reduce costs, as well as avoid delays, duplication and uncertainty for proponents that could arise from conducting separate EAs.

The Canada-BC Agreement contains provisions for:

- the two governments to work together with project proponents at the early stages of project planning to ensure that the environmental assessment requirements of both governments are clearly identified
- developing a common set of information requirements
- work planning on a project-by-project basis
- selecting a lead party for the assessment – normally, the Canadian Environmental Assessment Agency if the project is on federal lands and the BC EAO for projects on all other lands within the province of BC

- coordinating the involvement of Aboriginal groups potentially affected by the project (Note: both Canada and BC have a fiduciary obligation to protect existing Aboriginal and treaty rights [*Constitution Act, 1982* and common law])
- establishing joint review panels if both governments decide that they are required
- coordinating timing of decisions to the extent possible
- coordinating follow-up programs and compliance monitoring
- notifying the other party regarding obligations to assess transboundary effects
- entering into subsidiary agreements
- dispute resolution mechanisms where differences exist
- coordination and communication of all matters relating to the implementation of the agreement

In joint federal-provincial EAs in BC, the assessment will generally be conducted following *BCEAA* processes and procedures. However, there may be separate and additional consultation and information requirements under *CEAA*.

At the conclusion of a cooperative environmental assessment, both Canada and BC make independent decisions as required under their respective legislation. In this manner, each government retains its decision-making authority but their decisions are based on information gathered and analyzed through a cooperative process. Neither federal nor

provincial project decision-making is restricted by the Canada-BC agreement.

The Kamloops Groundwater Project and the Southern Crossing Pipeline Project are examples of joint federal-provincial reviews. See the case studies on page 3 of this section.

OTHER JOINT GOVERNMENT AGENCY ASSESSMENT PROCESSES

In some circumstances, a joint EA that is not covered by the Canada-BC harmonization agreement will be conducted by other federal or provincial government agencies that have overlapping statutory environmental assessment responsibilities.

For example, the National Energy Board (NEB) has an obligation to consider the potential environment effects of projects, such as pipelines, that are within its jurisdiction. A pipeline project that falls within the regulatory jurisdiction of the NEB may also trigger an environmental assessment under *CEAA*. As with joint federal-provincial assessments, joint agency assessments are designed to harmonize assessment processes and to avoid duplication.

The NEB-*CEAA* panel review of the Georgia Strait Crossing Project is an example of a federal process done



Pipelines projects may trigger an assessment under the National Energy Board and the *Canadian Environmental Assessment*.

CASE STUDY – NEB-CEAA PANEL REVIEW OF THE GEORGIA STRAIT CROSSING PROJECT

The joint panel review of the Georgia Strait Crossing (GSX) Project is an example of a joint EA between two federal government agencies.

The GSX Canada Pipeline project is the Canadian component of a proposed international pipeline, referred to as the Georgia Strait Crossing Project. The Georgia Strait Crossing Project will transport natural gas from Sumas, Washington to Duncan, British Columbia, on Vancouver Island. The proposed pipeline will be approximately 60 km long, with 44 km offshore and 16 km onshore.

The proponent, Georgia Strait Crossing Pipeline Limited, filed an application with the National Energy Board to build and operate the GSX Canada Pipeline. A joint panel review was established under National Energy Board regulations and CEAA.

The joint panel review process followed the rules and procedures of a National Energy Board hearing including:

- the release of a hearing order
- public consultation sessions to assist in the formulation of issues
- options for intervention

The joint panel applied both the CEAA and the *National Energy Board Act* in its consideration of the environmental effects of the project. Participant funding was available through the Participant Funding Program administered by the Canadian Environmental Assessment Agency.

On 30 July 2003, the joint review panel released its conclusions and recommendations, including mitigation measures, follow-up programs and its rationale in the Joint Review Panel Report. The panel recommended that GSX proceed to the next level of decision making. On November 21, 2003, the Government of Canada released its official response, accepting the panel's conclusion that the Canadian portion of the Georgia Strait Crossing pipeline project is unlikely to cause significant environmental effects, provided specific actions are taken to protect areas that could be affected.

On December 15, 2003 the NEB issued a Certificate of Public Convenience and Necessity, authorizing construction and operation of the GSX natural gas pipeline to Vancouver Island. The Certificate is subject to terms and conditions, including the receipt of regulatory approvals for the proposed Vancouver Island Generation Project (VIGP) facility and execution of firm gas transportation contracts.

jointly with *CEAA* and the NEB. See the case study on page 6 of this section.

When your First Nation is considering participating in an environmental assessment, you should first determine whether the review will be conducted under a joint federal-provincial process or other joint process. Joint reviews require an understanding of the individual processes as well as an understanding of the combined process. So it is important to become familiar with the specific legislative processes associated with each EA your First Nation participates in.

If a federal-provincial review process is being conducted under *BCEAA* and *CEAA*, see **Section 4** and **Section 5** of this toolkit. The information about participating in an assessment under either *CEAA* or *BCEAA* applies to participating in a joint assessment.

Details on review processes of other government agencies are not included in the scope of this toolkit. However, if the review process includes other government agencies (e.g., National Energy Board) you can contact the agency to request details of their specific procedures. Information is usually also available on the NEB's website, http://www.neb.gc.ca/index_e.htm

PARTICIPATING IN JOINT FEDERAL-PROVINCIAL ASSESSMENTS

ACHIEVING YOUR OBJECTIVES

Review the goals and objectives your First Nation has identified in relation to the environmental

assessment. (See **Section 3 – Environmental Assessment from a First Nation Perspective** for information about identifying goals and objectives).

Consider the benefits of participating in a joint environmental assessment:

- less of your resources will be required to participate in one process rather than two
- a joint process may help ensure that the best aspects of each process will be included in the EA and that some of the deficiencies of each process can be overcome
- potential cumulative effects will be reviewed under a joint process since this is required by *CEAA* and is discretionary under *BCEAA*
- a joint process may result in better opportunities to address alternatives to the project
- participant funding opportunities may be greater when both governments are involved in reviewing a project

Balance these against some of the challenges:

- a joint review process may be more complex
- Canada and BC may not conduct their assessments at the same pace and they will be working to fulfill different requirements

PARTICIPATION AGREEMENTS

Familiarize yourself with the requirements of each government's process, including the consultation and participation requirements. Remember that in a joint federal-provincial environmental

QUICK TIP

If your First Nation is participating in a joint federal-provincial review, it is important that your First Nation be familiar with *CEAA* and *BCEAA* legislation and processes

assessment, both governments will have an obligation to consult your First Nation if your Aboriginal rights or title or treaty rights may be infringed by granting project approval. Therefore, your opportunities for involvement may be greater. As with any environmental assessment process it is beneficial to initiate participation as early as possible in the process.

If your First Nation chooses to participate in a joint EA, negotiate a written participation agreement.

A participation agreement should cover the following aspects of the EA:

- identification of procedures that will be used throughout the assessment
- your First Nation’s role in defining the scope of the EA, establishing schedules, participating in and reviewing the draft EA report, formulating recommendations and funding for your First Nations overall participation
- the role and structure of any project assessment committee
- ability to retain experts and funding for experts
- how the federal or provincial government agencies and the proponent will interact with your community to explain the process and the project
- use and protection measures needed for sharing traditional knowledge and land use information
- how the significance of identified impacts will be determined
- your First Nation’s role in determining the acceptability of any proposed mitigation measures and management plans

- your First Nation’s role in follow-up and monitoring programs

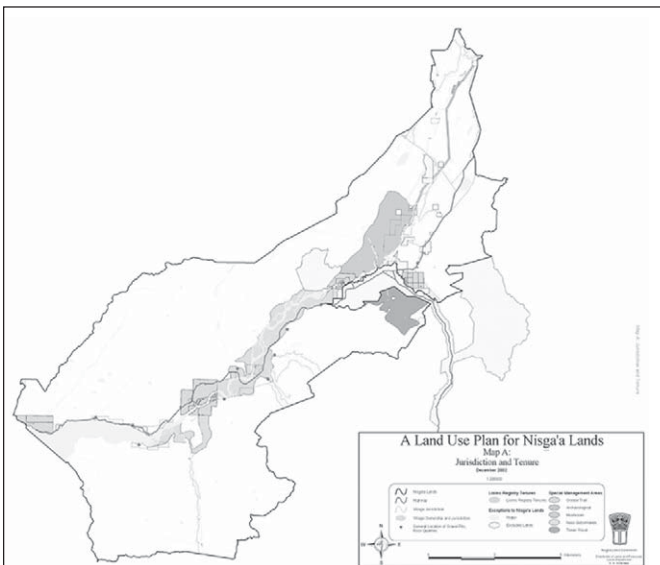
JOINT FIRST NATION-CROWN ASSESSMENTS

In British Columbia, there are a number of circumstances under which joint First Nation-Crown environmental assessments may be possible.

JOINT FIRST NATION-CROWN ASSESSMENTS – PROJECTS ON TREATY SETTLEMENT LAND

If a First Nation has negotiated environmental assessment law-making powers for projects on treaty settlement land in their treaty or land claim agreement, joint environmental assessments with Canada and/or BC may occur if:

- the First Nation has developed an EA law, pursuant to their treaty or land claim



Map of Land Use Plan for Nisga'a Lands. The Nisga'a have a treaty with BC that contains EA law-making powers. Photo courtesy of Nisga'a Lisims Government.

- the project is located on treaty settlement land
- the project also triggers federal and/or provincial EA legislation
- Canada, BC, and the First Nation have negotiated a harmonization agreement

To date, the Nisga'a are the only First Nation in BC to have finalized a treaty that contains EA law-making powers (see the Nisga'a Lisims Government website for additional information <http://www.nisgaalisims.ca/treaty.html>).

JOINT FIRST NATION-CROWN ASSESSMENTS – FIRST NATION LAND MANAGEMENT ACT

In 1996, 14 First Nations and Canada entered into a Framework Agreement on First Nation Land Management (the Framework Agreement). In 1999, Canada ratified the *First Nations Land Management Act (FNLMA)*, which is the legislation which brings into effect the Framework Agreement. In May 2003, the *FNLMA* was amended to include 22 more First Nations.

Five of the 14 signatory First Nations come from BC:

- Westbank
- Lheidli T'enneh
- N'quatqua
- Squamish
- Musqueam

Eleven of the twenty-two First Nations who were added to the *FNLMA* also come from BC:

- Songhees
- Beecher Bay

- Pavilion
- Tsawwassen
- Tsawout
- Burrard
- Sliammon
- Osoyoos
- Kitselas
- McLeod Lake
- Skeetchestn

BC has 16 signatories to the *FNLMA*. Under this Act a First Nation will have authority over reserve lands, natural resources and revenues on its reserve land base. To give effect to the Framework Agreement, each signatory First Nation is required to adopt a land code which will empower them to enact their own laws in areas such as environment and matrimonial real property, and to enforce those laws.

Thus, the opportunity for a joint CEAA-First Nation EA process exists for First Nations who have opted into the *FNLMA*, who have ratified a land code, and who have subsequently enacted an environmental assessment process. Additionally, the project must be proposed on reserve lands, and have triggered both federal and First Nation environmental assessment laws.

What is... the Framework Agreement

The Framework Agreement on First Nation Land Management was negotiated over a fourteen-year period by First Nations who were dissatisfied with the uncertainty and inefficiency involved in federal management of reserve lands and the narrow delegated land management powers under the Indian Act. The Agreement enables participating First Nations to take over the federal land and resource management jurisdiction contained in 32 sections of the Indian Act, which no longer apply once a community Land Code is ratified. Preserving the quantity and quality of existing First Nation lands is a fundamental principle of the Framework Agreement. A participating First Nation has the power to make environmental protection and assessment laws, which will be implemented through further agreements negotiated between the First Nation, Canada and the province (if it chooses to participate), for funding and harmonizing environmental protection and assessment regimes. Further information is available from the national Lands Advisory Board website at <http://www.fafnlm.com/LAB.NSF/vSysAboutDoc/English>.

 **SUMMARY**

There are several different types of joint review processes. In BC, the most common are joint federal-provincial reviews, where a proposed project triggers both *CEAA* and *BCEAA*. There are also other types of joint review processes between government agencies such as a joint review conducted when *CEAA* is triggered and the National Energy Board's process is triggered.

When considering participation in a joint review process ensure your First Nation becomes familiar with the details of each agency's review process since the joint process will usually incorporate elements of both processes.

In some circumstances, joint First Nation-Crown environmental assessments are possible. For instance, where a First Nation has entered into a treaty with the federal and provincial governments, and if their treaty contains environmental assessment law-making provisions, a harmonization agreement may be negotiated to conduct joint reviews where more than one environmental assessment process is triggered for proposed projects on treaty settlement land.

Joint First Nation-federal environmental assessments are also possible, for proposed projects on reserve land, where a First Nation has opted into the *First Nation Land Management Act*, has ratified a land code, and has enacted environmental assessment procedures.

For more information on participation in environmental assessments refer to **Section 2 – EA Basics**, **Section 3 – EA From a First Nation Perspective** and **Section 4 – BC's EA Process**, **Section 5 – Canada's EA Process**.

JOINT REVIEW PROCESSES

Additional Information

Canada-Wide Accord on Environmental Harmonization
Canadian Council of Ministers of the Environment
website at

[http://www.ccme.ca/initiatives/environment.html?
category_id=25](http://www.ccme.ca/initiatives/environment.html?category_id=25)

The EA Sub-Agreement

http://www.ccme.ca/assets/pdf/envtlassesssub_agr_e.pdf

JOINT FEDERAL PROVINCIAL AGREEMENTS

Canadian Environmental Assessment Agency
website at

http://www.ceaa-acee.gc.ca/013/agreements_e.htm#1

or the

BC Environmental Assessment Office
website at

[http://www.eao.gov.bc.ca/publicat/canada-bc-agreement/
home.htm](http://www.eao.gov.bc.ca/publicat/canada-bc-agreement/home.htm)

▶ **JOINT REVIEW PROCESSES – CHECKLIST**

Also refer to checklists in Sections 3, 4 and 5.

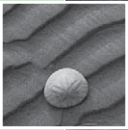
PARTICIPATION AGREEMENT

A participation agreement may include:

- identification of procedures for the joint EA process
- clarification of your First Nation's role in
 - scoping the EA
 - participating in the EA studies
 - reviewing the draft EA report
 - formulating recommendations
- the role and structure of any project assessment committee
- funding for experts
- how the federal or provincial government agencies and the proponent will interact with your community to explain the process and the project
- use and protection measures for sharing traditional knowledge and land use information
- process for determining the significance of identified impacts
- your First Nation's role in determining the acceptability of any proposed mitigation measures and management plans
- your First Nation's role in follow-up and monitoring programs

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 7 – TRADITIONAL KNOWLEDGE AND ENVIRONMENTAL ASSESSMENT



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Cover photo courtesy of Mark Connor, Taku Tlingit First Nation

If your First Nation is involved in an environmental assessment it may be worth including aspects of traditional knowledge (TK) as part of your involvement in the process. This section describes a process for assembling TK and ways that you might choose to include it in an environmental assessment. It also discusses legal considerations, funding for studies and ways to protect your TK.

This section includes the following:

- What is traditional knowledge?
- Why use TK in environmental assessment?
- Challenges in conducting a TK study
- Legal and policy considerations
- Protecting TK
- Funding sources
- Using an existing TK study or developing a new study?
- Process for developing a TK study
- Ways to include TK in an environmental assessment

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▶ WHAT IS TRADITIONAL KNOWLEDGE?

The wisdom and understanding that Aboriginal peoples have developed through living close to the earth is unique and is part of the ongoing cultural heritage of Aboriginal peoples. This body of knowledge is sometimes called traditional knowledge. There are differing views on how to define traditional knowledge and which term to use. Terms currently being used include traditional knowledge (TK), traditional ecological knowledge (TEK), Aboriginal traditional knowledge (ATK), indigenous knowledge (IK), community knowledge and local knowledge. For the purposes of this toolkit, we are using the term “traditional knowledge.” Your First Nation should use a term and definition that is accepted by your First Nation.

QUICK TIP

There are many terms used in reference to traditional knowledge – use a term that suits your First Nation. Some typical terms include indigenous knowledge or traditional ecological knowledge.

▶ WHY USE TK IN AN ENVIRONMENTAL ASSESSMENT?

Why would your First Nation want to use your traditional knowledge in an environmental assessment?

TK is being recognized as important information and contributes to the long-term knowledge of an area or about a particular species.

Here are some ways TK could be helpful to your involvement in the process:

- using TK can be one of the ways you use to identify issues of importance to your community
- conducting a TK study can help you to understand the potential impacts of a project from your community’s perspective and identify changes to the project that would eliminate or lessen those impacts
- use of TK can result in an improved understanding of community concerns by proponents and regulatory agencies. It can also facilitate relationships between the community and proponent
- TK can contribute to the design of monitoring and follow-up programs and improve the management of environmental, socio-economic and cultural effects of the project
- TK research can have positive benefits for the community beyond the environmental assessment process including education, planning, community development and land claims

Compiling and presenting TK in an environmental assessment process can have advantages regardless of whether your First Nation is opposed to a project, supportive of a project or somewhere in-between.

Here are some examples of projects where TK has been used for different purposes:

- In the Cayoosh Ski Resort environmental assessment, where the St’at’imc First Nation were opposed to the project, the inclusion of TK helped document their concerns with the project (see case study on page 3 of this section).

CASE STUDY – CAYOOSH SKI RESORT

This case study profiles an in-depth attempt by First Nations to use traditional knowledge (TK) to help understand the potential impacts of a large ski resort development in an isolated part of their territory. The environmental assessment (EA) process was a joint federal-provincial assessment.

BACKGROUND

The proposed Melvin Creek/ Cayoosh ski resort project consists of a highway and \$530 million ski village with a projected population of more than 14,000. It is located 55 km south-west of Lillooet, BC. The proposed project lies in the traditional territory of the eleven St'at'imc First Nations communities. The project was controversial for most of the First Nations and the majority chose not to participate in the joint assessment as members of the project committee. The Lillooet Tribal Council, to which three of the First Nations belonged, maintained from early in the assessment process that

the project site was located in St'at'imc Nation territory and that they would only be involved in the environmental assessment in a government-to-government relationship.

In June 1997, representatives of the In-SHUCK-ch and N'Quat'qua First Nations met with the environmental assessment office (EAO) to discuss several issues, including the need for a traditional use study. In August 1998, the EAO again met with several First Nations and the Lillooet Tribal Council to discuss the potential impacts of the project, as well as other concerns. The N'Quat'qua First Nation identified potential impacts on traditional activities such as hunting, and also raised concerns about impacts on valleys and watersheds adjacent to Melvin Creek.

The project report specifications required the proponent to conduct a traditional use study, consult with Aboriginal communities and re-evaluate the project-related socio-economic issues affecting local Aboriginal communities. However, the proponent's relationship with First Nations was not conducive to completing the required work.

USE OF TRADITIONAL KNOWLEDGE

In November 1998, the St'at'imc notified the EAO of their preference for the EAO to take the lead responsibility for most of the First Nations' study requirements,



and began negotiations with respect to the required studies. In October 1999 these negotiations were concluded and the studies begun. Terms of Reference and budgets were determined for cultural heritage, socio-economic and transportation studies. The St'at'imc Chiefs, while agreeing to participate in the study program, again declined to participate in the project committee.

The Lillooet Tribal Council had recommended that an Aboriginal Impacts Assessment should:

- address the impact of the project on First Nations' use of the area for hunting and trapping, fishing, gathering of plants, and social, spiritual and ceremonial uses
- assess the loss of access to traditional foods and medicines through avoidance of the area by wildlife, elimination of plants through clearing or pesticide use, or indirect changes in diet from the perception that traditional foods are contaminated

Specific issues to be studied included potential impacts on traditional use from:

- air and water pollution
- solid waste
- liquid waste
- changes in water supply and quality
- noise and traffic impacts
- additional access roads and trails

Studies were to:

- predict alterations in the patterns of use of traditional resources
- predict the medicinal, social, cultural and economic consequences of these alterations
- identify potential significant adverse effects

- identify measures the proponent could implement to avoid, minimize, rehabilitate, restore, or protect First Nations resources that would be adversely affected by the project

A consulting company owned by the Mount Currie First Nation conducted the prescribed studies on behalf of the St'at'imc Chiefs and submitted these draft reports to the EAO in March 2000:

- Cultural Heritage Study
- Review of Archaeology Studies Regarding Proposed Cayoosh Creek Resort
- Review of Wildlife and Habitat Assessment
- Summary of St'at'imc Ethnobiological Documentation
- Comments on Transportation and Infrastructure Issues
- Socio-Economic Study
- St'at'imc Social and Cumulative Impact Analysis

The TK component of these studies included interviews with St'at'imc people regarding the past and present use of the project area and surrounding watersheds. Interviewees identified hunting and gathering uses, trails to adjacent watersheds and traditional use of the area for vision quests.

The First Nations' review criticized the archaeology work done by the proponent since that study did not involve the St'at'imc in developing its predictive model, nor in interpreting its observations. The review concluded that the archaeological study might have failed to identify areas of high and moderate archaeological potential in the Melvin Creek valley and that the TK of St'at'imc elders, especially hunters, could have contributed key information.

The cultural heritage study concluded that if the resort were to proceed, the Melvin Creek drainage would become unavailable for St'at'imc traditional uses.

The study made sweeping recommendations, including:

- transfer of all current provincial tenures and designations in the area to the St'at'imc, on the basis of fee simple ownership
- establishing a St'at'imc Management Area, initially co-managed with the province but eventually transferred to St'at'imc control
- a request for funding from the province to investigate the feasibility of various economic development opportunities suggested in the socio-economic study

The project committee subsequently determined that such a proposal would fall outside its mandate.

The proponent was given an opportunity by the project committee to comment on the St'at'imc studies, and to propose measures to avoid or minimize the anticipated impacts.

While the proponent disagreed with some of the findings of the cultural heritage study, it did propose a number of mitigation measures that the project committee accepted:

- some traditional uses such as deer hunting in the valley could still occur since the seasonally oriented winter recreational use of the area would not start until after the fall hunting season
- snowmobiling would be prohibited
- the development would not interfere with archaeological sites or known trails

PROJECT REVIEW PROCESS

The project committee concluded that, while the cultural heritage study indicated the project might have an impact on some hunting and gathering activities around Melvin Creek, the proponent's mitigation measures could prevent or substantially reduce any potential adverse impacts to wildlife and plants. The committee seemed to be influenced by the large area "claimed" by the St'at'imc, considering this a mitigating factor for the losses that would occur in the project area. However, the project committee did not formally assess the remainder of the territory to determine if such a trade-off was appropriate.

The findings of the land use and cultural heritage studies did not persuade the project committee that it was obliged to evaluate whether approving the project would interfere with the Aboriginal rights and asserted land title.

CONCLUSION

After the project assessment, one First Nation was engaged in discussions with the province and the proponent with respect to its concerns. The other St'at'imc Nations reiterated their opposition to the project. The province and the federal government had offered to discuss study results and potential project impacts on First Nations' interests on several occasions during the assessment, but these offers had not been accepted by the St'at'imc Chiefs. The Ministers approved the project in August 2000.

For available EAO documents on Cayoosh refer to:

http://www.eao.gov.bc.ca/epic/output/html/deploy/epic_project_home_30.html

- In the Bamberton Residential Project, TK was used to improve the design of the project, protect sensitive areas and ensure that access to traditional use areas was maintained (see case study on page 19 of this section).

There are many other projects in BC that have a TK study component. Two examples are the Sea-to-Sky Highway Upgrade Project and the New Fraser River Crossing.

▶ CHALLENGES IN CONDUCTING A TK STUDY

If your First Nation is considering compiling TK information for an environmental assessment, there are several challenges to consider. TK studies can be expensive, as they require significant time and resources. However, if your community is interested in conducting a TK study and the project is fairly large, it is likely that the proponent will provide funding for the project.

In some cases a community may want to conduct a TK study but may not have people within the community who are trained in research. Also, during an environmental assessment there are usually many concurrent activities such as reviewing the proponent's information, meeting and negotiating with the proponent and providing written submissions to the government. In some situations, staff will be overworked, so consider getting help from outside the community.

Often the schedule is tight in an environmental assessment process. The time from project announcement to when the environmental assessment application is filed can vary from as little as a few months to as much as a few years. Typically, though, the process is less than a year. If the proponent has initiated communications with your community early in the process, there is a better chance that there will be time to do a study. There is also some opportunity to negotiate schedules with the proponent and the government agency if you can make a strong case for needing the time to provide your input. In some cases the proponent will commit to ongoing TK work after the environmental assessment is submitted.

▶ LEGAL AND POLICY CONSIDERATIONS

TRADITIONAL KNOWLEDGE AND THE BC ENVIRONMENTAL ASSESSMENT PROCESS

In British Columbia (BC), provincial environmental assessments are regulated by the *BC Environmental Assessment Act (BCEAA)*. There is no official requirement in the *BCEAA* to include TK in environmental assessments. The BC Environmental Assessment Office (EAO) (the branch of the government that regulates environmental assessment) encourages the inclusion of TK through their policies and practices.

In environmental assessment the company or group who is proposing to do the project are usually called the proponent. Proponents are encouraged

by the EAO to actively engage in consultation with First Nations as early as possible in the environmental assessment process. They are also encouraged to incorporate traditional knowledge into their assessment.

In their guidance to proponents on consulting with First Nations, the EAO suggests three main ways that TK can be brought into the environmental assessment process:

- through First Nations providing written comments on the project
- through conducting new studies such as current and traditional land use and archaeological studies
- as sub-components of other studies such as wildlife and socio-economic studies especially incorporating it into baseline information early on to better inform design and site selection decisions

See the policies and guidelines set out in the BC Environmental Assessment Process (March 2003) and the Provincial Policy for Consultation with First Nations (October 2002).

For more information on the Crown’s common law consultation obligations see the sub-section **Consultation and Accommodation Requirements in Section 3 – Environmental Assessment from a First Nation Perspective** of this toolkit.

In practice, traditional knowledge is included in most large environmental assessments in BC that involve Crown land. These studies have various names and have been called traditional use studies, Aboriginal use studies, First Nation’s study program, cultural

heritage impact assessments and traditional ecological knowledge studies.

There are no official guidelines as to how TK studies are done for environmental assessments. The way that TK is incorporated into BC environment assessments has been established on a project-by-project basis.

In assessments involving smaller amounts of Crown land, new TK studies are not typically required, unless your First Nation requires or presses for it. However, TK can be incorporated as written comments about the project or through consultation and site visits with TK knowledge holders.

Projects located on private land may incorporate some TK information (e.g., archaeology) and other information depending on whether or not Aboriginal use has continued to be practised on the private land and whether your First Nation requires or presses for it to be included.

If your First Nation would like to have TK included in a project here are three strategies:

1. In your discussions with the proponent about the project you can indicate your interest in including TK either informally or by conducting a new TK study. It is possible they will agree to fund a TK study.



Traditional knowledge gathering project. Photo courtesy of Mark Connor, Taku River Tlingit First Nation, Habitat Steward.

QUICK TIP

Incorporating TK in an EA requires your First Nation's consent. In other words, it is up to your First Nation if TK is included in an EA.

2. You can contact the BC Environmental Assessment Office to request they include traditional knowledge in the terms of reference for the environmental assessment. Sometimes the EAO will provide a formal opportunity within the environmental assessment process for a First Nation to provide written comments on the terms of reference. Other times this is done less formally. Regardless, a letter stating the reasons that you feel a TK study are necessary can be submitted to the EAO. If traditional knowledge is incorporated in the official terms of reference for an environmental assessment, then the proponent must include it in the assessment.
3. TK can be incorporated into any written submissions or oral presentations that your First Nation chooses to provide within the environmental assessment process.

In many cases it would be effective to use all three of these strategies. For each strategy above, summarize your request or the results of your discussions in a letter and submit it to the EAO so it becomes part of the official record of the assessment. This can be helpful in documenting your participation in the process.

TRADITIONAL KNOWLEDGE AND THE FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

The *Canadian Environmental Assessment Act (CEAA)* applies to projects where the federal government has decision-making authority, whether as a proponent, land manager, source of funding, or regulator. For example, a project funded by Industry Canada may require a *CEAA* assessment, as would a project that would require an authorization from the Department of Fisheries and Oceans where fish habitat may be adversely affected. (See the **Section 5** of this toolkit for additional information on the federal environmental assessment process). Your community's traditional knowledge may be considered in a *CEAA* assessment in three main ways.

First, under section 16(1) of *CEAA* federal departments and agencies conducting an EA are given the discretion to consider Aboriginal traditional knowledge in any EA. Section 16(1) states that:

“Community knowledge and **Aboriginal traditional knowledge** may be considered in conducting an environmental assessment.” (emphasis added)

If the federal government department or agency conducting the environmental assessment – the Responsible Authority (RA) – contacts your First Nation seeking to include your TK in a *CEAA* assessment, your First Nation has the discretion to decide if this would be appropriate. In other words, inclusion of your First Nations' TK in a federal environmental assessment is not mandatory and requires your First Nation's consent.

You should be aware, however that this also means that there is no statutory legal requirement for the responsible authority to consider your TK in a *CEAA* assessment, even if your First Nation would like to have it considered. For more information about the Crown's common law consultation obligations, refer to the sub-section **Consultation and Accommodation Requirements in Section 3 – Environmental Assessment from a First Nation Perspective** of this toolkit.

All *CEAA* assessments must include the consideration of the environmental effects of the project. This means that an RA must consider any change that the project may cause in the environment, and the effect of this change on (among other things) “the current use of lands and resources for traditional purposes by Aboriginal persons” (*CEAA*). Thus, your community may decide to provide its traditional knowledge to the RA or proponent in the context of the consideration of a project's environmental effects.

If your First Nation is interested in having your TK considered in the federal environmental assessment of a project, you can write a letter to the RA and request that your TK be considered in the assessment. And, as with the BC process, you can include TK in any submission that you make within the environmental assessment process.

The Canadian Environmental Assessment Agency (the Agency) has developed Interim *Principles for Incorporating Aboriginal Traditional Knowledge (ATK) into CEAA*. This interim principles document is intended to provide

general guidance to EA practitioners on the consideration of ATK in *CEAA* assessments. These interim principles are available on the *CEAA* website (<http://www.ceaa-acee.gc.ca>).

The interests of your First Nation may be considered in a *CEAA* assessment not only in the context of traditional knowledge. Refer to the *CEAA* section of this toolkit (Section 5) on how First Nation interests may be brought into the federal environmental assessment process under other sections of the Act.

TRADITIONAL KNOWLEDGE AND A JOINT FEDERAL-PROVINCIAL ENVIRONMENTAL ASSESSMENT PROCESS

If a project is being jointly reviewed by the BC Environmental Assessment Office and a department or agency of the federal government, the review may be coordinated. BC and Canada have a harmonization agreement in place that co-ordinates their respective processes. The Agreement, called the *Canada-British Columbia Agreement for Environmental Assessment Cooperation*, (see Section 6 of this toolkit on joint reviews for more information).

Providing your TK to a joint environmental assessment would mean that your TK would be considered under both the federal and provincial processes.

PROTECTING TRADITIONAL KNOWLEDGE

If your community decides to provide its traditional knowledge to a federal, provincial, or joint environmental assessment, it is important to consider ways to control and protect the use of this knowledge.

QUICK TIP

Remember that if you submit TK to an EA it may become accessible to the public. Be sure to have an agreement (or some other mechanism) that provides adequate protection of any sensitive information that is part of your First Nation's submission.

Environmental assessment is a public process and information submitted to the public registry as part of that process is typically available to government agencies, the proponent and the public. Although there may be benefits to using TK in an EA, there are also risks. In some situations, culturally sensitive information has been used outside of the environmental assessment in ways that were not intended. For example, in one environmental assessment a First Nation community identified important traditional fishing areas on a map and later found that non-Aboriginal fisherman had started using these areas.

Traditional knowledge is increasingly seen throughout the world as the legal property of the people holding the knowledge. Your community has a right to protect its TK and there are several strategies that you might consider. With any of these strategies it would be beneficial to consult with your lawyer.



Photo courtesy of Nisga'a Lisims Government

In any situation where traditional knowledge is being sought from your community, you could negotiate a written agreement with any parties involved that ensures confidentiality and allows your community to control what data gets released and how it is presented. This type of agreement would typically be between your community (or in some cases the specific knowledge holders), the organization seeking access to your TK (often the proponent and occasionally a government agency) and anyone that might be hired to conduct a TK study.

It is important to inform any knowledge holder who may be participating in a study about how the information collected is likely to be used and ensure that they are willing to share their knowledge for this purpose. Consider developing an informed consent form for knowledge-holders. A number of Canadian Aboriginal organizations have developed detailed protocols on the use of TK that you may wish to refer to. For example, the Dene Cultural Institute developed *Guidelines for the Conduct of Participatory Community Research to Document Traditional Ecological Knowledge for the Purpose of Environmental Assessment and Environmental Management* (<http://www.idrc.ca/books/847/7-App1.html>). In addition, the Inuit Tapirisat of Canada has developed *Research Principles for Community-controlled Research with the Inuit Tapirisat of Canada* (<http://www.idrc.ca/books/847/7-App1.html>).

If neighbouring First Nations are involved in the same assessment, consider arranging information-sharing protocols with them.

In some cases it is possible to negotiate confidentiality and information-sharing agreements limiting how much information is released to the public. However, it is important to be aware that both Canada and BC have access to information legislation in place that may restrict either government's ability to protect the confidentiality of your TK.

Consider limiting what TK you share to only the information that would explain the potential effects of the project and to highlight your issues. For instance, specific information can be summarized into general conclusions. Or, if specific places such as sacred sites, medicinal plant harvesting areas or important hunting areas have been identified, these can often be presented in a more general way that does not give away exact site locations. For example, if information is being presented on a map, a somewhat larger area can be indicated instead of a specific location. Other options are to not map sensitive areas or to designate these maps as confidential and only share them with specific parties.

Regardless of the strategies that you decide to use to protect your TK, it is important for your community to consider how you will document the information and under what circumstances you will share it.

FUNDING SOURCES

In almost all cases where TK studies are conducted in environmental assessment, the proponent provides the funding. Since the proponent may be required to consider TK in their environmental assessment, it is in their interest to fund any necessary TK studies.

In BC, there have been a few occasions where the EAO has provided the funding for TK studies. There is no funding available through *CEAA* for the inclusion of TK in *CEAA* assessments.

USING AN EXISTING TK STUDY OR DEVELOPING A NEW STUDY

Many First Nations have made substantial efforts over the years collecting information from their Elders, land users, and other knowledge holders. So sufficient information may already exist, and further research would be unnecessary. Start by examining the documented material already available in the community.

The most valuable sources are often interview tapes, transcripts, and maps produced through interviews with knowledge holders. Other documents, plans, surveys, photographs, studies and research papers are likely to be present and useful. Once you have compiled the information, examine the material to identify gaps in geographic coverage or historical record, particularly for information that relates to the proposed project site.

Consider conducting a new TK study if:

- there are information gaps
- the project is large and complex
- there is the potential for significant effects on your community
- there is a need to understand and compare current and traditional land use patterns

CASE STUDY – HUCKLEBERRY MINE

This case study profiles the use of TK by different First Nations to help understand the potential archaeological, environmental and land use impacts of an open-pit mine in part of their traditional territory. This was a joint federal-provincial environmental assessment.

BACKGROUND

Huckleberry Mines Ltd applied to construct and operate a proposed open pit mine south of Houston B.C. to recover over \$1 billion in minerals. The BC review of the Huckleberry mine project in 1995 involved the Cheslatta Carrier, Wet'suwet'en, Nee Tahi Buhn and Skin Tyee First Nations, all of whom had traditional resource use rights in the project area. The proposed electric transmission line and increased road traffic potentially affect the Broman Lake Indian Band. Downstream effects of the mine potentially affect the Haisla First Nation.

The First Nations participated in the assessment to varying degrees.

A number of issues were raised, and the proceedings were sometimes tumultuous, with little progress being made on the main issues of importance to the First Nations- infringement of Aboriginal rights and adequacy of wildlife impact assessment.

USE OF TRADITIONAL KNOWLEDGE

There appear to be two examples of using TK in the assessment, although this is not well documented in the project committee report. Firstly, the Cheslatta Carrier advised they considered the proponent's archaeological study incomplete and offered to provide additional historic information. At the suggestion of the Cheslatta, the proponent hired another consultant to do new work using Terms of Reference mutually agreed upon with the Cheslatta.

The new study included significant input from Cheslatta people and concluded that, while there was traditional and continuing resource use in the area, there was generally a low archaeological resource potential within the Huckleberry Mines impact zone. There was, however, cultural significance to the project area since it is part of the traditional territory of the Cheslatta Frog Clan.

Secondly, the Wet'suwet'en submitted a cultural and traditional use report based upon discussions with their people. The report concluded that the project footprint would affect two of the Wet'suwet'en territories, while the road access and power corridor would pass near several houses. The report also expressed concern about the cumulative impacts of all developments within the area.

PROJECT REVIEW PROCESS

In the late stages of the assessment, an Aboriginal issues working group was established from government committee members and most of the First Nations to address unresolved aboriginal issues relating to the project.

At the end of the assessment process, the First Nations concluded that wildlife baseline information and maps were inadequate. The Cheslatta were also concerned that the process had not appropriately considered Aboriginal rights and that the proponent had not conducted an adequate study of the project's socio-economic effects on Cheslatta people and their interests.

Both the Cheslatta and the Wet'suwet'en officially opposed the application for a project approval certificate. They did not agree to project approval without deficiencies in wildlife baseline data being addressed.

Further, the Wet'suwet'en stated a need for:

- recognition of the intrinsic value of wildlife to First Nations people
- adequate consideration of compensation
- some measure of control in wildlife impact mitigation strategies

The Wet'suwet'en hereditary chiefs also sought a clearly defined consultation process for dealing with the infringements they had identified.

The Nee Tahi Buhn and Skin Tyee First Nations asserted that any remaining Aboriginal rights issues could be resolved to their satisfaction at the permit level. They considered the time remaining to complete the assessment insufficient to gather the needed data, but dealing with the issue at the permit level would allow them time to address all wildlife issues, including compensation. They also stated that they could accommodate the loss of resource harvesting areas by utilizing other sites in their traditional territory.

In its advisory report to the Ministers recommending approval of the project, the project committee dealt with unresolved issues by recommending that a Huckleberry Mines Aboriginal Liaison Committee involving the proponent and the First Nations be a condition of approval. This would provide the basis for ongoing consultation including monitoring wildlife impacts and mitigation measures. The committee would also develop a study approach to gather information about impacts to wildlife for use during permitting. Other recommendations respecting mine reclamation to compensate for wildlife habitat losses were straightforward.

CONCLUSION

The key issues remained unresolved at the end of the assessment, ultimately ending up in court under judicial review. The process did not deal with the central issues raised by the First Nations concerning the infringement of their land-based rights involving wildlife and other resources. The project committee considered most these issues to be outside its mandate.

The Ministers approved the project and it began operation in September 1997. The mine directly employs about 180 people directly and another 40 provide contract services.

For further information of First Nations' issues in final project committee report see: http://www.eao.gov.bc.ca/epic/output/documents/p861037131779389_9036ce24fbac4cf193849918a0c7f07d.pdf

▶ PROCESS FOR DEVELOPING A TK STUDY

If your First Nation is considering a new TK study, the following process could help keep the project on-track:

QUICK TIP

It is important to hire a professional ethnographer or TK researcher if your First Nation believes that there is a possibility that the information you are collecting may be used in a court action. Data collection, including traditional knowledge, must be collected in a clear and objective manner to be accepted by the courts.

STEP 1 – MEET WITH THE PROPONENT

The initial step in the decision process is usually a meeting between your First Nation leadership, appropriate technical staff and the proponent. This is also an opportunity to request funding from the proponent for a TK study.

STEP 2 – COMMUNITY LEADERSHIP PROVIDE DIRECTION

After the initial meeting with the proponent, community leaders should discuss the use of TK and whether it fits into the overall strategy your First Nation has with regard to the project. At this stage it is helpful for the community leaders to begin community consultation and to assign a TK project coordinator.

The project coordinator would be responsible for managing and coordinating the TK study and retaining any necessary professional TK researchers.

The role of the TK coordinator includes:

- developing a study proposal for review and approval by the community
- being accountable to the community and reporting to community leadership
- being the main point of contact for all parties involved in the research
- contacting the knowledge holders to arrange for interviews or site visits
- monitoring the budget and time-line
- reviewing the report to ensure it meets the objectives of the community

STEP 3 – BEGIN COMMUNITY CONSULTATION

Consider setting up a community consultation process. TK input to an environmental assessment will be strongest if the community supports the study.

If your community supports the study the report produced will better reflect the community and TK input to the environmental assessment will be stronger.

The level of trust within the community can be increased by ensuring that those seeking access to your TK:

- provide full disclosure of the objectives of the study
- clarify how the information will be used and provide assurances about information ownership and access
- obtain informed consent from individual participants
- involve the community in the design of the TK research

- enter into a protocol agreement to ensure that your community's interests are protected

STEP 4 – DEVELOP A TK STUDY PROPOSAL

The project coordinator would develop a study proposal for review and approval by the community including:

a) Relevant Project Information

It is helpful to have large-scale maps that show where the project is located in relation to your community and your traditional use areas. As well, details on the potential effects of the project are useful (e.g., types of air and water emissions, locations of land disturbance and stream crossings).

Often the proponent will provide project information in their initial contact with community leaders or will have scheduled an open-house where members of your community can learn about the project. Sometimes the regulatory agency will provide this information.

b) Study Design

An initial study design clearly sets out such things as:

- the objectives of the research in relation to the EA process and the project being reviewed
- the methodology to be used to collect and evaluate the data (see side-bar box)
- the tasks or steps required to complete the research
- how the results of the research are to benefit the First Nation in its assessment of the project, and how it will assist in impact prediction or environmental management of the project

c) Budget

The budget for a TK study usually includes the costs of paying knowledge holders and translators for their participation and the cost of hiring a researcher to conduct the research and prepare the report. Other budget considerations include community meetings, administrative support, staff time, costs associated with site visits (e.g., helicopter, boat rental), mapping and printing.

d) Timeline

The timeline for a TK study usually depends on the availability of study participants and researchers and the length of time available within the environmental assessment process.

e) TK Researcher

It is important that the TK researcher is acceptable to the community. If you have capacity within your community to conduct your own research this would be a good route to take. If not, consider hiring a researcher from outside the community.

Often, the proponent will have hired a consultant to conduct their environmental assessment and they will propose that this consultant also conduct the TK study. If you feel uncomfortable with the proponent's consultant or there is not a high level of trust with the proponent, you may choose to insist on hiring an independent consultant. There can be advantages to hiring an independent consultant because they are not also working for the proponent and may be able to help you strategically.

This toolkit does not describe the methodology used to conduct a TK study since there are already several excellent documents that describe methods for conducting a TK study. See the Additional Information list provided at the end of this section.

It is important to check any researchers qualifications. Request copies of their previous work to assure yourself of their abilities and check with other First Nations to see what their experience has been with consultants you are considering using.

QUICK TIP

A geographic information system (GIS) is a helpful tool for mapping, storing and retrieving TK information. Consider its usefulness when considering the design of the study and when deciding how to store the TK your First Nation is gathering.

The terms of reference for the researcher should include:

- the scope of work and budget
- the research process
- confidentiality and communication protocol
- how the information will be used
- limits to the use of your information
- the reporting structure for the researcher (i.e., the researcher reports to the community's project coordinator, who reports to the First Nation's leadership)
- a clear statement that your First Nation retains proprietary rights to all materials, maps, documents and the final report
- clearly set out that your community will review (and make any necessary changes) to the report
- that it will be your community that submits the report

The terms of reference will form the basis for the written agreement between your First Nation and the researcher.

f) Capacity-building

Conducting a TK study offers the opportunity to build capacity within your community. If you decide to hire a consultant from outside the community or if you are working with the proponent's consultant, ensure there is a training component in the work to be completed. For instance, if someone in your community or on staff would like to learn about TK research this presents an opportunity for them to work with the researcher and become familiar with TK.

STEP 5 – PRESENT THE TK STUDY PROPOSAL TO THE COMMUNITY

When the TK study proposal is completed and a recommended researcher selected, the project coordinator presents the proposal to the community. Community members and leaders review the proposal and make suggestions. If approval to proceed with the study is given, the TK researcher is hired and the study begins.

STEP 6 – CONDUCT THE TK STUDY

A TK study consists of the following steps:

a) Identify Key Knowledge Holders

Generally, individuals in the community who have or are likely to have knowledge relevant to the people or area affected by the project will

already be known within the community. If not, identify them through a process of consultation with community leaders, Elders, and other knowledgeable people. Make sure that each participant is fully informed about the objectives of the study and is willing to participate.

b) Conduct Information-gathering Sessions with Knowledge Holders

An information-gathering session is an effective way to start documenting TK for an environmental assessment. This usually consists of a presentation and question and answer session about the project and followed by a discussion with the knowledge holders about their traditional knowledge and any concerns about the project. You could ask the proponent, their consultants, or the regulatory agency to give your community a presentation about the project. Or, if there is someone in the community familiar with the project and its potential effects, they could give the presentation.

Comments made by knowledge holders will often fall into the following categories:

- concerns about how the project will affect the environment or community at the chosen location
- information about the environment at this site, particularly in the past
- suggestions for how the project design could be improved to better protect the environment

It is useful to document and categorize this and to map it if possible (see **Additional**

Information at the end of this section for further information on TK research methods and mapping techniques).

c) Conduct Site Visits with Knowledge Holders

Site visits with knowledge holders can be a valuable aspect to a TK study by documenting general knowledge about the area and specific issues related to the proposed locations of project facilities such as plant sites and roads. Helicopter flights are often helpful, especially for large projects.

d) Compile Information

When research is complete it needs to be compiled along with any previously documented information. The information may be assembled into maps and a report.

e) Review the Report

Once the report is complete it is important to review it to make sure that you are comfortable with the information and how it is presented. You may choose to have more than one person from your community review the report. The review team may include the project coordinator, community leaders, knowledge holders and community members. Once the report is complete and has had an initial review, the results are reported to the community for their review, verification and approval.

f) Maintain TK Information

It is important to have a system to keep track of TK information so it can be used in the future. This may be as simple as keeping copies of the report and maps on file in your First Nation's office.

QUICK TIP

It is important to ground-truth TK information. Individual knowledge holders may have different experiences or sources for their information. In addition, there may be changes in the environment over time due to natural variation or other factors (such as climate change) that may affect the accuracy of the TK collected.

▶ WAYS TO INCLUDE TK IN ENVIRONMENTAL ASSESSMENT

QUICK TIP

TK will likely contain references to the spiritual relationship between your First Nation and your land and resources.

Although difficult to communicate, it is important that TK studies document these important references. The spiritual component of a First Nation relationship must be considered as part of the EA, and protecting that “spiritual” relationship will likely be key to your First Nation.

After compiling your First Nation’s TK information there are several ways you can incorporate it into the environmental assessment process including:

- submitting TK directly to the environmental assessment process
- contributing to the development of mitigation plans
- participating in the proponent’s baseline studies
- presenting TK orally to a panel or at a hearing
- contributing to the design of monitoring and follow-up programs

Your community may decide to use TK in some or all of these activities. How you decide to include TK could depend on a number of factors including the types of issues and concerns that your community has about the project, the size and complexity of the proposed project, your relationship with the proponent, and the funding and time available. For example, in a straightforward project such as a 10 km pipeline, you may include TK in your written comments about the pipeline route. In a larger project such as a mine or a new hydro-electric project, your community could choose to submit a TK report, participate in the proponent’s baseline studies, and/or if the First Nation can permit the project to proceed, use TK in the development of mitigation measures, compensation discussions and other follow-up programs.

SUBMITTING TK DIRECTLY TO THE EA PROCESS

TK information can be provided in your written submissions or as a stand-alone report to the Environmental Assessment Office (in BC assessments) or the Responsible Authority (in federal assessments) and/or to the proponent.

Submitting TK as a stand-alone report has the following benefits:

- it allows your First Nation to have complete control of the information that is submitted and that may ultimately become public
- it presents traditional knowledge in a comprehensive and systematic way and can bring a lot of information together in a single document
- it is easily distributed beyond the environmental assessment process itself, and so can become a useful public education tool
- it provides a permanent record of how traditional knowledge was used in a given EA process
- it can be used in the community for other purposes
- it can be submitted at any stage of an environmental assessment.

As discussed in **Protecting Traditional Knowledge** (page 9) ensure that you have taken steps to protect sensitive information since anything that you submit within the environmental assessment process becomes public information.

CASE STUDY – BAMBERTON RESIDENTIAL DEVELOPMENT

This case study profiles a provincially reviewed project that was withdrawn by the proponent before approval occurred. However, it is instructive to look at TK use in this case.

BACKGROUND

Bamberton was a proposal to build 4,900 residential units on a 1,560-acre site on the eastern slopes of Malahat Mountain lying within the traditional territory of the Cowichan, Malahat, Pauquachin, Tsartlip, Tsawout and Tseycum First Nations on Vancouver Island.

South Island Development Corporation had promoted and praised Bamberton internationally for almost a decade. They had promised it would produce a healthy economy combined with ecological responsibility and human-scale design. It was projected the community would take 20 to 25 years to build and would produce \$1.1 billion in economic growth in the process.

USE OF TRADITIONAL KNOWLEDGE

To assess the potential effects of the project on First Nations, a team of five technical experts conducted an Aboriginal Land Use and Cultural Heritage Study. This consisted of traditional land use, oral tradition, ethnobotany, archaeology and socio-economic impact assessments. The cultural heritage impact assessment and First Nations consultation were managed by a First Nations Project Management Committee made up of the elected Chiefs or their representatives of the six First Nations whose traditional territories were in the project area.

For the traditional land use and cultural heritage research a set of interview procedures was established under the direction of the Management Committee and with the advice of several Elders. Sixteen group interview sessions were conducted, including several field trips to the Bamberton site to identify plant resources and special areas. The TK collected fell into several broad categories, all potentially useful for impact assessment. TK data collected were grouped into four categories.

Knowledge about the environment:

- identification of species of plants, wildlife, fish, and birds
- identification of species habitats
- identification of seasonal movements and behaviour patterns
- identification of changes to populations over last 100 years

Knowledge about use of the environment:

- First Nations' land and resource use, and traditional seasonal cycles, in the region

- changes to these traditional activities and patterns over the last several hundred years
- detailed knowledge and use of the study area for spiritual, plant gathering, hunting, fishing and other activities
- importance of these activities to people today
- changes to traditional diets

Values about environment:

- rules and codes of behaviour when harvesting, preparing, consuming, using, or storing plants and animals
- role of animals and animal products in ceremonies

Knowledge system:

- Aboriginal perceptions and concerns relating to the potential loss of resources should the project proceed
- identification of priority areas for protection

Together with the results of the other scientific studies, a substantial amount of collected information was summarised in a final report. The archaeological investigations and TK research both indicated that various places around the project area were used as inland camping or stop-over sites for people carrying out plant gathering, ceremonial/spiritual activities or hunting activities. The research also indicated that areas slated for development contained significant amounts and varieties of medicinal and ceremonial plants.

The cultural heritage impact study found there had been “irreparable damage to large areas of natural environment” and “major” impacts to land use, economic livelihood, and spiritual and ceremonial practices for the six First Nations

over the past one hundred years. The conclusions predicted that further major impacts from the new development would occur.

Specific conclusions were:

- many of the original marine resources of the inlet have disappeared and hunting and fishing activities that were traditionally practised without restriction were no longer possible due to trespass laws and the lack of resources generally
- a sacred mountain had been desecrated in the view of the local people
- “it is extremely important to stress the continuation of... practices and the continual utilization of the Bamberton lands and adjacent areas in these practices. This part of the traditional culture is very much alive today as reflected in the continuation of the winter dances and associated ceremonial activities of the Saanich and Malahat people.”

Despite the observation that the First Nations would prefer to see no further development of lands within the project area, the recommendations in the studies included the following mitigation strategies:

- First Nation representatives should work with Bamberton’s design team to ensure that the site plan of Bamberton is compatible with First Nation interests. The plan should allow for continuation of current First Nation activities on the site in privacy and with dignity. This includes use of the site for ceremonial purposes and for plant gathering. Ethno-botanical resources must be preserved by protecting the broad ecological context in which various species are found.
- First Nations must have guaranteed access to the site for the pursuit of traditional activities.

- The existing environmental and health hazards on the site must be removed or ameliorated. These include oil storage tanks, a derelict processing plant and debris and refuse throughout the site.
 - Measures must ensure sustained First Nation employment opportunities at Bamberton.
 - The proponent, in partnership with local First Nations, should develop and promote First Nation's cultural activities and interpretive opportunities within the Bamberton development lands.
 - The proponent should continue consultations with the First Nations having an interest in the project throughout the planning process. Such consultations should continue on a more permanent basis through the establishment of appropriate protocols for the long term.
 - The proponent should cooperate with local First Nations in carrying out additional studies they identify as being important for the future protection of cultural heritage sites and activities within the development lands.
 - The proponent and the Environmental Assessment Office should continue the consultation process with First Nations throughout all phases of the proposed development.
- the way TK was used to shape recommendations in the final report is unclear so it is not known how TK might have influenced the advice given to the Ministers by the assessment committee

CONCLUSION

In late 1997, the proponent cancelled the project.

PROJECT REVIEW PROCESS

The provincial review had two unusual twists:

- the proponent withdrew its application several months before the report using the TK was completed, so the results were never used in a decision about the project

USING TK IN THE DEVELOPMENT OF MITIGATION PLANS

Your documented TK can help identify important mitigation measures that that your First Nation needs to ensure are in place, either in your direct negotiation with the proponent or in written submissions to the regulatory agency.

Following are two examples of how TK has been used to develop mitigation measures:

- Elders identified the general area where a sacred site was located. It was a site that no one from the community had visited for a long time and the exact location was not known. However, since the general area was known and it was an important site, the proponent committed to avoiding the site in their development and leaving a buffer around the general area. They also committed to working with the Elders through a helicopter flight to see if the site could be located. The proponent also committed, in a written agreement, to keep the site confidential.
- The proponent of an oil and gas development was proposing to put their plant site on an area of high ground that was part of a summer and winter travel route. The knowledge holders noted this while looking at a map of the project. They asked the proponent to move the plant site to avoid the route. The proponent suggested it would be difficult for them to find another location for the plant site based on the topography of the area. However, the First Nation and the proponent were able to find a compromise. The proponent guaranteed safe access around the plant site and would work with the community to develop an alternate route.



TK can be used in siting facilities.
Photo courtesy of Adobe.

PARTICIPATING IN THE PROPONENT'S BASELINE STUDIES

Typically, proponents hire environmental consultants to collect baseline information and write the environmental assessment. The consultants usually conduct field programs including activities such as collecting water samples, mapping vegetation communities, surveying wildlife and fish, and conducting archaeological studies.

Participating in these studies can benefit your community in a number of ways:

1. It is a practical way for members of the community to learn about the project.
2. It provides some initial socio-economic benefits to the community.
3. Participating in baseline studies can help to ensure that the environmental assessment addresses areas or topics of concern to your community.

4. It may help to build a relationship with the proponent or regulatory agency, and to have confidence that information is being collected that is important to your First Nation.

If there is a review panel or public hearing in an environmental assessment process this is an opportunity for knowledge holders to directly influence how TK is considered.

5. There is an opportunity to document traditional knowledge during these baseline studies and improve the quality of the baseline studies. Baseline studies typically only take place for one or two seasons. In contrast, TK represents long-term observations and understanding of the land.

Panels are set up so that information presented by the proponent can be directly examined through a public process. Panel members hear submissions from a wide range of presenters, including the general public, First Nations, western scientists, and regulatory agencies. The panel then makes a set of recommendations to the Minister of Environment with respect to the project in the form of a panel report.

The proponent may request that any traditional knowledge that is documented as part of the baseline surveys be submitted or integrated into the proponent’s baseline report and environmental assessment. If the First Nation has permitted the proponent to submit the information your community provides in their environmental assessment report, include a provision for your community to have the opportunity to review it before filing. **Ideally, require in writing, that the TK information will be submitted only by the First Nation.**

Direct involvement of knowledge holders in a panel can increase the effectiveness with which the panel receives and understands the information. It will likely also increase the knowledge holders’ sense of engagement in influencing events and decisions on behalf of their community.

To be most effective in a panel review, select a project coordinator to co-ordinate your community’s input into the review panel.

PRESENTING TK TO A REVIEW PANEL

Some federal environmental assessments are subject to a full public review by a review panel. For instance, the environmental assessment review of the Georgia Strait Crossing (GSX) was a joint CEAA-National Energy Board review. Note that review panels are very rare – the GSX panel was the first CEAA panel to be conducted in BC.

Like evidence prepared for a court case, TK is the evidence to support the point or position your First Nation is making in the assessment. In planning the presentation, inform yourself about the scope and content of the available community knowledge that will be relevant to the assessment.

Remember this is a public process; be sure that the information you are about to present is appropriate and approved by your community for public disclosure.

Identifying the Presenters

Not everyone who was interviewed for the TK study would necessarily need to make a presentation to the panel. The research team could identify the key individuals who can best present your community's view to the panel.



Elders at a traditional knowledge workshop. Photo courtesy IEMA.

An oral presentation will likely have the greatest effect if the number of presenters is kept to a reasonable level (no more than 8), and the scope of the individual presentations is coordinated or integrated so that duplication is avoided and all key issues are covered. The presenters should also be those individuals who can clearly and strongly state the information, who have a high degree of confidence in the knowledge they will be presenting, and are comfortable speaking in a public forum.

Preparing the Presenters

The project coordinator (and possibly your lawyer) should review the information with the presenters and identify particularly important pieces of information that need to be delivered in preparation for the presentation.

Key questions to keep in mind are:

- What is the story being told?
- What are the key messages that our community would like to have heard by the panel?
- How do these relate to the project being proposed?
- Are new concerns being raised that have not been dealt with in project planning?
- Are new ideas being raised that can mitigate or eliminate predicted negative effects?
- How will the information educate project managers and/or government decision-makers?

It is likely that panel members will ask questions of your presenters if they would like to have some information clarified. Therefore, it is a good idea to have some practice sessions so that presenters are prepared for the types of questions that might be asked. In addition, it is important to have First Nation technical staff available to help with clarifying and answering questions. You could also consider involving your legal counsel if you feel that their input is likely to help preparing presenters.

USING TK IN THE DESIGN OF FOLLOW-UP PROGRAMS

Traditional knowledge can be helpful in the design of monitoring programs, as well as for testing impact predictions. In your traditional knowledge research, it will be useful to identify what things in the environment need to be monitored from your community's perspective if

the project were developed. TK can identify the indicators (e.g., change in land use intensity and harvest success rates) that can be used in effective monitoring if the project proceeds. (For further information on follow-up see **Section 9 – Follow-up Programs** of this toolkit.)

Recent examples of comprehensive follow-up programs in federal environmental assessments include the negotiated environmental agreements between Canada and the proponents in the cases of low-level flying in Labrador and the two approved diamond mines in NWT. These agreements have explicit provisions requiring that the proponent integrate TK in the follow-up monitoring programs, and have created special institutions to oversee how the company and government do this.

A specific example of how TK is used in a follow-up program is at the Ekati Diamond Mine in the Northwest Territories. The proponent, BHP-Billiton, regularly invites groups of Elders from the various Aboriginal communities to assist them in identifying caribou crossing locations and proposing design changes when new roads are being constructed. The Elders also provide comments about habitat use by caribou and other wildlife. This assists the company in identifying appropriate plant species for its future re-vegetation efforts.

SUMMARY

The wisdom and understanding that Aboriginal people have developed through living close to the earth is sometimes called traditional knowledge. Your First Nation may choose to use its traditional knowledge within an environmental assessment process. It can help you understand the potential effects of the project and present your issues in an effective way. TK can be presented in your written comments on a project, as a stand-alone report or as an oral presentation to a review board. TK can also contribute to improving environmental baseline studies, developing mitigation plans and designing monitoring and other follow-up programs.

If you are gathering TK information for an environmental assessment it is important that your community and specific knowledge holders are consulted and are supportive of the process. This can be accomplished by consulting within your community early in the process, while the TK study plan is being developed.

Generally, TK that is submitted within an environmental assessment process becomes public information. Therefore, it is important to consider ways to protect your TK from misuse such as carefully considering how TK is presented and developing written confidentiality agreements with anyone seeking to use your TK.



Western redcedar. Photo courtesy of Mark Johannes, Northwest Ecosystem Institute.

TRADITIONAL KNOWLEDGE AND ENVIRONMENTAL ASSESSMENT

Additional Information

USE OF TRADITIONAL KNOWLEDGE IN ENVIRONMENTAL ASSESSMENT

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4. Clayoquot Sound Scientific Panel. First Nations' Perspectives Relating to Forest Practices in Clayoquot Sound. March, 1995. See Chapter 3: Recognition of Traditional Ecological Knowledge.
5. Alan R. Emery & Associates. Guidelines for Environmental Assessments and Traditional Knowledge: A Report from the Centre for Traditional Knowledge to the World Council of Indigenous People. (Section 2) March, 1997.

METHODS FOR CONDUCTING TK RESEARCH

1. Council of Yukon Indians. Traditional Knowledge Research Guidelines: A Guide for Researchers in the Yukon. August, 2000.
2. Dene Cultural Institute. Ethical Guidelines on Conducting Research in Indigenous and Local Communities: A Draft Report for the Biodiversity Convention Office. Prepared by Stephen J. Augustine and Barney Masuzumi. April, 1999.
3. Ellanna, L.J., G.K.Sherrod and S.J. Langdon. Subsistence Mapping: An Evaluation and Methodological Guidelines. Tech. paper #125. Division of Subsistence, Alaska Department of Fish and Game, 1985.
4. Ferguson, M and Francois Messier. Collection and Analysis of Traditional Ecological Knowledge about a Population of Arctic Tundra Caribou. *Arctic* 52(1). 1997. pp.17-28.
5. Freeman, M, ed. Report: Inuit Land Use and Occupancy Project. (3 vols). Department of Indian Affairs and Northern Development. 1976.
6. Tobias, Terry M. Chief Kerry's Moose: A Guidebook to Land Use and Occupancy Mapping, Research Design and Data Collection. Published by Union of BC Indian Chiefs and Ecotrust Canada, 2000. Available at <http://www.nativemaps.org/chiefkerrysmoose/index.html>

TK IN GENERAL

For a general summary of the ideas on TK see the following:

http://courses.washington.edu/tek/tek_email.htm

Aboriginal Mapping Network for mapping ideas at:

<http://www.nativemaps.org/>

See a number of publications on TK and intellectual property under Environment and Diversity at International Development Research Centre's website:

http://web.idrc.ca/en/ev-8958-201-1-DO_TOPIC.html

TRADITIONAL KNOWLEDGE AND ENVIRONMENTAL ASSESSMENT

Additional Information

THE ROLE OF TK AND THE RIGHTS OF INDIGENOUS PEOPLES

1. Freeman, Milton. The Nature and Utility of Traditional Ecological Knowledge. CARC. Vol.20, No.1. 1992. Available at: <http://www.carc.org/pubs/v20no1/utility.htm>
2. Mauro, Francesco and Preston D. Hardison. Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives. Ecological Applications. 10(5). October, 2000. pp. 1263-1269.
3. Albert Howard and Frances Widdowson. Traditional Knowledge Threatens Environmental Assessment. Policy Options. November, 1996.
4. Marc G. Stevenson. Ignorance and Prejudice Threaten Environmental Assessment. Policy Options. March, 1997.
5. Fikret Berkes and Thomas Henley. Co-Management and Traditional Knowledge: Threat or Opportunity. Policy Options. March, 1997.
6. Paul Nadasdy. The Politics of TK: Power and the Integration of Knowledge. Arctic Anthropology. Vol.36, Nos. 1-2, pp. 1-18. 1999.
7. Albert Howard and Frances Widdowson. Revisiting Traditional Knowledge. Policy Options. April, 1997.
8. Alan R. Emery and Associates. Guidelines for Environmental Assessments and Traditional Knowledge: A Report from the Centre for Traditional Knowledge to the World Council of Indigenous People. March, 1997.
9. Raymond Pierotti and Daniel Wildcat. Traditional Ecological Knowledge: the Third Alternative (Commentary). Ecological Applications. 10(5), 2000. pp.1333-1340.

TK AS INTELLECTUAL PROPERTY

Handbook on Intellectual Property and Traditional Knowledge by American Association for the Advancement of Science:

<http://shr.aaas.org/tek/handbook/>

Indigenous Peoples Biodiversity Information Network (IBIN)

<http://www.ibin.org/top-ipr.htm>

Electronic Journal of Intellectual Property Rights

<http://www.oiprc.ox.ac.uk/EJINDEX.html>

Recording and Using Indigenous Knowledge:

<http://www.panasia.org.sg/iirr/ikmanual/intellec.htm>

TK AND SUSTAINABILITY

UNESCO publication Best Practices in Indigenous Knowledge at:

<http://www.unesco.org/most/bpikpub.htm>

See also the following links:

http://www.unesco.org/education/tlsf/theme_c/mod11/uncom11bod.htm

http://trumpeter.athabascau.ca/content/v18.1/reid_et_al.html

▶ TRADITIONAL KNOWLEDGE – CHECKLIST

PROCESS FOR DEVELOPING A TK STUDY

- compile existing documented TK (eg., documents, maps, tapes and transcripts)
- examine material for gaps in geographic or historical coverage
- meet with the proponent
- community leadership provide direction
- consider ways to protect your TK
 - written agreements regarding confidentiality and your control of data with anyone seeking your TK
 - informed consent forms
 - information sharing protocols
 - consider limiting what TK you share to information to explain the potential effects of the project and highlight your issues
- secure funding for the study
- retain an appropriate professional TK researcher
- assign a TK project coordinator
- begin community consultation
- develop a TK study proposal
 - collect relevant project information and maps
 - study design
 - budget
 - timeline
 - select a TK researcher
 - consider opportunities for capacity building

TERMS OF REFERENCE FOR A RESEARCHER

Consider the following:

- the scope of work and budget

- the research process
- confidentiality and communication protocol
- how the information will be used
- limits to the use of your information
- the reporting structure for the researcher (i.e., the researcher reports to the community's project coordinator, who reports to the First Nation's leadership)
- a clear statement that your First Nation retains proprietary rights to all materials, maps, documents and the final report
- clearly set out that your community will review (and make any necessary changes) to the report
- that it will be your community that submits the report

CONDUCTING A TK STUDY

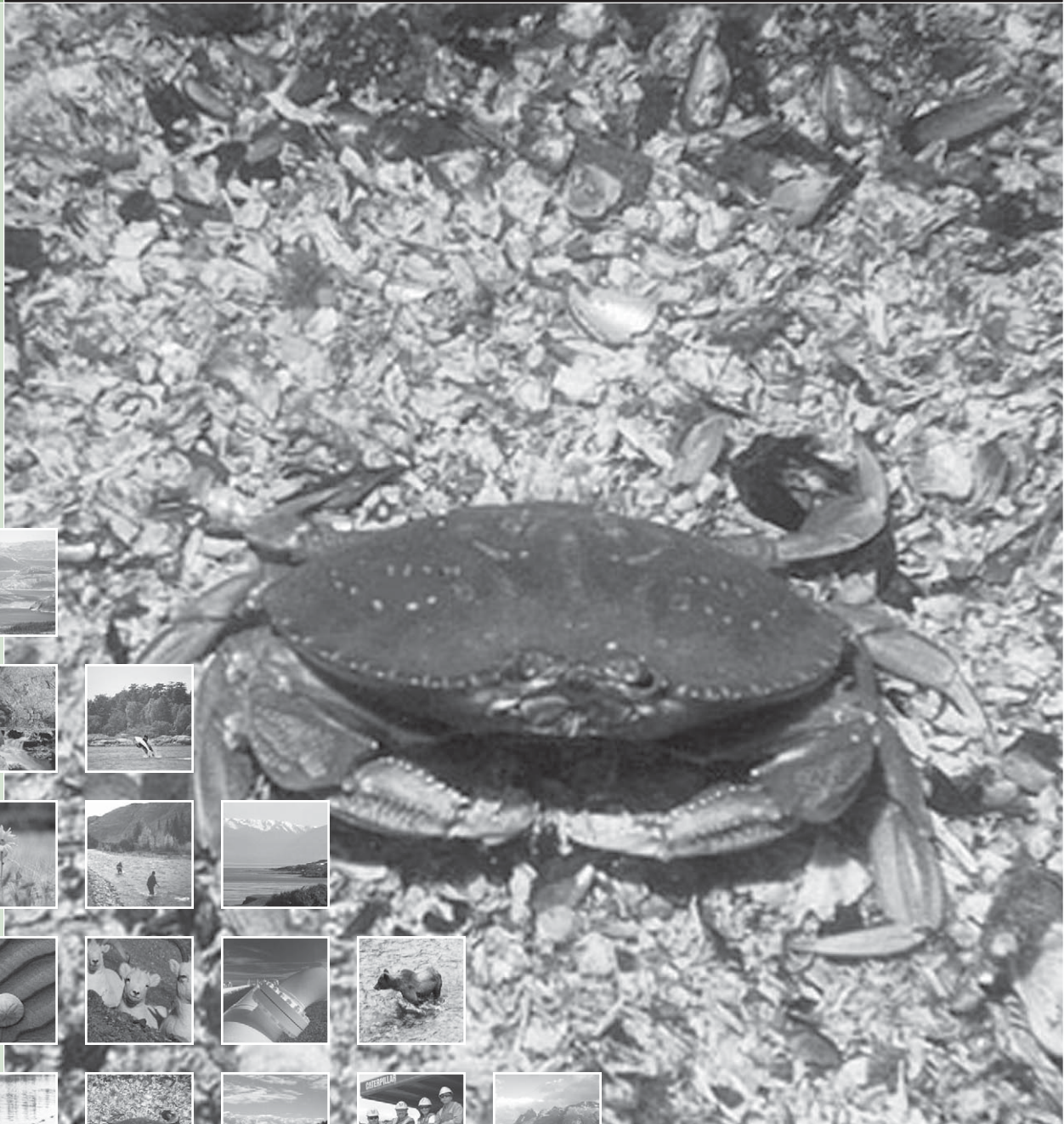
- hold community meeting early in process
- identify knowledge holders
 - inform knowledge holders about the purpose of the study and how the results may be used
 - consider developing an informed consent form for knowledge holders
- conduct information gathering sessions with knowledge holders
- conduct site visits with knowledge holders
- prepare study report
- initial review of report
- present to community for report review, verification and approval
- maintain TK information

WAYS TO INCLUDE TK IN AN ENVIRONMENTAL ASSESSMENT

- submitting TK directly to the environmental assessment process
- contributing to the development of mitigation plans
- participating in the proponent's baseline studies
- presenting TK orally on a panel at a hearing
- contributing to the design of monitoring and follow-up programs

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 8 – REVIEWING ENVIRONMENTAL ASSESSMENT REPORTS



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

 **Section 8 – Reviewing Environmental Assessment Reports**

Section 9 – Follow-up Programs

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

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Cover photo courtesy of Dr. Randy Shuma, King County Department of Natural Resources

This section outlines suggested steps to follow when reviewing an EA report or application. It is important to review environmental assessment reports to determine if your First Nation’s interests, issues and concerns have been addressed.

This section includes the following:

- What is an EA report?
- Getting started
- Scope of the review
- Reviewing the project description
- Reviewing the environmental baseline
- Reviewing the impact analysis
- Reviewing the cumulated effects assessment
- Reviewing the proposed mitigation measures
- Reviewing the proposed environmental management system
- Reviewing the closure plan
- Reviewing follow-up programs

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▶ WHAT IS AN EA REPORT?

QUICK TIP

There are checklists at the back of many of the sections of this toolkit. These can be helpful for planning and tracking activities. Consider making your own checklists or modifying the checklists in the toolkit.

There are two major report phases in a typical environmental assessment. The first report is usually prepared by a consultant hired by the proponent, who then writes up their findings in report form. This report will have different names depending on the stage of the EA, the regulatory process, and the legislation guiding the EA.

Typical names include:

- an Application or an Application for an Environmental Assessment Certificate for an EA under the *British Columbia Environmental Assessment Act (BCEAA)*
- a Screening Report (for screenings conducted under the *Canada Environmental Assessment Act (CEAA)*)
- a Comprehensive Study Report (for comprehensive studies conducted under *CEAA*)
- an Environmental Impact Statement (for reports submitted by proponents to a panel under *CEAA*)

In BC, a second report is typically written by BC government representatives and is referred to as an Assessment Report. It is typically prepared by the provincial government agency at the conclusion of the environmental assessment. This report presents the results of the review process contains recommendations on the proponent's Application.

Since the findings of a EA report influence project approval decisions, it is important to review the EA report from your First Nation's perspective to make sure that your interests have been properly addressed. In most cases you will have an opportunity to provide a formal written submission regarding the conclusions of the review and draft EA report, which form the basis for conditions attached to EA certificates. Even if there is not a specific avenue available to comment, your First Nation may decide to do so. In the event that you do prepare written comments regarding the acceptability of the project approval, ensure that all the appropriate government agencies and representatives receive the information.

The following discussion provides a starting place for conducting a technical review of an EA report and suggests questions that you will likely ask as you go through your review. It also indicates situations where you ought to consider getting expert or technical help. For more examples, see **Getting Expert Legal and Technical Assistance in Section 3 – Environmental Assessment from a First Nation Perspective.**

▶ GETTING STARTED

It is helpful to have a general understanding of environmental assessments prior to reviewing an EA report. You will find it beneficial to review **Section 2 – Environmental Assessment Basics** since it provides an overview of the EA process and typical methods used to assess impacts. You should also be familiar with the regulatory process under which the environmental assessment has been conducted.

See the following sections of the toolkit for detailed information on the different regulatory processes associated with EA's conducted in British Columbia:

- Section 4 – British Columbia's Environmental Assessment Process
- Section 5 – Canada's Environmental Assessment Process
- Section 6 – Joint Review Processes

To get started with the technical review, obtain the EA report and other relevant project-related information that have been prepared by the proponent plus any relevant information produced by government regulatory agencies. You will receive these documents as a matter of course if your First Nation is participating in the review process; otherwise you may usually obtain them from the appropriate federal or provincial on-line registry, or from the proponent directly. Information about most federal EAs can be found online on the Canadian Environmental Assessment Registry (http://www.ceaa-acee.gc.ca/050/index_e.cfm) and information about provincial EAs can be found

on the province's Electronic Project Information Centre (http://www.eao.gov.bc.ca/epic/output/html/deploy/epic_home.html).

The EA report will likely comprise several volumes of material, which contain detailed technical information relating to all aspects of project development. Sometimes the number of reports and the amount of information can be intimidating. However, not all material will be directly relevant to your First Nation's issues. Once you become familiar with the structure and contents of the EA you are reviewing, it will become easier to find relevant information and to identify key sections to review in detail. Having technical assistance from someone with experience representing First Nation's interests in EA processes will prove beneficial throughout the EA report review.

TABLE OF CONTENTS

A good way to get started is to review the table of contents. This will provide you with an overview of the organization and content of the report.

The organization of the EA report will vary depending on who prepares the report and what the terms of reference for the EA report requirements were.

The following is a commonly used approach:

- Project-related information will be presented in a separate section or volume that is prepared by the proponent. This section may include the project description, purpose of the project, project alternatives, environmental management plans and a description of consultation activities.
- Environmental information (baseline description, impact assessment, cumulative effects assessment (if required), mitigation and follow-up) will be presented in a separate sections or volumes prepared by consultants for the proponent. In some cases, the proponent will summarize the consultant's information.

QUICK TIP

A good way to get started with reviewing an EA Report is to review the table of contents. This will provide you with an overview of the organization and content of the report.

QUICK TIP

When reviewing the consultation section of an EA report, note whether the consultation with your First Nation has been accurately described. You should also ask: "Was the consultation conducted appropriately for our community?"

- Closure or reclamation plans are usually presented in a separate section.
- Technical support documents such as special studies, baseline reports or modelling information are often appendices to the main report. Sometimes these supporting documents are not filed with the EA report and need to be requested from the proponent.
- The EA report may also include applications for related permits and approvals. For example, a proponent may require a specific permit from the provincial government to withdraw water from a river. These related applications are sometimes appendices to the EA report and sometimes submitted separately.

What is included in an EA report will depend on the requirements of the EA that was conducted, that is, whether the EA was a federal, provincial or a joint review.

However, the following list represents typical sections that are generally required in an EA report:

- project description
- purpose of the project
- project alternatives
- environmental management plans (description of how environmental protection in the project zone of influence will be undertaken)
- description of consultation activities with First Nations, the public and others
- environmental or baseline setting (description of existing environmental conditions without the project)
- impact assessment (predictions about how the project will affect the environment, the community(ies) affected and your First Nation's current and historic land use activities and their Aboriginal rights and title and treaty rights)
- cumulative impact assessment (required in some EAs)
- mitigation (description of how the impacts will be reduced or eliminated by applying various measures during construction and/or operation of the project)
- proposed follow-up and monitoring
- closure or reclamation and decommissioning plans
- a description of all licenses and/or permits that are required for the proposed development

Do a quick review of all the documents to ensure that the above categories of information are present somewhere. Obtain any missing information from the proponent or raise the question about why it is not included in the EA report.

DETERMINING WHO PREPARED THE REPORT

Determine who prepared the report.

It may be helpful to ask the following questions:

- Has a team of qualified experts prepared the written material?
- Are these experts identified with their particular contributions so that you can tell who wrote what?
- Has the material been accurately summarized by the proponent, with the expert technical reports used as supporting material for the main document?

It is important to be aware of who prepared the report. In some cases you may want to check on the qualifications of the authors. Also, if the proponent has summarized the technical reports, ensure that the summary has accurately captured the results of any studies or reports used in preparing the EA report. This would likely include a review of any of the technical reports.

REPORT SUMMARY

If the EA report contains a summary it is useful to read this initially to get a general understanding of the key conclusions and to identify areas where your First Nation has concerns. This will help you focus your review.

▶ SCOPE OF THE REVIEW

The EA report should cover the requirements that were listed in the EA terms of reference (provincial or joint EA) or the EA scoping document (federal EA). Some EA reports will contain a checklist or table that lists the terms

of reference or EA scoping requirements and the corresponding section of the report where it is discussed. It can be helpful to go through this type of checklist and ensure that all issues of interest to your community have been included in the report. If not included you can request one from the proponent.

As you are reviewing the EA report, check on whether issues relating to your First Nation have been covered.

Use the following questions to focus your review:

- Have the requirements described in the EA scope and the terms of reference been addressed?
- Have the issues that were described in the scoping document and/or the terms of reference document been addressed? Pay particular attention to any documents submitted by your First Nation.
- If the proponent consulted with your community, are the consultation process and results accurately described?
- Is your community accurately described in relation to the project?
- Are your community's goals in relation to the project clearly defined?
- Are the land use practices of your community accurately described?
- Has a community impact assessment (including a land use impact assessment) been conducted and are its results accurately described? Do the findings alleviate any concerns or protect any interests? Is the protection adequate and likely to be implemented? What additional measures are needed to protect interests and address concerns?

QUICK TIP

BCEAA: See page 15 in Section 4 for information on participating in the development of the terms of reference for a *BCEAA* assessment.

CEAA: See pages 10 and 11 in Section 5 for information on participating in the scoping of a *CEAA* assessment.

- Have the cultural heritage resource values associated with your community been adequately considered? Have adequate protection measures been recommended in the EA report?
- Have the issues you have raised during the environmental assessment been addressed? To what degree? Are protection/mitigation measures adequate? Is your First Nation included in follow-up programs?

▶ REVIEWING THE PROJECT DESCRIPTION

UNDERSTANDING THE PROJECT DESCRIPTION

Study the project description to be sure that you have a reasonably good understanding of the project. You may need expert or technical assistance with some parts of project description review.

Focus on the following features of the project:

- the type of project, its size, and expected life-time
- workforce for construction and operation, transportation and accommodation, and the affects of the additional population on your community
- whether the project has conventional or new technology components
- are there any new access requirements such as roads or rights-of-ways for transmission lines or pipelines
- the design of the project and proposed industrial processes
- the type, amount and rates of production of any waste materials (e.g., airborne emissions, wastewater, solid wastes)
- descriptions of any testing that has been done on the waste materials to identify their characteristics and predict how they will behave once exposed or released to the surrounding environment
- waste management and follow-up plans

When reviewing the project description it is helpful to keep the following questions in mind:

Project Purpose

- Is the purpose of the project clearly described and justified?

The level of analysis that a proponent is required to present with respect to the project's purpose will depend on what was identified in the EA scoping exercise or terms of reference development. Examine the project purpose to determine if there is sufficient information and if you feel that the proponent's justification is sufficient. See the case study – **Vancouver Island Generation Project (VIGP)** in **Section 2 – Environmental Assessment Basics** for an example of when a First Nation challenged the proponent's project justification. The Snuneymuxw First Nation argued that the proponent's justification was insufficient and incomplete and that the Environmental Assessment Office declined to investigate justification or need for the plant in their review of the VIGP, citing mandate limitations.

Project Alternatives

- Have all potential project alternatives been adequately evaluated?

If project alternatives were evaluated, review to ensure that any concerns your First Nation had were addressed. See **Project Alternatives in Section 2 – Environmental Assessment Basics** for more information on project alternatives.

New Technology

- Is there any new technology associated with the project?

If the technology is new and does not have a demonstrated track record of environmental performance, including its safety following project closure, it should be considered 'experimental'. This does not mean the technology will be bad for the environment – it might be an improvement over conventional methods. However, there may be less certainty in predicting potential effects. The significance of the effect depends on what the risk is for your First Nation's land and resources and the interests and concerns expressed by your people. Pay particular attention to the proposed mitigation, monitoring and any contingency and follow up plans.

Waste Material

- Is any of the waste material produced by the project potentially harmful to people or the environment? What are the risks associated with managing the waste produced and are the risks manageable in the project's environmental setting? Is the technology for management proven effective or not?

Documents about the proposed project should provide information about the safety of any waste materials associated with the project (including air emissions and effluent from processing plants). Check the impact assessment section to see if potential impacts from wastes identified in the project description have been adequately assessed. If you need to find out more about a waste material, see: <http://www.epa.gov/enviro/html/emci/chemref/>

Waste Management Measures

- Will special waste management measures be required either during operation, decommissioning, abandonment and closure? If so are they adequate and proven effective? Is there any new technology used?

If the disposal of project-wastes is a significant issue, then the wastes should be clearly described and adequate disposal methods provided for within the EA application and report. This will include descriptions of the physical and chemical properties of the waste and how it can be expected to behave once released into the environment. The details of these studies are often not provided in the proponent's application or environmental assessment report, but may be found in the technical support documents. Consider obtaining the studies and having them reviewed by a qualified expert if you have any unresolved concerns. See **Reviewing the Proposed Environmental Management** on page 16 of this section.

QUICK TIP

An important question to ask is: Does the EA process sufficiently look at "alternatives" to a project?

Zones of Influence

- Have the zones of influence for the various project activities been adequately described?

Most projects will have zones of influence that extend beyond the physical footprint of the project. Zones of influence will vary for different aspects of the project. For example, the area affected by the project's airborne emissions will normally be different than the area affected by its wastewater discharge. It is important to understand the potential influences and be prepared to fully consider what those mean for your First Nation.

▶ REVIEWING THE ENVIRONMENTAL BASELINE

Environmental baseline information is necessary to:

- Provide a clear picture of past and present environmental conditions of an existing resource, land use or area of land
- compare potential project impacts with the existing situation
- support environmental monitoring

The following questions may be helpful to ask when reviewing the baseline:

Also, see the discussion in Section 2 – Environmental Assessment Basics under the heading Baseline Description.

Key Environmental Features

Does the baseline provide information about highly valued or sensitive parts of the environment that have been identified by your community including:

- water quality
- air quality
- rare, sensitive or particularly productive habitat, including important wildlife movement corridors, calving grounds, mineral licks and wintering areas
- rare, sensitive or culturally valued fish or wildlife populations
- previously disturbed or contaminated vegetation and soils
- important First Nation sites, such as gathering places, hunting areas, trails and trap lines

Ecosystem Relationships

- Does the baseline describe important ecological processes and relationships?

Often baseline descriptions will be largely a list of ecosystem components (e.g., species lists, weather patterns, hydrology and water quality) with little information about how the components function and relate to each other. Review the baseline descriptions to ensure that any key ecological relationships of interest to your community have been documented. Ensure the EA has included an assessment of impacts among species and on the relationships among species and ecosystems.

Consistency of the Information

- Are there differences and inconsistencies between information presented by the proponent and what your community knows about the local environment?

Reviewing the environmental baseline information may be an ideal time to incorporate the use of traditional knowledge (TK) in the EA. One approach is to summarize the environmental information collected by the proponent and hold a workshop with key community members (Elders, hunters, trappers, harvesters and others) to review this material. Traditional knowledge holders may be able to identify deficiencies in the information or survey methods that can help you in your evaluation of what the proponent has assembled. See **Section 7 – Traditional Knowledge and Environmental Assessment** for more information.

Zone of Influence

- Did the surveys for the baseline information cover the appropriate zones of influence?

The area potentially affected by the project may be much greater than the area identified by the proponent as the zone of influence. For example, it is common for proponents to identify the zone of influence along a linear corridor such as a road or pipeline as the directly disturbed area (the footprint) of the corridor. The units of wildlife habitat located in the footprint are counted to determine the total impact.

This area will then be compared to the study area to show that a small portion of the total area is represented by the footprint impacts. When in fact, impacts from the road may be experienced by wildlife throughout a larger area.



Photo courtesy of Round River Conservation Studies.

It is important that a realistic zone of influence be clarified for your review of the EA report.

To determine the zone of influence and the importance of the impacts to the wildlife resources, some factors you may want to consider are:

- Does the footprint of the project (road in this example) pass through any high value habitat for species that are especially valuable to your First Nation?
- What are the behaviour patterns of the animals potentially affected by the road (e.g., will they avoid the road due to noise and how far away will they stay)?

- Does the road pass through or near any areas that are used for particular aspects of a wildlife population's life-cycle (e.g., wintering grounds, breeding areas)?
- Does the road pass through areas that are critical or important for other reasons to your First Nation?

Adequacy of Baseline Data

- Were the surveys conducted at the right time of year, over a long enough period and in the right areas to get accurate information about the environmental variable (e.g., water quality/quantity) being measured?

For most environmental baseline surveys at least two years of data is needed to gain a preliminary understanding of what is happening with a particular environmental variable. Environmental conditions can change substantially throughout the year and from year to year, and this natural variability needs to be adequately described in the baseline studies. It is important to understand the variability to be able to measure any future changes and determine if they are due to natural variability or caused by the project. This is an area where TK can be very helpful.

REVIEWING THE IMPACT ANALYSIS

There are three broad areas to examine in your review of the impact analysis:

- factors considered in the impact analysis
- methods used to predict the potential effects of the project
- the results of the assessment – the proponent's conclusions about predicted impacts and their significance

Factors Considered in the Impact Analysis

Review the factors considered in the impact analysis for completeness and ask the following questions:

- What things have been included in the review and has anything that was required in the EA scope or terms of reference been left out?
- If valued ecosystem components (VECs) were selected to focus the assessment was your First Nation consulted about the selection and do you agree with choices? See **Section 2 – Environmental Assessment Basics** for more detail on VECs.
- Does the zone of influence considered in the impact analysis include particular environmental components of concern?

The zone of influence, or geographic scope for the assessment, must be consistent with the natural boundaries or range of important environmental components. For some wide-ranging environmental

components such as large mammals or predators it is important that the geographic boundaries include their entire range.

IMPACT ANALYSIS METHODS

Examine the approach or methods used by the proponent to identify and assess the impacts. Several methods may have been used to identify potential impacts. You might find it helpful to make a list of the methods used and the predicted effects for each component and then review the discussion on impact analysis methods in **Section 2 – Environmental Assessment Basics** of the toolkit.

Ask the following questions about the methods used:

Linkage Diagrams

- If linkage diagrams were used for the assessment do these diagrams make sense to you and your community advisors?

Linkage diagrams are developed from the opinions of outside technical specialists who may have limited field experience in the ecosystem under consideration. Because these diagrams, like models, are simplified representations of the real world, important linkages and pathways may be overlooked. This is one area where traditional knowledge can be usefully applied – review the linkage diagrams with local community land users to ensure they make sense. You may need to request more information or do further work to confirm the relationships shown in the diagrams. Often diagrams are reasonably accurate as far as they go, but may not provide an

accurate description of the intricate relationships that your Elders and other holders of TK are aware of.

Modelling

Was the following information provided about the modelling:

- the assumptions used
- specifications about how the model is to be used (usually in an appendix)
- the applicability to particular situations
- data sources and an evaluation of data reliability
- the confidence limits including margins for error of the model results

If you are reviewing an EA in which mathematical modelling has been used to predict impacts, independent technical help from a modelling expert can be valuable, particularly if the impact or set of impacts being modelled are important in terms of understanding potential risks to your First Nation's interests.

Experiments

- Are the results of the experiments reliable?

Experiments can be done directly in the field or in the laboratory, depending upon the nature of the impact and the resources available. However, unpredicted outcomes can occur when the experimental data or results are scaled up to life size. There is not always a linear (straight-line) relationship between cause and effect when you move to different scales. Therefore, pay careful attention when any experimental results are applied to "real life".

Results of experiments used to predict “negligible” impacts to key environmental parameters (such as downstream water quality) should be examined carefully. In these cases, have a qualified expert review the documentation of the experiment to ensure that the assumptions used were appropriate, that data was properly collected and analyzed, and the conclusions were consistent with the observations.

Professional Judgement

- If professional judgement was used, are the qualifications of the person making the judgement clearly identified somewhere and are they relevant to the topic being assessed?

Professional judgement is based on training and experience and also influenced by the values of the individual. If the conclusion reached by professional judgement sounds reasonable to you, it probably is. However, if the explanation of the conclusion is not straightforward then it is worthwhile to pay closer attention to the validity of the claim. If the risks associated with inaccurate predictions are high, then you should have the professional judgement reviewed by another professional. This is called peer review and is done routinely in the scientific, academic and technical professions.

Case Studies

- If case studies were used, is enough detail presented for you to make a comparison to the current project?

The use of case studies – examples of past experiences that illustrate how an issue was handled – is a common and helpful approach for predicting impacts and supporting proposed mitigation measures. However, usually only brief references or very concise summaries of the case studies are provided. If the issue is important for your First Nation, examine the complete case study to see how similar/different the case study is to the assessment or project you are reviewing.

Statistics

- If statistical analysis was used to reach a conclusion about impacts was the analysis properly conducted?

If statistical analysis was used there should be a discussion of the data quality, margins of error and confidence limits of the analysis. Consider obtaining technical assistance if the statistics were used to assess a potential impact of importance to your First Nation.

IMPACT ANALYSIS RESULTS

Reviewing the impact analysis is an important step since much of the environmental management of the project, apart from standard regulatory controls, will be based on the conclusions of the impact analysis

Ask the following questions about the impact analysis:

Residual Impacts

- Is the method or discussion clear regarding how the residual impacts were determined?

Residual impacts are those impacts, which are expected to continue, following the application of mitigation measures. See **Identifying Residual Impacts in Section 2 – Environmental Assessment Basics** for more detail on residual impacts.

Each impact arises from an interaction between a project activity and an environmental component. Thus, the accuracy of an impact prediction will depend upon how well the assessment method was applied to understanding that specific situation. The cause and effect relationship in this situation should be clearly defined and rationale for the conclusion should be straightforward.

- Have identified residual impacts been downplayed or minimized?

Often identified residual impacts are determined to be “negligible”. For impacts that are classified as negligible, check to see that this conclusion is based on a sound argument. If the impact is a well-known effect of the project and the mitigation and management techniques are standard and proven, then the determination of “negligible” may be reasonable. If it is a new type of project, information reliability is poor or the specific impact is not well understood, then a more precautionary approach should be taken. This might include a discussion of a range of potential

effects and perhaps even an examination of a “worst case” scenario. A precautionary approach would examine potential impacts at the more serious end of the spectrum and then plan mitigation and management appropriately. If you think the assessor has unreasonably come to the conclusion of “negligible impact”, consider making a request to have the assessment of a particular impact redone using more conservative assumptions and approaches.

Determining Significance

- Do you agree with the determination of significance for each impact?

The determination of significance is a key result of the impact assessment. See **Determining Significance** on page 21 of **Section 2 – Environmental Assessment Basics** for a more detailed discussion of significance.

Residual impacts classified as significant will be examined closely by decision-makers and will influence whether the projects should be approved, whether further study is necessary or the terms and conditions under which the project is approved. Ideally, your First Nation would be consulted about the determination of significance. However, if your First Nation has not been involved in determining the significance as presented in the EA report, review each residual impact to see if you agree with the significance determination. If you feel that there are residual impacts that are significant from your First Nation’s point of view, then it is important to note these in your review comments and in your discussions with the proponent and government agencies.

▶ REVIEWING THE CUMULATIVE EFFECTS ASSESSMENT

Cumulative effects assessments (CEA) are required in all EAs conducted under *CEAA* and may be included in some EAs conducted under *BCEAA*. See page 19 of **Section 2 – Environmental Assessment Basics**, and page 14 of **Section 5 – Canada’s Environmental Assessment Process**, for more information on CEAs.

If a CEA has been conducted, it is important to carefully review the CEA since the cumulative impacts of a project may be of greater concern than the individual impacts. The scope for the CEA will likely have been considered earlier in the process, as with other aspects of the EA. However, only significant residual impacts are typically assessed in the CEA. Therefore, the environmental components that are assessed in the CEA are based somewhat on the results of the impact analysis.

Determine if all the residual impacts that your First Nation feels are significant were included in the CEA and if they have the potential to interact with effects from other activities or projects. If not, consider including your concerns in your written comments about the CEA and also raise the issue directly with the proponent and government agencies.

The CEA will generally be conducted using the same methods and approach as the impact analysis. Therefore, you can use the same approach to reviewing the CEA as you used for the impact analysis (See the previous section **Reviewing the Impact Analysis Results**).

In addition, it is helpful to ask the following questions:

- Have your First Nation’s key concerns regarding cumulative effects been considered and addressed?
- Has the geographic scope of the cumulative effects assessment been set widely enough to include those effects of past or foreseeable projects that are likely to interact with the effects of the project under review?
- Are the significant adverse effects of the other projects or activities properly documented, and is there reliable information that describes these effects and their significance?
- Have all the residual impacts of all the past and future projects that were identified in the scoping been addressed?
- Have the residual cumulative impacts been clearly identified?
- What level of uncertainty exists about the significance of these impacts and their effects?

REVIEWING THE PROPOSED MITIGATION MEASURES

Be thorough in your review of proposed mitigation measures especially if they are designed to protect an environmental value that is important to your First Nation. Mitigation measures can eliminate or minimize potential adverse effects and are one way to make the project more acceptable.

For example, if you are concerned about downstream water quality from a proposed mine, carefully review the proposed discharge and waste water treatment plans for all potential sites. Consider hiring a specialist to examine aspects of the project, such as a water quality engineer to review the treatment technology being proposed or an aquatic biologist to review the potential effects to aquatic life in the receiving environment.

Review all proposed mitigation measures with the following kinds of questions in mind:

- Are the proposed mitigation measures well-known and have they been demonstrated to work effectively?
- Is there a clear plan for contingencies in the event of mitigation failure or emergencies?

If the project uses standard technology with well understood impacts and the measures proposed for mitigating impacts are similarly well known to be effective, this will provide increased certainty about the reliability of the assessment. If the project is new technology or standard technology in a unique or

extreme environmental setting, then the proposed mitigation needs to be more closely examined. Has the proponent made a convincing case that the proposed mitigation will work? Have case studies or other situations been described that support the claim of effectiveness? If necessary, review any case studies referred to and ensure that the situations and the applications of the mitigation technology are comparable. Consider proposing special follow-up measures to check the effectiveness of the technology and to ensure that the proponent has contingency plans for dealing with failure.

- What special requirements might be needed to make the proposed mitigation work successfully and are these requirements in place?

Sometimes a proposed mitigation measure will depend on several other mitigation measures being in place. For example, a proponent might propose to limit vehicle traffic on the project access road when high numbers of caribou are in the area. The success of this mitigation measure would depend on a number of other procedures being in place such as a monitoring program to monitor the presence of caribou and a manager assigned to reviewing the monitoring data and triggering the mitigation measure in a timely fashion. Make sure the contingency plans are in place in case mitigation measures fail.

▶ REVIEWING THE PROPOSED ENVIRONMENTAL MANAGEMENT SYSTEM

KEY DEFINITION

Adaptive Management

A rigorous science-based management approach where decision-makers utilize new data gathered during project implementation to guide decision-making associated with the project. See Section 9 – Follow-up Programs, page 9 for more information.

An environmental management system describes the environmental management approach and how environmental management plans will be implemented.

Most proposed projects will require management plans for the following:

- emergency and spill contingency
- solid waste management and disposal
- hazardous waste treatment and disposal
- liquid effluent treatment, disposal, discharge and monitoring
- access management
- closure, decommissioning, reclamation and abandonment
- environmental monitoring

Compare the environmental management plans with the proposed measures described in the environmental assessment report or application documents – they should be consistent and complete. If there are no environmental management plans provided in the EA report, request that the proponent prepare them. If not done during the EA, your First Nation could address this during development agreement negotiations.

Ideally, your First Nation would be involved in all aspects of developing and implementing an environmental management plan for projects in your traditional territory. Your First Nation would participate substantially in reviewing the monitoring plans and work cooperatively with the proponent and legislative agencies in implementing the plans.

This cooperation would ensure that changes and improvements are made as necessary and possible. At a minimum your First Nation should review and comment on the environmental monitoring plan.

The following questions will help you in assessing the adequacy of the proposed environmental management measures:

- Has the proponent provided environmental management plans for review?
- Are the proposed methods of managing the environmental effects of the project described in the proponent's documents?
- Is it clear who will be responsible for managing environmental issues?
- Are the thresholds or triggers for taking management action identified?
- Will any kind of regular, independent and publicly available environmental auditing be undertaken?
- Does the proponent have a demonstrated track record of good environmental performance?

REVIEWING THE CLOSURE PLAN

All projects that undergo an environmental assessment should include a plan describing what will be done when the project is temporarily or permanently shut down.

When reviewing a closure plan ask the following questions:

- Are the baseline characteristics of the site adequately described?
- Are the structures or facilities that will be constructed and ultimately reclaimed described?
- Is there a description of how each of these structures will affect the land and the baseline characteristics at regular intervals throughout the life-time of the project and at closure?
- Is there a list of objectives for the closure of each project component?
- Are the closure activities that will be undertaken for each project component described?
- Are there targets or criteria to assess whether the closure objectives have been met?
- Is there a description of any progressive reclamation that will occur during operations?
- Is there an estimate of the liability for reclamation and closure of the site?

REVIEWING FOLLOW-UP PROGRAMS

See **Section 9 – Follow-up Programs** for guidelines on how to review monitoring and follow-up programs. This is a key aspect of any project's implementation and may influence the environmental management of the overall project. Pay special attention to ensure there is follow-up on items that were of special concern to your First Nation.

SUMMARY

It is important to review the EA report since the conclusions of the report will influence decisions about project approval and the terms and conditions of the approval.



Partially reclaimed abandoned mine from the 1950's. Acid mine drainage is an ongoing closure issue at this site. Photo courtesy of TRTFN.

Initially, check to see if the report is complete and covers the specifications set out in the terms of reference or EA scoping exercise. Focus on the areas that are of most interest and concern to your First Nation. Note whether the proponent has accurately described and considered your First Nation's concerns and interests.

When reviewing the project description pay particular attention to the type of technology planned, any wastes associated with the project and the proposed waste management plan.

Examine the baseline data to see if important environmental components are included and if there are any inconsistencies compared to your community's traditional knowledge and experience. Determine if the baseline data were collected for a large enough area, during the right time of year and for a long enough time period.

When reviewing the impact analysis, make sure the issues and concerns identified by your First Nation have been addressed. Also, examine the impact analysis methods and conclusions – they should be well described and the reasoning for the conclusions should be clear. It is important to review the determination of significance for the residual impacts. If you do not agree with the significance ratings note this in your review comments and in your discussions with the proponent and government agencies. If a cumulative effects assessment was done, review it to ensure that your concerns were addressed and that all the potential cumulative effects were assessed.

When you review the proposed mitigation plans check to see if the mitigation measures are well-known and proven. If they are not, the proponent should provide evidence that the mitigation measures will work, have a plan in place to monitor the effectiveness of mitigation and describe contingency plans in the event that the mitigation fails.

The environmental management system should describe the environmental management approach and include a discussion of what will trigger management actions. Specific environmental management plans should also be provided. If the proponent does not provide an Environmental Management System or Environmental Management Plan, request that they be provided.

When reviewing the closure plan, look for detail on baseline conditions and clarify requirements for reclamation.

It is important to focus on your First Nation's interests and concerns when reviewing an EA report. If a project has the potential to impact a resource that is connected to your First Nation's Aboriginal rights and title and treaty rights, pay particular attention to those items throughout your review of the report. Finally, ensure that all relevant comments are compiled and submitted to the EA process. It will be especially important to highlight the risks associated with the impacts from a projects development on your First Nation's Aboriginal rights and title, treaty rights and other interests.

▶ REVIEWING EA REPORTS – CHECKLIST

SCOPE OF THE REVIEW

Questions to focus your review:

- Have the requirements described in the EA scope and the terms of reference been addressed?
- Have the issues that were described in the scoping document and/or the terms of reference document been addressed?
- If the proponent consulted with your community, are the consultation process and results accurately described?
- Is your First Nation and local community accurately described in relation to the project?
- Are your First Nation's goals in relation to the project clearly defined?
- Are the land use practices of your First Nation accurately described?
- Has a community impact assessment (including a land use impact assessment) been conducted and are its results accurately described? Do the findings alleviate any concerns or protect any interests? Is the protection adequate and likely to be implemented? What additional measures are needed to protect interests and address concerns?
- Have the cultural heritage resource values associated with your community been adequately considered? Have adequate protection measures been recommended in the EA report?
- Have the issues you have raised during the environmental assessment been addressed? To what degree? Are protection/mitigation measures adequate? Is your First Nation included in follow-up programs?

PROJECT DESCRIPTION

Features to focus on:

- the type of project, its size, and expected life-time
- workforce for construction and operation, transportation and accommodation, and the affects of the additional population on your community
- whether the project has conventional or new technology components
- are there any new access requirements such as roads or rights-of-ways for transmission lines or pipelines
- the design of the project and proposed industrial processes
- the type, amount and rates of production of any waste materials (e.g., airborne emissions, wastewater, solid wastes)
- descriptions of any testing that has been done on the waste materials to identify their characteristics and predict how they will behave once exposed or released to the surrounding environment
- waste management and follow-up plans

Questions to ask:

- Is the purpose of the project clearly described and justified?
- Have all potential project alternatives been adequately evaluated?
- Is there any new technology associated with the project?
- Is any of the waste material produced by the project potentially harmful to people or the environment? What are the risks associated with managing the waste produced and are the risks manageable in the project's environmental setting? Is the technology for management proven effective or not?
- Will special waste management measures be required either during operations or during decommissioning, abandonment and closure? If so are they adequate and proven effective?
- Have the zones of influence for the various project activities been adequately described?

ENVIRONMENTAL BASELINE**Features to focus on:**

- water quality
- air quality
- rare, sensitive or particularly productive habitat, including important wildlife movement corridors, calving grounds, mineral licks and wintering areas
- rare, sensitive or culturally valued fish or wildlife populations
- previously disturbed or contaminated vegetation and soils
- important First Nation sites, such as gathering places, hunting areas, trails, and traplines

Questions to ask:

- Does the baseline describe important ecological processes and relationships?
- Are there differences and inconsistencies between information presented by the proponent and what your community knows about the local environment?
- Did the surveys for the baseline information cover the appropriate zones of influence?

IMPACT ANALYSIS**Factors considered in the impact analysis:**

- What things have been included in the review and has anything that was required in the EA scope or terms of reference been left out?
- If valued ecosystem components (VECs) were selected to focus the assessment was your First Nation consulted about the selection and do you agree with choices? See **Section 2 – Environmental Assessment Basics** for more detail on VECs.
- Does the zone of influence considered in the impact analysis include particular environmental components of concern?

Impact analysis methods:

- If modelling was used was the following information provided:
 - the assumptions used
 - specifications about how the model is to be used (usually in an appendix)
 - the applicability to the particular situation
 - data sources and an evaluation of data reliability
 - the confidence limits including margins for error of the model results
- Are the results of the experiments reliable?
- If professional judgement was used, are the qualifications of the person making the judgement clearly identified somewhere and are they relevant to the topic being assessed?
- If case studies were used, is enough detail presented for you to make a comparison to the assessment or project you are reviewing?
- If statistical analysis was used to reach a conclusion about impacts was the analysis properly conducted?

Impact assessment results:

- Is the method or discussion clear regarding how the residual impacts were determined?
- Have identified residual impacts been downplayed or minimized?
- Do you agree with the determination of significance for each impact?

CUMULATIVE EFFECTS ASSESSMENT**Questions to ask:**

- Have your First Nation's key concerns regarding cumulative effects been considered and addressed?
- Has the geographic scope of the cumulative effects assessment been set widely enough to include those effects of past or foreseeable projects that are likely to interact with the effects of the project under review?
- Are the significant adverse effects of the other projects or activities properly documented, and is there reliable information that describes these effects and their significance?
- Have all the residual impacts of all the past and future projects that were identified in the scoping been addressed?
- Have the residual cumulative impacts been clearly identified?
- What level of uncertainty exists about the significance of these impacts and their effects?

MITIGATION MEASURES

Questions to ask:

- Are the proposed mitigation measures well-known and have they been demonstrated to work effectively?
- Is there a clear plan for contingencies in the event of mitigation failure or emergencies?
- What special requirements might be needed to make the proposed mitigation work successfully and are these requirements in place?

ENVIRONMENTAL MANAGEMENT SYSTEM

Questions to ask:

- Has the proponent provided environmental management plans for review?
- Are the proposed methods of managing the environmental effects of the project described in the proponent's documents?
- Is it clear who will be responsible for managing environmental issues?
- Are the thresholds or triggers for taking management action identified?
- Will any kind of regular, independent and publicly available environmental auditing be undertaken?
- Does the proponent have a demonstrated track record of good environmental performance?

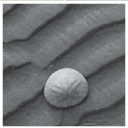
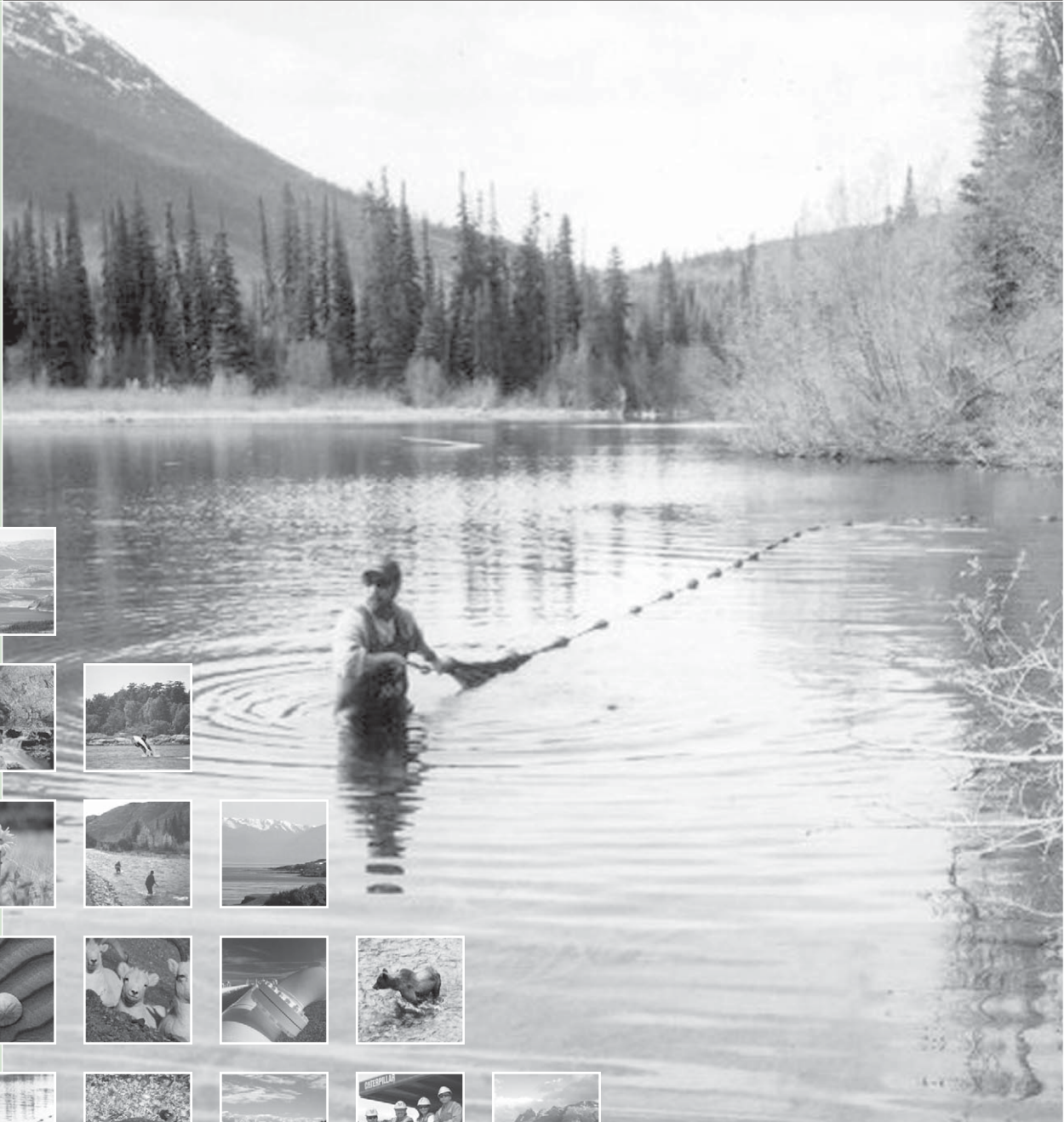
CLOSURE PLAN

Questions to ask:

- Are the baseline characteristics of the site adequately described?
- Are the structures or facilities that will be constructed and ultimately reclaimed described?
- Is there a description of how each of these structures will affect the land and the baseline characteristics at regular intervals throughout the life-time of the project and at closure?
- Is there a list of objectives for the closure of each project component?
- Are the closure activities that will be undertaken for each project component described?
- Are there targets or criteria to assess whether the closure objectives have been met?
- Is there a description of any progressive reclamation that will occur during operations?
- Is there an estimate of the liability for reclamation and closure of the site?

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 9 – FOLLOW-UP PROGRAMS



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

 **Section 9 – Follow-up Programs**

Section 10 – Development Agreements

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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Cover photo courtesy of Round River Conservation Studies

Follow-up programs are an important part of the environmental management of a project. This section discusses follow-up programs and suggests ways that your First Nation can participate. Types of follow-up programs, principles of successful follow-up and what to look for when reviewing follow-up programs are described. Examples and case studies of follow-up programs are included.

This section includes the following:

- What is a follow-up program?
- Why do follow-up?
- Types of follow-up
- Legal and policy considerations
- Principles for success
- Designing and reviewing follow-up programs

Case Study – Tulsequah Chief Project 4

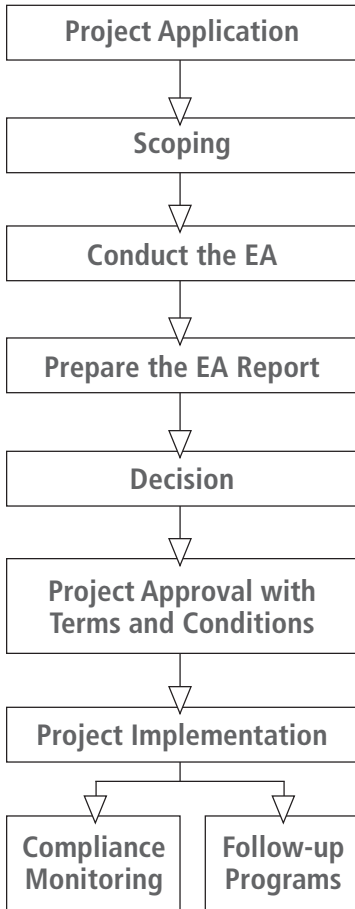
Case Study – South Kemess Mine 7

Case Study – Ekati Diamond Mine 7

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▶ WHAT IS A FOLLOW-UP PROGRAM?



A follow-up program occurs after an environmental assessment has been submitted and a project has been approved and initiated. Follow-up programs are used to verify the predictions of the environmental assessment and determine the effectiveness of mitigation measures. These programs also address areas of uncertainty and information gaps identified during the environmental assessment process. The main goal of a follow-up program is to ensure that the result of implementing the project is consistent with what was intended when the approval was given. Follow-up programs may extend throughout the life of the project (construction, operation, decommissioning, reclamation and closure).

Follow-up is sometimes confused with compliance monitoring since both are conditions of project approval, and both involve collecting monitoring data and include filing written reports. Compliance monitoring is the process government agencies use to check that the terms and conditions of its regulatory permits are being met. It responds to the question: “Were the mitigation measures implemented?” Health and safety inspections at the project site would be types of compliance monitoring. Another example would be the requirement for a proponent to collect and analyze water samples from their wastewater system or to measure the levels of air emissions from their processing plant.

In contrast, follow-up programs are used to assess the accuracy of the predictions made during an EA. Information gathered in follow-up programs is utilized to determine if mitigation measures are working to control/limit impacts. Follow-up programs are used to understand the impacts from a project and to make any necessary project management decisions. Management of a project that relies on follow-up programs to inform and adapt management strategies is often called “adaptive management”. Adaptive management is discussed in more detail on page 9 of this section.

Compliance monitoring and follow-up programs are both needed to ensure the environmental management of a project is successful. This section of the toolkit focuses on follow-up.

▶ WHY DO FOLLOW-UP?

Follow-up programs are conducted to:

- verify predictions made about the environmental, cultural, and socio-economic effects of the project
- evaluate the impacts of the project and the success of mitigation measures
- assist in the detection of unanticipated environmental, cultural and socio-economic effects
- address information gaps

- lessen the uncertainty associated with complex or new types of projects
- provide information that can be used for future environmental assessments including cumulative effects assessments
- provide reliable information for environmental management

- detect change that is greater than the natural variability
- determine if the change was caused by the project
- define what level of change is acceptable
- identify the actions to be taken to address the problem if the level of change is unacceptable

TYPES OF FOLLOW-UP PROGRAMS

Requirements for follow-up may be quite simple and straightforward. Site reclamation, for example, may require only a single inspection at the end of the closure program to verify that the follow-up work was successful. Other programs may be more complex, involving work on a number of environmental issues over extended periods of time. The scale and complexity of a follow-up program should be appropriate to the scale and complexity of the project to which it relates.

Types of follow-up programs include:

- monitoring
- directed studies
- environmental audits
- post-project impact assessments

MONITORING

Monitoring is a very common type of follow-up program. It is a process for measuring change in a particular environmental component over a period of time. To be useful, monitoring programs must be linked to a management system so that if a problem is found it can be addressed.

Monitoring and management programs are designed to:

The level of acceptable change is often called a trigger or threshold. An example of a threshold would be a certain percentage change in wildlife population numbers.

DIRECTED STUDIES

Directed studies are short-term, focused investigations in the field or laboratory. These are done to address information gaps or to answer specific questions identified in the environmental assessment. Directed studies are one of the main ways that information gaps are assessed.

ENVIRONMENTAL AUDITS

An environmental audit is a “snap-shot” survey of the state of the environment, or a particular component of it, at any given moment in the project’s lifetime. An audit will measure actual project-related changes. Audits are valuable as a way to evaluate the success of monitoring programs and other project environmental management systems.

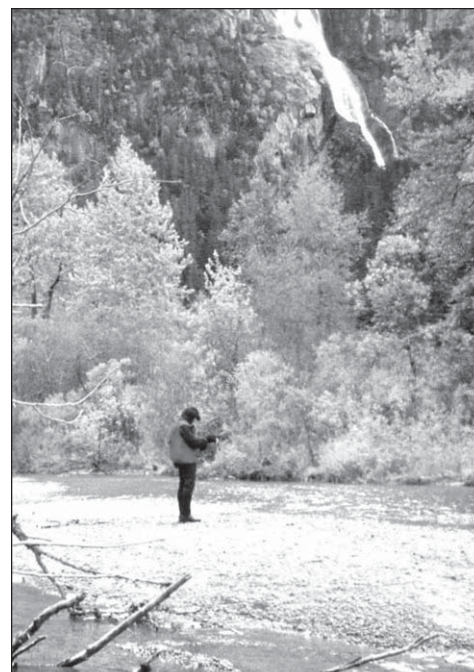


Photo courtesy of Mark Connor, Taku River Tlingit First Nation

CASE STUDY - TULSEQUAH CHIEF PROJECT

The 1998 approval of the Tulsequah Chief mine is an example of a *BCEAA* approval in which a number of follow-up programs were identified during the environmental assessment and incorporated as conditions in the approval certificate.

Major items included:

1. Environmental supervision plan to ensure that construction and decommissioning of the mine and access roads are done in accordance with the Follow-up and Monitoring Program.

This plan provides for two environmental supervisors responsible for:

- identifying environmentally sensitive areas
- reviewing mitigation plans
- developing specific mitigation measures
- implementing a training program
- directing environmental monitoring during construction

2. Environmental effects monitoring program designed to detect potential impacts related to the project, particularly with respect to tailings disposal

3. Cumulative effects analysis and monitoring program for grizzly bears
4. Monitoring program for ungulates (deer, moose and caribou)
5. Fish and fish habitat mitigation and compensation plan

While the follow-up programs identified for the Tulsequah Chief Project were important and necessary, there were still outstanding concerns related to the quality of baseline data. It is important that baseline data gaps are filled prior to designing and initiating monitoring programs.



A cumulative effects analysis and monitoring program for grizzly bears was required follow-up. Photo courtesy of Steve Uyesugi, BC Ministry of Transportation

POST-PROJECT IMPACT ASSESSMENT

Post-project impact assessment is a comprehensive environmental audit done at the completion or post-closure stage of a project. Its main purpose is to determine how successful the original environmental assessment was in predicting what would happen and in prescribing effective management and mitigation measures.

LEGAL AND POLICY CONSIDERATIONS

FOLLOW-UP AND THE BC PROCESS

The Minister of Sustainable Resource Management has the discretion to require follow-up programs and the policy of the BC Environmental Assessment Office is to require follow-up programs where the need is identified. If follow-up programs are needed, these are included as conditions of the environmental assessment certificate for the project. (See **Section 4 – British Columbia’s Environmental Assessment Process** for additional information on *BCEAA*.)

FOLLOW-UP AND THE FEDERAL PROCESS

The *Canadian Environmental Assessment Act (CEAA)* applies to projects where the federal government has decision-making authority, whether as a proponent, land manager, source of funding, or regulator. The federal agency responsible for conducting the assessment is the responsible authority (RA) (See **Section 5 – Canada’s Environmental Assessment Process** for additional information on the federal environmental assessment process).

For screening assessments under *CEAA*, the RA must determine whether follow-up is necessary. If so, the RA must design the follow-up program and ensure its implementation. The RA may require the proponent to do so or choose to do so itself. Where an expert Federal Authority has proposed follow-up, it is obliged to assist the RA in its implementation, if asked to do so by the RA. The RA must post a notice on the internet site of the **Canadian Environmental Assessment Registry** stating whether or not a follow-up program is considered appropriate for the project. If a follow-up program is required, a description summarizing the program and its results or an indication of how a full description of the program and its results can be obtained must be posted on the Registry.

For comprehensive studies, mediations and review panels under *CEAA*:

- the RA must design a follow-up program and ensure its implementation
- the RA may ask the proponent to design and implement the follow-up program
- relevant material about the follow-up programs must also be placed on the Canadian Environmental Assessment Registry

The Canadian Environmental Assessment Agency has established an electronic registry that will contain a variety of information related to the EA of a project, including any information gathered during follow-up programs. The registry allows others to use the results of follow-up programs to improve their ability to predict effects and design mitigation measures. The Canadian Environmental Assessment Registry can be found on the Agency’s website at the following address, http://www.ceaa-acee.gc.ca/050/index_e.cfm. See also **Section 5** of this toolkit for additional information on the requirements of the *Canadian Environmental Assessment Act*.

QUICK TIP

Participation in follow-up programs is one way to ensure that your First Nation has meaningful involvement in the ongoing management activities associated with a project.

FOLLOW-UP AND A JOINT FEDERAL-PROVINCIAL PROCESS

If a project is being jointly reviewed by the BC Environmental Assessment Office and a federal government department or agency, the design and implementation of any follow-up programs is coordinated. See **Section 6** on Joint Review Processes for more information.

QUICK TIP

Ensure your First Nation has the opportunity to review, comment and participate in the design and implementation of follow-up programs.

FIRST NATION PARTICIPATION

Since follow-up programs arise from the environmental assessment, an initial way that your First Nation can influence follow-up is through your participation in the environmental assessment process. For example, you can comment on the need to describe follow-up programs in your written comments on the terms of reference for the environmental assessment. As well, when reviewing the EA, look for follow-up and monitoring commitments from the proponent and comment on these in your written comments on the EA.

Neither federal nor provincial environmental assessment legislation requires the formal involvement of First Nations in planning follow-up programs. However, it may be possible to negotiate the formal participation of your First Nation in follow-up programs during the environmental assessment of the project. In addition, some provincial regulatory agencies will informally engage your community by referring permits or authorizations to your First Nation for comments or inviting a representative from your community to regulatory meetings.

You may also be able to negotiate participation in follow-up programs directly with the project proponent (see **Section 10 – Development Agreements**).

If you are negotiating an agreement with a regulatory agency or the proponent, ensure you have the opportunity to review and comment on the design of follow-up programs and that the results are provided to your First Nation. Consider negotiating direct participation in follow-up programs that are of interest to your First Nation such as monitoring programs. You may also want to include traditional knowledge in your input into follow-up (see **Section 7 – Traditional Knowledge and Environmental Assessment**).

▶ PRINCIPLES FOR SUCCESS

Follow-up programs can help achieve better projects. Several features need to be in place to ensure that follow-up programs contribute to good environmental management of a project.

Follow-up programs tend to be more successful when they are:

- defined early in the environmental assessment process and clearly linked to issues raised during the environmental assessment
- integrated into the proponent's environmental management system
- a requirement of regulatory approval
- reviewed through a well-defined regulatory framework

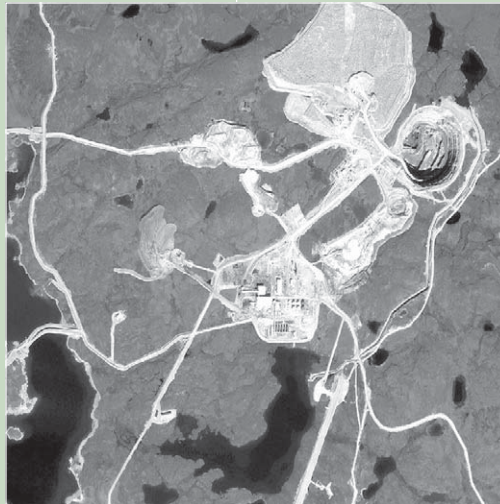
CASE STUDY – SOUTH KEMESS MINE

The South Kemess mine is an example of a project where the follow-up program did not have sufficient funding.

The 1996 EA was conducted as a harmonized BCEAA/CEAA review, and resulted in an approval specifying that a full-time, independent environmental monitor be present at the site during construction. The proponent, Royal Oak Mines, was to pay for the cost of the environmental supervision program. However, after project approval the BC Ministry of Energy and Mines (MEM) and Royal Oak agreed that only a part-time monitor was required, and further that the company's funding requirement would be capped at \$100,000. This was spent within four months, and MEM did not have the resources to hire an independent monitor. The job was added to the regular workload of the regional Reclamation Inspector. During the second summer of construction there were severe sedimentation problems at the mine. The BC Ministry of Environment, Lands and Parks (MELP) intervened and hired an independent monitor.

The lesson learned here is that regulatory agencies may negotiate post-approval arrangements that can undermine the follow-up work.

There are several strategies that your First Nation could use to try to prevent post approval processes or agreements from undermining your interests or the environmental assessment conclusions. Development agreements between your First Nation and the proponent that specify funding commitments and are negotiated prior to project approval can help to strengthen post approval processes (See **Section 10 - Development Agreements**). As well, when negotiating your First Nation's participation in an EA process, include participation in post approval processes. See **Section 4 – British Columbia's Environmental Assessment Process** and **Section 5 – Canada's Environmental Assessment Process** for further details on participation agreements.



Ekati Diamond Mine. Image courtesy of Northwest Territories Remote Sensing Centre, BHP Diamonds Inc. and Space Imaging.

CASE STUDY – EKATI DIAMOND MINE

The Independent Environmental Monitoring Agency for the Ekati Diamond Mine in the Northwest Territories is probably the most substantive attempt in Canada at a coordinated approach to follow-up for a major industrial project.

The Ekati Diamond Mine was reviewed by a federal panel and approved in

1996. It is the first diamond mine to be approved in Canada.

Following project approval, the Minister of Indian and Northern Affairs required the proponent, BHP-Billiton, to negotiate an environmental agreement with the federal government.

This agreement

required the proponent to commit to environmental protection and monitoring programs that would not have been required through the usual regulatory processes.

To satisfy concerns raised by the Aboriginal groups potentially affected by this new type of development, the environmental agreement required the creation of the Independent Environmental Monitoring Agency.

The agency has seven directors, four of whom are appointed by the Aboriginal groups, and the other three jointly appointed by the federal and territorial governments and the proponent. BHP-Billiton is required to fund the operations of the monitoring agency. The annual budget in 2001 was approximately \$500,000.

The monitoring agency reviews and comments on BHP-Billiton's environmental monitoring and management activities and the regulatory agency's work as it relates to the mine. It has no enforcement role; however, it has the ability to correspond directly with the Minister when circumstances warrant. The monitoring agency also publishes an annual report and makes recommendations to BHP-Billiton about needed changes. BHP-Billiton is obliged to adopt the recommendations or explain in writing why the recommendations will not be adopted.

The agency's tasks include:

- reviewing and commenting on design and implementation of environmental effects monitoring programs (terrestrial, aquatics, air quality) and environmental management programs (e.g., waste rock, reclamation)
- monitoring and facilitating the use of Traditional Knowledge in the mine's environmental management activities
- acting as an intervenor in regulatory processes related to environmental management at the mine
- communicating concerns of Aboriginal people and the public to BHP-Billiton and regulatory agencies
- informing the Aboriginal organizations and public about environmental performance and issues at the mine

Successes to date for the monitoring agency include:

- detecting and warning BHP-Billiton that winter oxygen levels in Kodiak Lake were declining to dangerously low levels for fish as a result of sewage disposal
- detecting and warning BHP-Billiton that some waste rock piles were generating acidic drainage
- notifying the Department of Fisheries and Oceans (DFO) that Leslie Lake, a proposed fish habitat compensation lake, may not be appropriate because of rising nitrate levels in the lake and its location immediately downstream of the mine discharge
- initiating and promoting annual workshops to review environmental effects monitoring programs
- improving aquatic and terrestrial environmental effects monitoring programs
- improving quality of BHP-Billiton's published environmental reports
- encouraging BHP-Billiton to identify gross reclamation liabilities in its forecasting and not include future reclamation expenditures as credits in its liability estimates
- encouraging BHP-Billiton to better document how it uses traditional knowledge in environmental management
- encouraging BHP-Billiton to pay more attention to caribou movement requirements during construction of roads

- adequately funded
- based on good quality baseline data
- compared against the original environmental assessment predictions and issues
- linked to other programs where appropriate

FOLLOW-UP AND ENVIRONMENTAL ASSESSMENT – THINGS TO CONSIDER

Follow-up programs address issues raised in the environmental assessment such as uncertainty about the success of mitigation measures or predictions about the extent of an environmental impact. Therefore, it is important that all the follow-up is described in as much detail as possible in the EA report. Often environmental assessments contain only general references to additional future studies or monitoring programs. This is not sufficient.

If you are reviewing the terms of reference for an environmental assessment, look for a section on monitoring or follow-up. If there is no reference to these, you can request that the requirement for monitoring and follow-up be added to the terms of reference or scope of the EA. See **Section 4 – British Columbia’s Environmental Assessment Process**, sub-section **EA Application Terms of Reference** for more information on terms of reference for a provincial review. Also see **Section 5 – Canada’s Environmental Assessment Process** under the sub-heading **Step 3 – Determining the Scope of the Project and the Scope of the Assessment** for information on the scope of a federal review.

Later, when reviewing an environmental assessment, look for the proponent’s commitments to

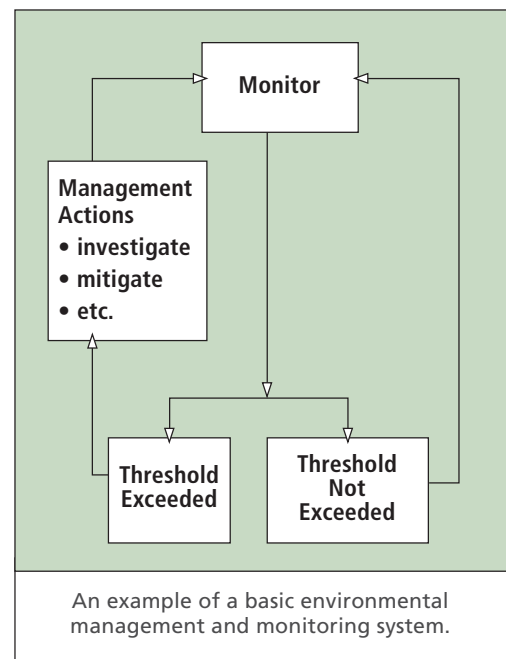
monitoring and follow-up studies and whether these address issues of concern to your community. In your First Nation’s review of the EA, you can comment on the adequacy of the follow-up programs described.

Some areas to consider are:

- the extent that traditional knowledge was used to predict the environmental effects of the proposed project (see **Section 7 – Traditional Knowledge and Environmental Assessment**)
- the potential for significant community economic, social and cultural impacts
- the potential for significant impacts to your First Nation’s land use patterns and harvesting activity
- impacts on key aspects of the environment such as wildlife and fish habitats
- aspects of the environmental impact assessment that you feel are lacking information or are uncertain

MANAGEMENT SYSTEMS

Follow-up programs contribute to the overall environmental management of a project and they need to be linked to the proponent’s Environmental Management Plan (EMP) or Environmental Management System (EMS). The EMP or EMS should describe the environmental management approach and how the results of follow-up work will affect management decisions.



A common environmental management approach is called **adaptive management**. Adaptive management is a management approach that learns and changes by deliberately designing and applying management actions as experiments. It integrates experimental design, resource management and monitoring to systematically test assumptions and learn, and then use what has been learned to adjust management decisions. Proponents who adopt this approach will be better able to determine (and demonstrate) the effectiveness of their management procedures, as well as to identify and implement necessary changes to improve outcomes.

An adaptive management system should also outline the management approval procedures to be used if adverse effects occur beyond what was predicted.

Not all proponents have an EMP and this is something that you can comment on in your review of the environmental assessment or in your negotiations with the proponent. For example, the proponent for the Brilliant Expansion Powerplant (a hydroelectric facility on the Kootenay River) was required to develop an EMP as a condition of their project approval certificate.

APPROVAL CONDITIONS AND REGULATORY FRAMEWORK

Follow-up programs are more likely to be successful if they are based on adequate baseline data, are required as an approval condition and if appropriate regulatory and review structures are in place. Follow-up needs to be linked to the EA so that concerns identified in the EA are not later ignored. As well, a process for First Nation and public access to follow-up results needs to be in place.

The project approval should define what is required for follow-up and who is responsible for the follow-up program. It is important that there are clearly defined roles and responsibilities for the various participants

including the proponent, government agencies, your First Nation, scientific and technical advisors, and the public. The Tulsequah Chief Project is an example of a *BCEAA* Approval that had a number of follow-up programs and studies in the approval certificate (see **Case Study – Tulsequah Chief Project** on page 4).

For large or complex projects, a review board is sometimes formed representing various stakeholder groups. The review board usually does not have regulatory authority but it does have the right to review and make recommendations on follow-up programs. Consider requesting a review board that includes members from your First Nation. It may be a good idea to have independent experts and members of the public on the board as well. A review board with a well-defined mandate can increase the credibility and quality of the follow-up programs

(see **Case Study – Ekati Diamond Mine** on page 7).



Ekati Diamond Mine Independent Environmental Monitoring Agency and BHP-Billiton staff at mine site. Photo courtesy of IEMA.

FUNDING

The success of follow-up programs depends to a large extent on whether they are funded appropriately. Financial assurances, such as company guarantees, security deposits and reclamation funds are valuable tools in ensuring the implementation of certain follow-up programs, as well as any additional mitigation measures which may be identified as needed during the follow-up program. When you are reviewing follow-up programs check that the responsibility for funding is well-defined and the appropriate amount of funds are in place.

The South Kemess mine project is an example of a follow-up program where there were challenges due to lack of commitment to funding (see *Case Study – South Kemess Mine* on page 7). In contrast the follow-up for the BHP-Billiton Ekati Diamond Mine has been very successful since appropriate funds are in place for the agreement as well as an appropriate regulatory framework and funding for a new agency, the Independent Environmental Monitoring Agency (see *Case Study – Ekati Diamond Mine* on page 7).

BASELINE INFORMATION

The quality of baseline data significantly affects the ability to design effective follow-up and monitoring. Monitoring programs need to be able to distinguish between natural variability and project-related effects. Depending on the environmental component being studied, several years of baseline data may be required to adequately characterize the baseline. This is particularly important for fish and wildlife populations since population levels and characteristics vary from

year to year. In addition, it is important that the baseline data are collected over a large enough geographic area. Inclusion of traditional knowledge in baseline studies can improve the quality of the information since it represents long-term understanding of the land.

Ideally, adequate baseline data are collected during the environmental assessment process. However, if this is not the case, sometimes the first step in developing a successful follow-up program is to conduct additional baseline studies. It is sometimes possible to collect baseline data after project approval but before construction of the project begins.

COMPARISON TO ENVIRONMENTAL ASSESSMENT PREDICTIONS

Follow-up programs are meant to assess the accuracy of predictions and provide further information for decision makers on issues raised in the environmental assessment. Sometimes, however, follow-up programs are carried out and the important step of comparing the program results to the predictions made during an EA is missed. This feedback is important and should be built into the design of follow-up programs.

LINKAGES TO OTHER PROGRAMS

Where appropriate, follow-up programs should be linked to other sources of information such as regional data, cumulative effects monitoring and follow-up programs of other projects affecting the same environmental components.

QUICK TIP

Adaptive management is an evolving proactive management approach. Your First Nation will likely require an independent expert to review follow-up programs to ensure that the information collected will be useful for proactive environmental management of a project.

DESIGNING AND REVIEWING FOLLOW-UP PROGRAMS

QUICK TIP

Follow-up programs can be a valuable aspect of the environmental management of a project and it is worthwhile for your First Nation to participate in them.

If you are involved in the design or review of a proposed follow-up program, it is helpful to ask the following questions:

- What is the purpose of the follow-up program?
- Will the program last for the required length of time?
- Are the objectives for the follow-up program clearly defined?
- What information is required to achieve the objectives?
- Will the proposed program be able to distinguish project-related changes from natural changes or other non project-related changes?
- Are commitments in place to guarantee that the work will be implemented?
- Are the things to be measured or studied consistent with the stated purpose?
- Are the parties responsible for the work identified?
- Is the program clearly described?
- Are triggers or thresholds clearly identified in the follow-up program for when and what management action might be required?
- Is the system for reviewing results and communicating these to managers clearly laid out?
- Is there an environmental management plan that describes this process?
- Are the different phases of the project (construction, operation, and closure) addressed?
- Will the results of the follow-up program be available to your First Nation?

If you are unsure about the technical aspects of a follow-up, consider having an independent expert review or help design the follow-up program. An example would be to have an aquatic ecologist review any proposals for post-project aquatic habitat or population monitoring, particularly for fish species of high value to your First Nation.

REVIEWING MONITORING PROGRAMS

Here are the things to look for when reviewing a monitoring program:

- a clear statement of the environmental impact hypothesis that is being tested through the monitoring program
- an evaluation of the suitability of available baseline data and plans to address data gaps
- identification of the indicators to be monitored
- a description of sampling methods

- details of how many samples will be collected and how often
- details of generally accepted quality assurance and quality control procedures that ensure reliable data
- a clear description of the data analysis approach, including statistical methods and confidence limits
- identification of who will be responsible for collecting and reviewing the data, and communicating the results to managers or appropriate decision-makers
- identification of the thresholds or triggers in the indicator values that will prompt management action
- a description of management actions that will be taken when a threshold is exceeded

SUMMARY

In summary, follow-up programs can be a valuable aspect of the environmental management of a project and can be helpful in addressing issues and concerns of your community. It is sometimes possible to negotiate formal participation in follow-up programs with the proponent or the regulatory agency. Regardless of whether formal participation is negotiated, your First Nation can provide written comments on the need for follow-up in your review of the environmental assessment and in consultations with the proponent or government agencies involved in EA and management of the project.

Follow-up is done to address uncertainties, information gaps

and issues raised during the environmental assessment. It is a way to verify the predictions made in the environmental assessment and provide information to manage the effects of the project.

The extent of follow-up varies. For small projects or those that involve well-known technologies or processes, follow-up may be limited. For large, complex or new types of projects, follow-up may be extensive. It could include monitoring programs, directed studies, environmental audits and post-project impact assessment activities and studies.

It is important that follow-up is considered early in the project approval process and that there is a funding and a regulatory framework for implementation.

FOLLOW-UP PROGRAMS Additional Information

GENERAL INFORMATION ON FOLLOW-UP

International Association of Impact Assessment:

<http://www.iaia.org>

Principles of Environmental Impact Assessment Best Practice, IAIA, January 1999.

Environmental Follow-up (SEFA) consists of a database of reference documents concerning environmental follow-up (monitoring). Available in english and french

<http://www.aqei.gc.ca/sefaenglish.html>

Environmental Management Systems

http://www.epd.gov.hk/epd/english/how_help/tools_ems/ems.html

Follow-up Programs under CEAA

http://www.ceaa-acee.gc.ca/013/0002/followup_e.htm

Ekati Diamond Mine Project - Independent Environmental Monitoring Agency

<http://www.monitoringagency.net/>

FOLLOW-UP PROGRAMS CHECKLIST

PRINCIPLES FOR SUCCESSFUL FOLLOW-UP

Follow-up programs tend to be more successful when the following are in place. Is the follow-up program:

- Defined early in the EA process?
- Linked to key issues?
- Linked to proponent's management system?
- A requirement of the approval?
- Reviewed through a well defined regulatory framework?
- Adequately funded?
- Based on good quality baseline data?
- Linked to other programs where appropriate, (e.g. cumulative effects, monitoring, regional programs)?

DESIGNING FOLLOW-UP

- Purpose of the follow-up program clearly defined
- Program to last for the required length of time
- Objectives for the follow-up program clearly defined
- Information required to achieve the objectives is appropriate
- Proposed program is designed to distinguish project-related changes from natural changes or other non project-related changes
- Commitments in place to guarantee that the work will be implemented
- Things to be measured or studied consistent with the stated purpose
- Parties responsible for the work identified
- Program clearly described
- Triggers or thresholds clearly identified in the follow-up program for when and what management action might be required
- System for reviewing results and communicating these to managers clearly laid out
- Environmental management plan in place
- Different phases of the project (construction, operation, and closure) addressed
- Results of the follow-up program are available to your First Nation

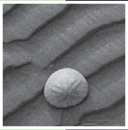
DESIGNING MONITORING

- There is a clear statement of the environmental impact hypothesis
- Baseline data is suitable or if not, plans are in place to address data gaps
- Indicators to be monitored are identified
- Sampling methods are described
- Timing of sampling is described
- Generally accepted quality assurance and quality control procedures are in place
- Data analysis approach is described, including statistical methods and confidence limits
- Individuals responsible for collecting and reviewing the data are identified
- Thresholds or triggers in the indicator values that will prompt management action are identified
- Management actions that will be taken when a threshold is exceeded are described

NOTES

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 10 – DEVELOPMENT AGREEMENTS



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

 **Section 10 – Development Agreements** 

Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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Cover photo courtesy of Tourism Victoria

A development agreement is a useful tool for managing your relationship with a proponent. It can help ensure that your First Nation’s interests are protected and that it benefits from the project. This section discusses the benefits and limitations of development agreements. Steps for negotiating development agreements are outlined along with examples of content to use as a guideline for developing your agreement.

This section includes the following:

- What are development agreements?
- Benefits of development agreements
- Limitations to development agreements
- Negotiating a development agreement
- Content of development agreements
- Revenue-sharing arrangements

Case Study – The Dona Lake Agreement 4

Content of Development Agreements 10

Revenue-sharing Arrangements 18

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▶ WHAT ARE DEVELOPMENT AGREEMENTS?

QUICK TIP

The index at the back of the toolkit can help you to find specific information.

A development agreement is a written arrangement between a First Nation and a proponent about how a project will be carried out, and about how the two parties will relate during the project. Development agreement negotiations may be one aspect of consultation between a First Nation and a proponent during an EA. They may also take place outside an EA process. From a First Nation's perspective, a development agreement addresses the impacts of the development on local communities by providing for the sharing of benefits from the project and protecting or compensating the community for any damages caused by the development. From a developer's perspective, a development agreement can provide certainty for the development and a social license to proceed.

Other common names for development agreements are:

- impact and benefit agreements
- protection and benefit agreements
- cooperation agreements
- memorandums of understanding (MOUs)

▶ BENEFITS OF DEVELOPMENT AGREEMENTS

Development agreements are intended to protect your First Nation's interests and provide benefits to your First Nation.

Protecting your interests usually means setting out in the agreement how the social, economic, cultural and environmental impacts of the project will be prevented, mitigated or compensated. Some common examples include commitments by the proponent to specific environmental mitigation, monitoring and follow-up programs, protection of access to traditional use areas, compensation for lost trapping and fishing revenues and funding to administer the agreement.

Benefiting from the project means that your First Nation is further ahead than before the project. Some common examples of benefits are employment opportunities, training and apprenticeship programs, scholarships and educational assistance, funding for community-based projects and programs, service contracts to supply the project and revenue-sharing arrangements.

A development agreement should achieve key objectives your community is concerned about. For example, it should:

- provide an acceptable level of engagement by your First Nation in the environmental management of the project
- ensure adequate protection of your First Nation's valued resources
- ensure adequate protection of your First Nation's land-based rights, title and interests
- provide lasting economic, social and cultural benefits to your community

- provide a process for effective communication between your First Nation government and the proponent
- provide an effective and fair means of resolving disputes that may arise between the proponent and your community

If these objectives are achieved, it is likely that an agreement will provide net benefits for your community.

LIMITATIONS OF DEVELOPMENT AGREEMENTS

Development agreements have the potential to help your community, but there can also be problems with their implementation. Successful implementation requires a high level of administrative capacity and follow-up on details of agreed upon commitments.

Depending on the size and complexity of the agreement and the number of agreements that your First Nation has with one or more proponents, administering agreements can be time consuming and costly. **Ensure that your agreement includes funds to implement and administer the agreement.** If your First Nation does not have the administrative capacity to implement the agreement, consider getting assistance from outside the community.

When you negotiate the agreement, clarify what each term in the agreement means to each party, especially with regard to funding. Regular follow-up and evaluation of the success of the agreement helps to encourage each party to follow through on its commitments.

In some cases the proponent has not fulfilled all the commitments it made in an agreement. For example, sometimes a proponent did not provide the funding, programs or information that it had promised. If the proponent refuses to honour its obligations, consult with your lawyer about the legal options associated with the agreement.

First Nations have also had problems fully realizing the opportunities defined in their agreements.

Some of the problems have resulted from not having:

- people with skill levels high enough to fill jobs or positions offered
- enough available workers to fill the jobs or positions available
- the existing entrepreneurial experience to capitalize on the business opportunities available
- experience in evaluating technical information
- finances to hire independent expertise
- the administrative or organizational structures to properly manage the agreement

Many of these problems can be prevented by realistically considering capacity issues at the negotiation stage of the agreement. For example, consider negotiating support funding to hire technical or administrative experts where needed. Also, consider what your community can realistically achieve in terms of employment and job training. Negotiating community development programs can help build the capacity necessary to fully realize the potential of your agreement.

QUICK TIP

When you negotiate a development agreement, it is important that you cooperatively define key terms, especially with regard to funding.

CASE STUDY – THE DONA LAKE AGREEMENT

The Dona Lake Agreement was a development agreement signed by the Windigo and Osnaburgh First Nations, Placer Dome Inc., Ontario and Canada in 1987. The First Nations were not involved in the original project approval decisions and the agreement was negotiated after the project was approved.

The agreement provided for an evaluation after five years, which was conducted by an independent auditor in 1992. One of the First Nations did not participate in the evaluation, but even with this limitation, the audit provides insight into how the outcome of the agreement differed from the promised package of benefits.

RESULTS OF THE EVALUATION

What happened after five years? Here are the main observations:

- Five sub-agreements were to be established:
 - Human Resource Development Needs
 - Traditional Economic Activities
 - Economic and Business Development
 - Social, Cultural and Community Support
 - Resourcing its Implementation
- Only two were actually completed. The evaluation indicated that there was “unanimous agreement among all parties that the negotiation of separate sub-agreements was not entirely effective and is not recommended for any future agreement.”
- There was a construction employment target of 55 First Nation members. However there was no monitoring or records kept and it was impossible to determine how many were actually employed.
 - There was an operations employment target of 30 First Nation members, but the target was never reached. The average monthly number of First Nation employees decreased yearly from 22 in 1988 to 10 in 1992.
 - Provisions for time-off for traditional activities were rarely used. First Nation employees reported they were deterred from requesting traditional leave because of the numerous conditions involved.
 - Canada and Ontario never implemented relocation counselling programs required by the agreement. No such programs existed or were created in the area.
 - The training programs promised by the agreement were unsuccessful. The graduates of these programs “left unprepared for actual mine work.” The auditor concluded that participants “might have benefited more from life-skills/assertiveness training in their own community prior to any other training and/or employment at the mine.”
 - Twelve First Nation members entered apprenticeship programs but none stayed. Six members started an underground mine training course but none finished.

- For business opportunities, the proponent purchased lumber worth \$22,000 from one First Nation-owned sawmill. Other First Nation mills expressed no interest in supplying lumber to the proponent.
- The intended transportation service to transport First Nation workers from communities to the mine site was reported to be infeasible without subsidies.
- The only new businesses created under the agreement were janitorial contracts, none of which were renewed after the contracts expired.
- did not adequately address the after-hours support and assistance required by First Nation employees at the mine
- was not successful in terms of the separate negotiation of sub-agreements
- demonstrated that on-the-job training was not successful when it was the only training provided
- demonstrated that the federal and provincial commitments to support initiatives from within existing programs was not the most effective option to support proposed initiatives

AUDITOR'S CONCLUSIONS

The auditor concluded that the agreement:

- did not provide significant economic and social benefits to the First Nation communities, although a small number of individuals benefited from wages and job experiences
- provided minimal success of various business ventures
- did not, at any time, attain the contemplated employment targets
- established an organizational structure and administrative processes that were unwieldy and impractical
- was not the subject of great interest at the local level
- underestimated the need for local resources, expertise and experience in order that communities could benefit
- underestimated the training and support required by the proposed labour pool

▶ NEGOTIATING A DEVELOPMENT AGREEMENT

KEY DEFINITIONS

Development Agreement

A written arrangement between a First Nation and a proponent about how a project will be carried out and about how the two parties will relate during the life of the project. Other common names for development agreements are: impacts and benefits agreements, protection and benefits agreements, cooperation agreements or a memorandum of understanding.

Interim Agreement

An agreement defining the initial working relationship between some or all of the parties involved in an EA up to the point where a longer-term agreement, if desired, can be established. Typically negotiated for the interim or review period prior to when a development agreement is negotiated. It may even reference or clarify the process for development agreement negotiations.

There can be many variations in the negotiation process, timing and content of a development agreement. It may be negotiated as part of an environmental assessment process, in tandem with an environmental assessment, or completely separate from the environmental assessment. It may involve only the First Nation and the proponent, or may involve others such as government, other third parties or other First Nations. There is no universal formula and each agreement will be unique to the circumstances.

Where it takes considerable time and resources to fully understand a project and to negotiate a long-term development agreement, an interim agreement with the proponent may be appropriate. An interim agreement usually extends through the project assessment period and includes items such as funding and protocols for traditional knowledge studies or traditional use studies and the environmental assessment review. Interim agreements may have different names such as framework agreements, memorandums of understanding (MOUs) or participation agreements. Interim agreements are discussed in detail under the heading **Engaging the Proponent** in Section 3 – EA From a First Nation Perspective and see the **Tulsequah Chief Project Case Study** in Section 12.

Often the process of negotiating the agreement is as important as the content of the agreement itself, since it provides a structured opportunity for the participants to come together and develop an informed relationship.

Regardless of the circumstances of any particular negotiation the following information should be considered.

ASSESSING YOUR BARGAINING POSITION

Your ability to negotiate a beneficial development agreement depends to a large extent on your bargaining position.

Your bargaining position will be stronger if some or all of these factors are present:

- the project is physically located on your First Nation's reserve, treaty settlement lands or traditional territory
- your First Nation controls access to the project site
- the project will have a demonstrably adverse effect on, or pose a serious risk to, your First Nation's people, lands, interests or rights
- the proponent has the financial capacity to fund the programs or processes you require in the agreement
- the proponent shows good will in negotiating fair terms and effectively implementing its part of the agreement
- your First Nation shows good will in delivering upon its commitments under the agreement
- your First Nation is well prepared for the negotiations

- your negotiators have a clear mandate
- your First Nation has retained experienced legal counsel and technical advisors as needed
- your community is united in its views on the project and the agreement
- you have a clear understanding of the project and its potential impacts
- the federal or provincial regulatory agencies that are reviewing the project clearly support a formal agreement with the proponent
- there is a need for your First Nation's traditional knowledge or land use information in the environmental assessment process
- there is a statutory or common law duty for the proponent to consult with you and accommodate your interests. (See Section 3 of this toolkit for additional information on the Crown's duty of consultation.)

PREPARING FOR NEGOTIATIONS

If your community has decided to enter into a development agreement, here are some steps that will be helpful in preparing for negotiations.

Form a Negotiating Team

You will need a negotiating team that is fully informed about the project. Negotiating teams may include community leaders, other community members and your lawyer or consultants.

Legal and technical advice is very important when negotiating an agreement. It is sometimes

tempting to negotiate without professional help. However, remember that the proponent always uses legal and technical expertise. They do this because a small investment up front can prevent expensive mistakes. Too much is at stake in your pending agreement to risk negotiating it without professional support. Invest in professional help from the beginning to ensure that the agreement is well designed and effectively negotiated.

Determine Your Objectives

Define your objectives prior to commencing negotiations. It is helpful to use documents such as community plans, strategic plans or your Constitution or Vision Statements that define the community's vision and goals.

Notify the Proponent

To start formal negotiations, send an official letter to the proponent stating that your First Nation wishes to explore the possibility of negotiating a development agreement.

A notification letter could include:

- a statement of conditional and without prejudice support for the project linked to a desire to negotiate a development agreement
- any observations about key environmental assessment findings
- a suggested date and place for a first meeting
- a proposed agenda

Ideally, formal notification should be preceded by informal personal contact with the proponent.

QUICK TIP

It may be necessary for your First Nation to invest in professional assistance early in the negotiations; this will help ensure that the agreement is well designed.

- Having a First Nation representative work closely with any professional you hire is important for internal capacity building.

In most contemporary development projects, a proponent will attempt to establish contact with your First Nation, either in the ordinary course of business or in fulfillment of the requirements of the provincial environmental assessment process. Mutual groundwork can establish a positive atmosphere for building a stronger formal relationship.

QUICK TIP

Effective coordination within your negotiating team will require establishing and maintaining clear lines of communication between your First Nation and the proponent's negotiating team.

Compile Information

Once the proponent has confirmed its interest in negotiating with you, allow your negotiating team time to prepare for the initial meeting.

It is helpful to compile the following information in advance:

- community comments and concerns about the project
- proposed terms and conditions necessary to deal with the impacts
- proposed socio-economic benefits
- research on precedents and other agreements
- information about the proponent and its past corporate performance on environmental issues and community relationships
- information about the economic viability of the project and the financial situation of the proponent including its investment structure

COORDINATION AND COMMUNICATION

Coordination and communication within your negotiating team and with the proponent is important for successful negotiations. Some agreements have been compromised by poorly defined communication procedures, especially in cases where informal and separate conversations between the proponent and different community representatives have taken place.

To establish clear lines of communication within your team and between your negotiators and the proponent it is recommended that you consider these guidelines:

- establish a communication protocol (memorandum of understanding) with the proponent that sets out the procedures for conducting business with your First Nation
- ensure that all members of your negotiating team know the communication protocol
- ensure that all your First Nation government departments, business corporations and other entities are informed about, and will comply with, the communication protocol
- establish a single contact person who has responsibility for conducting all direct communications with the proponent
- never let a single individual from your First Nation meet alone with the proponent to discuss your issues; always bring at least one other observer or witness
- keep detailed notes of all meetings and discussions, you may wish to consider having each meeting formally recorded and transcribed verbatim

- when important outcomes or decisions emerge from meetings, send a follow-up letter to the proponent confirming your understanding
- document all important communication in writing to provide a clear and accessible record

Some of these, particularly the communications procedures, can later be formalized in the text of the development agreement.

TIMING OF NEGOTIATIONS

Start your negotiations early in the EA process. However, if possible, do not finalize your negotiations until you have satisfactorily reviewed the environmental assessment for the project. This ensures that your negotiating team has a good understanding of the potential adverse effects that will have to be addressed in the agreement.

If the project is subject to approval by a provincial or federal agency, then your strongest bargaining window is the time before the minister or government agency makes a decision to approve the project. Once government approvals are issued, there is less pressure on the proponent to negotiate an agreement with you.

An additional reason for finalizing a development agreement before the project is approved is that often some terms of the agreement, such as monitoring programs, can be included as project approval conditions.

When the federal or provincial department reviewing the project explicitly supports the idea of an

agreement, especially as a condition of project approval, timing becomes less critical. Written support from the reviewing agency will greatly help you in negotiating a good deal. For example, in the case of the Ekati diamond mine, the Minister of Indian Affairs and Northern Development required the proponent, BHP Billiton, to negotiate impacts and benefits agreements with the five affected Aboriginal organizations as a condition for project approval.

CONTENT OF DEVELOPMENT AGREEMENTS

In general, development agreements include the following components:

- principles
- objectives
- communication and consultation procedures
- dispute resolution mechanisms
- funding commitments for agreement administration
- environmental mitigation commitments
- reclamation and closure planning
- follow-up and monitoring
- socio-economic mitigation commitments
- revenue-sharing arrangements

The following are examples of specific provisions in existing development agreements. Often there is not a single agreement, but rather several smaller agreements based on key topics.

CONTENT OF DEVELOPMENT AGREEMENTS

| AGREEMENT | SIGNING PARTIES | STATED BENEFITS TO FIRST NATION |
|---|---|--|
| <p>GOLDEN PATRICIA (cyanide leach underground gold mine)</p> | <p>Osnaburgh FN Cat Lake FN New Slate Falls FN Windigo Tribal Council LAC Minerals Ontario Government Canada</p> | <ul style="list-style-type: none"> • established hiring targets for local natives • on-site mill training • scholarships • time-off for traditional harvesting activities • compensation • improvements to local community facilities • support for Aboriginal businesses • studies on traditional economic activities • LAC Minerals, Ontario and Canada each to contribute up to \$500,000 for a total of \$1.5 million for implementation |
| <p>DONA LAKE* (gold mine) * see case study on page 4</p> | <p>Windigo Tribal Council, Osnaburgh FN Placer Dome</p> | <ul style="list-style-type: none"> • as above for Golden Patricia • \$100,000 contributed by Canada for community hall • compensation to some members for loss of traditional resource harvesting |
| <p>SA DENE HES (sulphide mine)</p> | <p>Kaska Dena Council Curragh Resources</p> | <ul style="list-style-type: none"> • priority status for employment, training, and business opportunities • option to purchase 5% equity • role in mine’s Management Advisory Committee |
| <p>MUSSELWHITE (gold mine)</p> | <p>Windigo Tribal Council Cat Lake FN Kingfisher FN Wunnumin Lake FN Shibogama FN Council Placer Dome TVX Gold Inter. Corona Corp Ontario Government Canada</p> | <ul style="list-style-type: none"> • established employment targets of 55 construction jobs and 60 operation jobs • training and apprenticeship programs • undefined number of scholarships for general education and project-related technical education • work schedule to accommodate traditional activities • government assistance to establish service-related businesses • contracts with First Nation-owned air services to provide project transportation • contract with First Nation company to provide laundry service to mine site • other initiative related to fish suppliers, sawmill • Ontario to fund conference on First Nations and resource development in one of the communities • protection of heritage sites near mine site • limited initiatives in monitoring and environmental protection • companies, Canada and Ontario to contribute equally up to \$1.675 million for implementing agreement |

CONTENT OF DEVELOPMENT AGREEMENTS

| AGREEMENT | SIGNING PARTIES | STATED BENEFITS TO FIRST NATION |
|--|---|--|
| EKATI DIAMOND MINE (open-pit diamond mine) | Dogrib Treaty 11 Council and BHP-Billiton | <ul style="list-style-type: none"> • liaison committee established • employment targets set and assessed each year, with goal of hiring “greatest possible number” of Dogrib people in the project • relaxed qualifications for “entry level” employment • package of training, apprenticeship, orientation, and counselling programs • fair notice and opportunity provided to Dogrib people to bid on goods and services contracts • university and high school scholarships offered • community support fund established to support traditional culture (annual contributions) • implementation funds for first 3 years • heritage fund (annual contribution) • heritage sites to be preserved where possible • environmental mitigation measures to be applied as described in the Environmental Impact Statement • company to meet conditions set out in regulatory approvals and the laws of the day • company to investigate any environmental concerns brought to it by the Dogrib • dispute resolution procedures |
| PORT SIMPSON LNG TERMINAL | Lax Kw’alaams Indian Band Dome Petroleum | <ul style="list-style-type: none"> • company to pay community impacts compensation including all costs associated with reviewing the project and negotiating the agreement • \$275,000 paid to Lax Kw’alaams Indian Band (LK) during each year of construction • \$400,000 for studies to help LK address project impacts • \$250,000 plus 0.5% of plant owner’s share (assumed 55%) project revenues paid to LK each year of operation • company to pay \$3.5 million for capital projects in community • liaison/monitoring committee established; preferential hiring for Port Simpson residents • scholarships in technical programs • fair notice and other provisions to help LK entrepreneurs take advantage of goods and services contracts arising from project • joint venture between the parties for tugboat services • joint venture to own and operate mooring launches • company to have policy for construction camp to mitigate social impacts • project closure commitment • \$700 per hectare to be paid to LK for easements for each of access road, pipeline, and transmission line • environmental mitigation and compensation measures including baseline studies and monitoring of potentially affected fish stocks and fishery, with onus of proof on Dome to show any adverse effect not caused by it • Dome to provide natural gas to community • official project support by LK • joint request by the parties to have the Agreement incorporated in any regulatory authorization |

CONTENT OF DEVELOPMENT AGREEMENTS

| AGREEMENT | SIGNING PARTIES | STATED BENEFITS TO FIRST NATION |
|--|--|--|
| <p>GOLDEN BEAR (open-pit and underground gold mine)</p> | <p>Tahltan Nation Development Co. Golden Bear Operating Co.</p> | <ul style="list-style-type: none"> • contract for road construction and maintenance and mining • \$1 million joint venture contract for tailings pond construction • \$5 million contract for ore-hauling • 20% of all employment plus job-training • access road relocation to avoid sensitive wildlife habitat • redesign of tailings pond • \$1.8 million grant by Canada to enable purchase of heavy equipment |
| <p>RAGLAN MINE (copper, nickel, cobalt)</p> | <p>Qarqalik Landholding Corp of Salliut, Northern Village Corp of Salliut, Nunaturlik Landholding Corp of Kangiqsujuaq, Northern Village Corp of Kangiqsujuaq Makivik Corp Societe Miniere Raglan du Quebec Ltee</p> | <ul style="list-style-type: none"> • establishes Raglan Committee of 6 people (3 from Inuit entities and 3 from the proponent) to oversee the agreement and communicate on matters related to the project (detailed procedures for the Committee provided) • provides for assessment and mitigation measures for new deposits that may be found • monitoring to evaluate accuracy of impact predictions and mitigation measures • compensation protocol for losses by Inuit harvesters • baselines studies as required to address concerns of Makivik people • provides additional mitigation or compensation for higher than predicted significant effects • cooperation with and participation in regional training programs (heavy equipment) • on-site training plus language training • \$50,000 for scholarships and summer job program • hiring priority and recruitment programs • relaxed entry requirements for language and education • free employee transportation from mine to villages • cross-cultural training and employee counselling programs • kitchen use of traditional foods • company to negotiate with qualified Inuit enterprises for goods and services delivery • procedures for awarding contracts, including competitive bidding described in detail • Raglan trust established for Inuit organizations to receive payments from company, including a guaranteed first allocation of \$1m upon approval of the project, \$1m at start of production, \$0.3m/y for first 5 years, \$0.5m/y for next 5 years, \$0.8m/y for each year thereafter of commercial production, plus a guaranteed second allocation of \$0.275m each year of production, plus a profit-sharing allocation equal to 4.5% of annual operating cash flow as calculated by complex procedures defined in the agreement • dispute resolution process with arbitration • agreement is without prejudice to any claims by Inuit of harm or damage from pollutants or toxic contamination. |

(eg., environmental mitigation, socio-economic, traditional knowledge). These can be used as guidelines and adapted to meet the needs of your community.

PRINCIPLES

The principles section in a development agreement clearly states the intent of the agreement and the values that the parties share or acknowledge in conducting the activities described in the agreement.

The principles describe the general way that the parties will relate to each other and may include:

- treating each other with respect
- respecting the First Nation's traditional practices, cultural activities and language
- respecting the proponent's legal interests and obligations
- a description of a First Nation's Aboriginal rights and title and treaty rights, interests, and obligations to their membership
- sharing information, including traditional knowledge, in an open and timely way
- working cooperatively to implement the agreement and solve problems
- regularly reviewing and updating the agreement
- periodically evaluating the success of the agreement

The principles also describe the general approach to managing the project and its potential impacts. Management approaches that are sometimes used include

adaptive management and the precautionary principle.

Adaptive management involves ongoing refinement of management procedures and policies to reflect lessons learned from previous experience or the results of current observations such as monitoring data.

The precautionary principle involves taking action to solve a problem before there is scientific certainty of the cause and effect. This approach is used when there is potential for serious, irreversible, or cumulative environmental or social damage.

It is also important that there are statements about your First Nation's rights in the agreement.

These non-derogation statements are often included in the Principles section and could include statements such as:

- "this agreement does not prejudice the rights or interests of the First Nation"
- "this agreement acknowledges the ownership and interests of the First Nation in the lands affected by the project"
- "this agreement is without prejudice to any claims by the First Nation for harm or damage from pollution or toxic contamination"

OBJECTIVES

The objectives of the agreement state what each party hopes to achieve by signing the agreement. This requires you to articulate the ways that the agreement may help you protect what is important to your community and achieve your goals.

QUICK TIP

For any development agreement that your First Nation negotiates, ensure that there are statements recognizing and protecting your First Nation's rights.

QUICK TIP

A development agreement should clarify what funding is committed from the proponent to ensure First Nation engagement in the project development process.

Some possible objectives for an agreement may be to:

- establish the conditions under which the First Nation will provide its support to the project
- provide a basis for an effective working relationship between the parties throughout the project
- provide for direct and continuing involvement of the First Nation in decisions about the project that may affect its citizens, resources and lands
- protect the air, land, water, animals and health of the community
- ensure that the activities of the proponent do not interfere with the ability of the First Nation to continue land-based activities and traditional cultural practices
- advance the social and economic well-being of the First Nation while not creating adverse effects
- ensure that employment and business opportunities arising from the project are made available to First Nation members and businesses

COMMUNICATION AND CONSULTATION

The communication and consultation section of a development agreement provides for effective communication between the parties.

It usually:

- describes a formal process for communication, information exchange and on-going consultation
- provides for regular updates and consultation with the community
- provides for proactive identification of issues and opportunities to work together
- identifies relationship building opportunities
- identifies the individuals who will be the official communication contacts
- provides for access to specific types of information held by either party
- provides the rules for confidentiality and public release of information related to the agreement or any activities conducted under the agreement

Sometimes a liaison committee is formed with representatives from each party. The liaison committee would be responsible for monitoring the implementation of the agreement, informing and discussing issues within their organization and proposing updates to the agreement. Often, funding for the First Nation members of the liaison committee is provided under the agreement.

FUNDING

The agreement should establish specific funding relating to the engagement of the First Nation in the project.

Funding may be necessary for:

- hiring technical experts to review environmental reports and monitoring plans
- staff to administer the agreement
- legal or consulting costs
- ongoing consultation in the community

- an acknowledgement that the proponent retains the overall responsibility and liability for the maintenance of environmental quality in the area affected by the project
- an assurance that the proponent intends to comply with the terms and conditions of any licences, permits or regulations that apply to the project

DISPUTE RESOLUTION

Most agreements have a section that describes how disputes between the parties to the development agreement will be resolved. This is a complex field that usually involves a sequence of processes that may include informal discussions, facilitated discussions and provisions for mediation or arbitration in case of disagreement. Any independent facilitator, mediator or arbitrator would have to be acceptable to both parties.

- specific mitigation measures, monitoring, and follow-up programs that will be implemented in relation to environment, people’s health and safety issues
- First Nation participation in the design, conduct and review of monitoring and follow-up studies
- inclusion of traditional knowledge in monitoring and follow-up studies
- commitment by the proponent to a process to provide the results of monitoring and follow-up studies to the community

ENVIRONMENTAL MITIGATION AND COMMITMENTS

It is important that the development agreement addresses community concerns regarding social, cultural, health and environmental impacts. There are provincial and federal government regulations that are designed to protect the environment and ensure that projects are safe for people. However, these regulations may not provide the level of protection that the community desires. As well, your First Nation may have concerns that are not covered by existing legislation or are specific to your community or the project.

- implementation of an environmental management system that is reviewable by the First Nation
- an independent environmental audit at regular intervals or on request by the First Nation
- establishment and funding of a joint proponent/First Nation committee to review and address environmental issues
- a requirement for a performance bond to cover the costs of environmental emergencies during construction and operation of the project

The following terms may be included in an environmental mitigation and commitments section:

QUICK TIP

It is important that your First Nation's role in developing and implementing the closure plan is clarified within the development agreement. This will provide an opportunity for your First Nation to ensure that any long-term liability concerns (environmental, social and safety) are addressed.

Following are some examples of how specific First Nation issues could be addressed by commitments in the development agreement:

- If the community is concerned about the effects of the project on wildlife, proponent commitments might include:
 - having a hunting and fishing policy for employees that is reviewable by the First Nation
 - developing a site plan that maximizes the use of existing clearings and minimizes the disturbance to wildlife habitat
 - additional baseline studies on wildlife
 - strictly enforced speed limits to help prevent collisions with wildlife
 - working with Elders and other knowledge holders from the community to incorporate traditional knowledge in the management of wildlife issues
 - providing opportunities for First Nation members to participate in closure planning and reclamation work for the project
- If the community is concerned about the effects of the project on air quality, the proponent could commit to:
 - using the best available technology to minimize air emissions from the project
 - clean-burning vehicle fuels
 - dust control measures on roads
 - bussing of workers to reduce unnecessary vehicle trips
 - air quality monitoring in the community

RECLAMATION AND CLOSURE PLANNING

Closure is the final phase of a project during which the proponent prepares to finish the project and leave the site.

Closure usually includes:

- decommissioning, which involves shutting down the physical and processing facilities
- reclamation, which involves cleaning up and restoring the land
- abandonment, which involves leaving the site and having no further management obligations

The closure phase is important since any long-term environmental and safety issues must be addressed. If closure is not properly considered, disastrous results may occur. For example, some older mining projects in the Northwest Territories and in British Columbia have not been reclaimed appropriately and have left environmental hazards such as toxic chemicals leaching into lakes and ocean waters.

Your community may also be interested in having input into closure planning since there is the potential to restore or enhance resources and land uses that

were adversely affected during the life of the project. There may also be opportunities for job creation or salvage during the closure phase.

You could therefore consider including the following requirements in the development agreement:

- establishing a joint First Nation/proponent committee to be involved in closure planning
- preparation of a closure plan prior to construction of the project and updating the plan on a regular basis
- a commitment to progressive reclamation where the project is designed so that reclamation starts as soon as individual aspects of the project are completed
- establishing a performance bond that is held by an independent entity such as the provincial or federal government, to cover outstanding reclamation liability at any time during the project

SOCIO-ECONOMIC MITIGATION AND COMMITMENTS

The socio-economic mitigation and commitments section of a development agreement includes measures to prevent impacts on the community's culture, way of life and economy. It also includes benefits that would enhance a community's overall wellbeing.

Socio-economic mitigation could include:

- management strategies to prevent impacts on traditional land uses and culture

- protection for sensitive areas and sacred sites
- compensation for loss of access to traditional areas
- compensation for lost revenues from trapping or fishing

Development agreements may also be used to secure socio-economic benefits for your First Nation through commitments such as:

- preferential or secured access to economic opportunities, including provision of goods and services associated with construction, operation and closure of the project
- preferential access to employment opportunities offered by the project
- establishing training programs available to, and accessible by, the First Nation's workforce to upgrade their skills
- making annual cash contributions to the First Nation government over the lifetime of the project
- providing financial, technical or human resource assistance to improve community infrastructure, implement community programs or establish a cultural development fund
- establishing employment policies and procedures that reflect the First Nation's values and cultural practices

First Nations will need to ensure that they have a structured process in place to distribute and manage the economic benefits, including tax and own source revenue consequences.



Training and employment opportunities are one of the potential benefits that can be negotiated in a development agreement. Photo courtesy of BC Minerals Association.

KEY DEFINITIONS

Own source revenue (OSR) is revenue that a First Nation generates independently of government transfer payments, such as through its economic development initiatives.

EXAMPLE OF REVENUE-SHARING ARRANGEMENTS FOR A MINING PROJECT

Mining projects tend to have higher financial risks for proponents than other types of projects. The proponent has to take several gambles - that the world price for the metal will stay high, that it has the ore grades and reserves in the ground predicted to be there, and that it can recover the commodity and get it to market at a low enough cost. There are also environmental risks and uncertainties associated with mining. Proponents will only undertake such a high-risk investment if the project offers the potential for high returns.

To reflect this risk, mining projects often have some kind of revenue-sharing arrangement. Here is an example of potential revenue sharing arrangements for a mining project. The terms used are specific to the mining industry as are the types of revenue sharing arrangements described. The advantages and disadvantages of these revenue sharing arrangements are compared in the table at the end of this section.

NET SMELTER RETURN

Net smelter return (NSR) is a type of royalty payment based on resource extraction rates. When ore is shipped to a smelter or refinery, the smelter takes a percentage of the ore as payment, and what comes back to the miner is called the net smelter return. Transportation charges have also been deducted. The NSR is received either as actual metal, for example gold bullion, or the equivalent in cash following sale of the refined metal by the smelter. Depending upon the strength of your bargaining position, it may be possible to negotiate a royalty based on a percentage (likely small or less than 10) of the NSR.

OPERATING CASH FLOW ROYALTY

Operating cash flow royalty is a revenue sharing arrangement based on a share of annual revenues. This royalty is a portion of the Net Revenue, that is, the NSR minus mining, milling, site administration and marketing costs.

NET PROFITS INTEREST

Net profits interest is a revenue sharing arrangement based on profit sharing. This payment would be a percentage of net profit after all costs and taxes are accounted for.

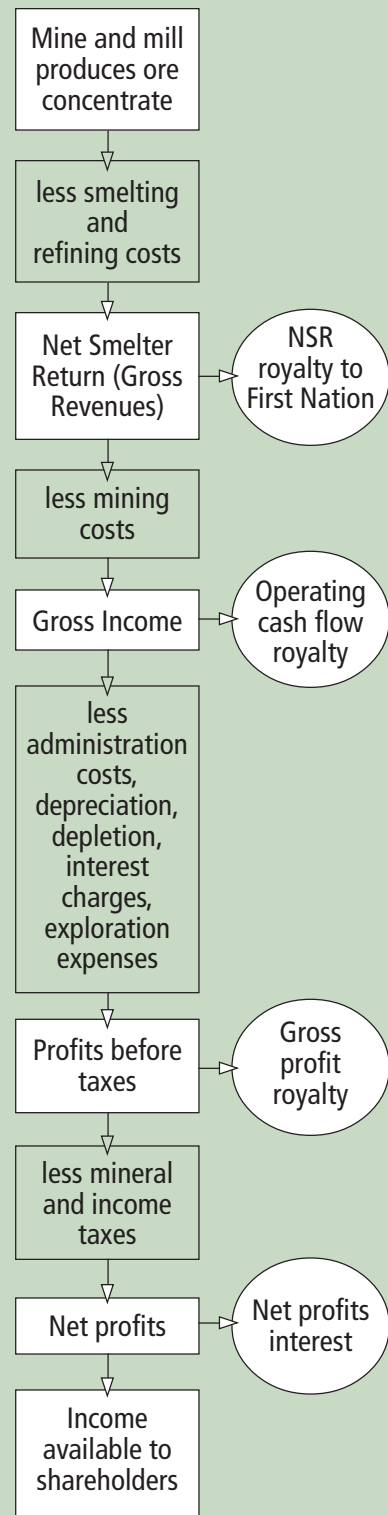
EQUITY INTEREST

Equity interest is a form of ownership based on percentage share in the financial value of a project, including capital investment. It usually, but not always, takes the form of holding shares or stocks in the venture.

JOINT VENTURE PARTNERSHIP

A joint venture is a partnership in all or some aspects of the project. It usually includes an option agreement between two parties, one of whom is an owner of mineral property and the other who is in a position to gain an interest in the property because of particular skills, assets, or interests they may bring to the project.

MINING REVENUE STREAM



| TYPE OF INTEREST | ADVANTAGES | DISADVANTAGES |
|---|---|--|
| Net Smelter Return | <ul style="list-style-type: none"> • payable as long as mine is operating, even if unprofitable • value not dependent on any operating costs or method of financing • early cash flow • least risk position for First Nation • simple definition, easy to administer | <ul style="list-style-type: none"> • value subject to metal price changes • does not increase in value if the mine is able to reduce operating costs • cannot be treated as a cost of production for tax purposes |
| Operating Cash Flow Royalties | <ul style="list-style-type: none"> • value dependent on proponent's method of financing • early cash flow • less risk than an equity interest • value can increase if mining costs are lowered • value increases if price of metal increases | <ul style="list-style-type: none"> • value subject to price of metal • operating costs may be higher than forecast and may be manipulated by proponent • must be rigidly defined in agreement, so harder to administer • is a pre-tax cost of production |
| Equity Interest or Joint-venture | <ul style="list-style-type: none"> • First Nation is partner in project with meaningful input into decision process • provides increased value if project is profitable or larger than forecast | <ul style="list-style-type: none"> • must raise capital for investment • project must be profitable to have any value • subject to all project variables including price of metal • share first cash flow • may be required to fund share of operating losses or new capital expenditures • potential liabilities as part owner • most risky approach for First Nation • legal costs may be high |
| Net Profits Interest | <ul style="list-style-type: none"> • increased value if project is more profitable or larger than forecast • low risk position | <ul style="list-style-type: none"> • dependent on all project variables • no income until project makes profits • no value unless project is profitable • definition problems; harder to administer; higher accounting costs • legal costs may be high |

▶ REVENUE-SHARING ARRANGEMENTS

Often, one of the most significant aspects of a development agreement is money to compensate for effects on the community or to be used for community development. However, it can be challenging to negotiate financial benefits. As with other benefits, your potential for negotiating financial benefits depends on the strength of your bargaining position (see **Assessing Your Bargaining Position** on page 6).

Financial compensation from a project can be made through straightforward cash payments that are unrelated to project revenue.

These payments can include:

- a one-time cash payment early in the project
- annual fixed payments
- a schedule of varying payments of pre-established amounts

Cash payments have the advantage of being dependable, having no risk or uncertainty attached and requiring minimal administrative effort. However, because cash payments may be small compared to overall project profits, the First Nation does not share significantly in the wealth generated by the project, particularly where unpredicted windfall gains may be made.

In contrast, with revenue-sharing arrangements your community shares proportionately in the economic wealth generated by the project. Project profits can be highly variable over time, and reflect factors such as the market price of the commodity, production costs and the long-term economic viability of the proponent. These arrangements are more complex to negotiate and administer, but they may provide opportunities for revenues for the First Nation that far exceed fixed-cash arrangements. Therefore, if you are prepared to accept the risk and uncertainty that goes with revenue-sharing, these arrangements should be investigated.

Types of revenue-sharing arrangements include:

- royalty payments based on resource extraction rates
- payments based on a share of annual revenues
- payments based on profit-sharing
- equity participation, such as shares in the project
- joint-venture partnerships

An example of a revenue-sharing arrangement that combines fixed-cash payments with profit-sharing is the agreement for the Raglan Mine, a copper, nickel and cobalt mine in northern Quebec. This agreement between the Société Minière Raglan du Québec Ltee and the Makivik Inuit provides fixed annual payments over the lifetime of the project in two different guaranteed allocations, plus a profit-sharing contribution amounting to about 4.5% of annual operating cash flows. Further

information on the Raglan agreement is available at http://www.firstpeoples.org/land_rights/canada/mining_agreements.

SUMMARY

In summary, development agreements can be a useful tool for protecting your First Nation's interests and achieving benefits from a project. They provide a formal way to document the proponent's environmental and socio-economic commitments. A development agreement should have clearly defined principles, objectives, communication frameworks and dispute resolution methods. Adequate funding to administer the agreement is essential.

When preparing to negotiate a development agreement, carefully consider your community's concerns and objectives related to the project. Good preparation and legal assistance are essential in negotiating a successful agreement. Ensure the success of your agreement with regular review and updating.

DEVELOPMENT AGREEMENTS Additional Information

Canadian Arctic Resources Committee Northern Perspectives Volume 25, Number 4 1999-2000

includes a summary of a workshop with northern aboriginal groups in 1998, a summary of the legal and constitutional basis for Impact and Benefit Agreements with the northern mining sector, and an Australian perspective that includes some discussion on implementation and enforcement.

<http://www.carc.org/pubs/v25no4/>

After the Miners are Gone: A Backgrounder on First Nations' Impact and Benefit Mining Agreements in Canada includes a list of common elements found in Canadian agreements and case studies of the Dona Lake, Musselwhite, Raglan and Whitehorse mining initiatives.

http://www.firstpeoples.org/land_rights/canada/mining_agreements/miningIrc.htm

Two publications on Impact and Benefit Agreements are available through the Canadian Institute of Resources Law at

http://www.cirl.ca/html/pub_BR1.html

- Steven A. Kennett, *A Guide to Impact and Benefits Agreements*, 1999. 120 pp. ISBN 0-919269-48-6. \$35.00 (soft cover)
- Janet M. Keeping, *Local Benefits from Mineral Development*:

The Law Applicable in the Northwest Territories, 1999. 122 pp. ISBN 0-919269-47-8. \$35.00 (soft cover)

A comprehensive, 99-page review of agreements between mining companies and indigenous communities in Australia to December 2001 is available at

<http://www.natural-resources.org/minerals/CD/docs/mmsd/australia/finalreport/indigenous.pdf>

▶ DEVELOPMENT AGREEMENTS – CHECKLIST

NEGOTIATIONS

Preparing for Negotiations

- Form a negotiating team
- Identify a lead negotiator
- Seek legal and technical advice
- Determine objectives
- Notify proponent
- Compile information

Coordination and Communication during Negotiations

- Establish a communication protocol with the proponent that sets out the procedures for conducting business with your First Nation
- Ensure negotiating team is aware of communication protocol
- Ensure First Nation government department, business and other groups are aware of protocol
- Ensure that all members of your negotiating team know the communication protocol
- Ensure that all your First Nation government departments, business corporations and other entities are informed about, and will comply with, the communication protocol
- Establish a single contact person who has responsibility for conducting all direct communications with the proponent
- Never let a single individual from your First Nation meet alone with the proponent to discuss your issues; always bring at least one other observer or witness
- Keep detailed notes of all meetings and discussions
- When important outcomes or decisions emerge from meetings, send a follow-up letter to the proponent confirming your understanding
- Document all important communication in writing to provide a clear and accessible record

▶ DEVELOPMENT AGREEMENTS – CHECKLIST

SAMPLE COMPONENTS OF DEVELOPMENT AGREEMENTS

Principles

- Statement about respect between the parties
- Respect for the traditional practices, culture
- Respect for the proponent's legal interests and obligations
- Description of a First Nation's Aboriginal rights and title and treaty rights, interests and obligations to its membership
- Information sharing and confidentiality protocols
- Statement about working cooperatively
- Time period for regular review and update of the agreement
- Non-derogation statements
 - This agreement does not prejudice the rights or interests of the First Nation
 - This agreement acknowledges the ownership and interests of the First Nation in the lands affected by the project
 - This agreement is without prejudice to any claims by the First Nation for harm or damage from pollution or toxic contamination

Objectives

- Conditions under which the First Nation will provide its support to the project
- Statements regarding working relationship between the parties
- Statements about direct and continuing involvement of the First Nation in decisions about the project
- Specific commitments related to addressing issues related to air, land, water, animals and health of the community
- Proponent commitments to not impact land-based activities and traditional cultural practices
- Outline of benefits to the community
- Employment and business opportunities

Communication and Consultation

- Communication process
- Individuals who will be the official communication contacts
- Information exchange process
- How/when the proponent will provide updates about the project
- Relationship building opportunities
- Information exchange process
- Methods of on-going consultation
- Access to specific types of information held by either party
- Rules for confidentiality regarding information and agreement activities

Funding

- Provisions for hiring technical experts to review environmental reports and monitoring plans
- Staff to administer the agreement
- Legal or consulting costs
- Funding for ongoing consultation in the community

Dispute resolution

- Dispute resolution process

Environmental Mitigation and Commitments

- A statement that the proponent retains the overall responsibility and liability for the maintenance of environmental quality in the area affected by the project
- Proponent commitment to comply with the terms and conditions of licences, permits or regulations that apply to the project
- Specific mitigation measures, monitoring and follow-up programs
- First Nation participation in the monitoring and follow-up studies
- Inclusion of traditional knowledge in monitoring and follow-up studies
- Commitment by the proponent to provide the results of monitoring and follow-up studies to the community

- Implementation of an environmental management system that is reviewable by the First Nation
- Independent environmental audit at regular intervals or on request by the First Nation
- Establishment and funding of a joint proponent/First Nation committee to review and address environmental issues
- A performance bond to cover the costs of environmental emergencies during construction and operation of the project

Reclamation and Closure Planning

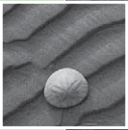
- Establishing a joint First Nation/proponent committee to be involved in closure planning
- Commitment from proponent to regular closure plan updates
- Commitment from proponent to progressive reclamation
- A performance bond to cover outstanding reclamation liability at any time during the project

Socio-economic Mitigation and Commitments

- Strategies to prevent impacts on traditional land uses and culture
- Protection for sensitive areas and sacred sites
- Compensation for loss of access to traditional areas
- Compensation for lost revenues from trapping or fishing
- Preferential or secured access to economic opportunities, including provision of goods and services associated with construction, operation and closure of the project
- Preferential access to employment opportunities offered by the project
- Training programs available to, and accessible by, the First Nation's workforce to upgrade their skills
- Annual cash contributions to the First Nation government over the lifetime of the project
- Resource assistance to improve community infrastructure, implement community programs or establish a cultural development fund
- Employment policies and procedures that reflect the First Nation's values and cultural practices

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 11 – DETAILED CASE STUDY – VOISEY'S BAY NICKEL MINE



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

Section 9 – Follow-up Programs

Section 10 – Development Agreements

▶ **Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine**

Section 12 – Detailed Case Study – Tulsequah Chief Project

Glossary, References and Index

DISCLAIMER

This document does not necessarily reflect the views of any of the First Nations that participate in the First Nations Environmental Assessment Technical Working Group, the Government of Canada or the Province of British Columbia. Case studies and examples included in this toolkit do not necessarily reflect the view of the parties involved in the assessments.

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Cover photo courtesy of Voisey’s Bay Nickel Company

This section of the toolkit provides a detailed history of the harmonized Innu-Inuit-federal-provincial environmental assessment of the Voisey’s Bay Nickel Mine located on the north-east coast of Labrador. The environmental assessment process and the lessons learned are described.

This section includes the following:

- Project description
- The land and historical use
- Exploration phase and confrontation
- Negotiation and consultation
- The environmental assessment
- Conclusion

Chronology of the Voisey’s Bay Project .. 4

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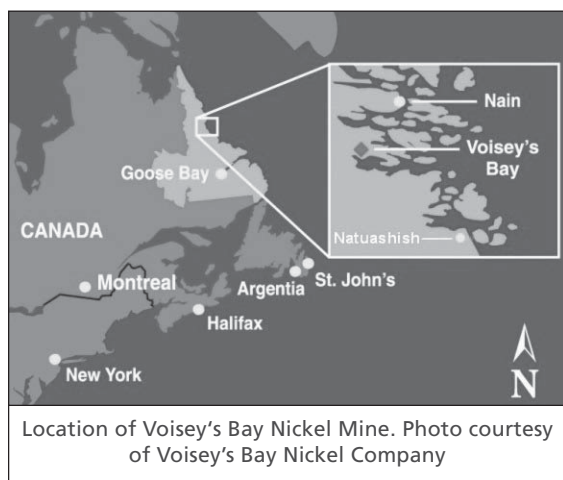
▶ INTRODUCTION

The Voisey’s Bay environmental assessment covers the range of possible experiences a First Nation might encounter dealing with a large industrial project in its traditional territory including negotiations, environment assessments, public hearings, media campaigns, blockades and litigation.

The environmental assessment is also an example of how two Aboriginal communities with distinctly different cultures can work together effectively.

The Voisey’s Bay nickel mine and mill are being developed on lands traditionally shared by the Innu and Inuit. These two communities worked hard to ensure that the project would proceed only with their consent. Ultimately, they succeeded in gaining substantial recognition of their rights by governments and in negotiating impacts and benefits agreements with the proponent. These agreements should ensure that Innu and Inuit can benefit from employment and business opportunities at the mine, while also being compensated for the negative impacts that it will have on their lands and ways of life.

This case study examines some of the ways the Innu and Inuit intervened – both within and outside the environmental assessment process – and the effectiveness of those interventions in shaping the final results.



▶ PROJECT DESCRIPTION

The Voisey’s Bay ore bodies, discovered in 1994, contain proven reserves of 31 million tonnes of high-grade nickel, copper and cobalt ore near the surface. Near-surface ore will be mined using open pit techniques. Inco, the property owner, estimates it will recover an additional 97 million tonnes of ore in deeper deposits by underground mining.

Construction began in 2002, and over the next four years, Inco will spend almost \$600 million dollars to bring the mine into production. Construction will include a port and shipment terminal, ore concentrator, site roads, waste rock and tailings disposal areas, and camp facilities. This will require over 1,700 person-years of employment.

Once production starts in 2006, the mine and mill will employ 400 workers who will fly in and out of the site on a rotating basis. Ore concentrate will be shipped by bulk carrier to processing and refining facilities in Ontario and, when constructed, to a new refining facility in Argentia, Newfoundland. Underground operations will commence in 2016, doubling the workforce. The Voisey’s Bay mine will produce approximately 110 million pounds of nickel, 85 million pounds of copper

and five million pounds of cobalt each year. Inco expects the economic impact of the project to exceed \$11 billion dollars, with over \$6 billion dollars spent on operations over the 30-year life of the project.

the communities of Sheshatshiu, Utshimassit (Davis Inlet) and Natuashish (the new community replacing Davis Inlet).

Approximately 35 km south of the Inuit community of Nain, on a peninsula on the north Labrador coast, is one of the world’s largest nickel deposits. Arctic char spawn in the streams that flow to the bays, and the valley itself is home to wolves, black bears, moose, small mammals and raptors. This land is important for migratory caribou and for the many bird species that pass through every spring and fall.

▶ THE LAND AND HISTORICAL USE

The Innu (an Algonquin-speaking people closely related to the Cree) and the Inuit are original inhabitants of the Quebec-Labrador peninsula, a vast territory of sub-arctic boreal forests and barrens that stretches north from the Gulf of St. Lawrence to the Hudson Straits. Archaeological evidence of this place indicates continuous human habitation dating back 6,000 years.

The Voisey’s Bay area has been a crossroads between these Aboriginal groups for millennia. The Innu call the valley Kapukuanipant-kauashat and the Inuit know it as Tasiujatsoak.

By the late 19th century, the valley became an important point of contact between the Innu, Inuit, and European fishers and traders who had established homesteads and trading posts at several locations near the bay. Over time, these European arrivals, today known as settlers or Kablunangajuit became closely associated with the Inuit through intermarriage, and are now included as members of the Labrador Inuit Association. A membership of about 5,500 Inuit and Settlers reside primarily in the coastal communities of Nain, Hopedale, Makkovik, Postville and Rigolet. The Innu Nation represents approximately 2,100 Innu living in

▶ EXPLORATION PHASE AND CONFRONTATION

In late 1993, two diamond prospectors found a rusty rock outcrop near Voisey’s Bay. By November 1994, initial drilling confirmed the site was potentially one of the world’s largest nickel deposits.

The Innu and the Inuit wrote to the leaseholder, Diamond Fields Resources (Diamond Fields), notifying them that the discovery was on unceded Aboriginal land, and that any further exploration and development required Innu and Inuit consent. The Innu also publicly affirmed their Aboriginal ownership of the lands in question.

The president of Diamond Fields met with the Innu and Inuit, who prepared for the meeting by researching the background of the company and its executive personnel. Their research revealed that the president and the principal shareholder were key players in the failed Galactic

What about... the proponent’s history?

Know who you are dealing with. Proponent information can be readily obtained from on-line sources or corporate registry offices, and there are a number of organizations that monitor corporate performance and provide reports on their social, ethical and environmental track records. Find out if the companies involved in the project have policies on Aboriginal consultation and participation, environmental protection and social responsibility. Progressive companies may be willing to work with First Nations to implement environmental and cultural protection measures even before the environmental assessment begins. Other companies may have track records that will make you – and responsible government agencies – want to keep a very close eye on them.

Chronology of the Voisey’s Bay Project

| | |
|----------------|---|
| 1994 | Voisey’s Bay nickel deposit found. |
| February 1995 | Innu Nation issues eviction notice to Diamond Fields Resources; two-week standoff between Innu protesters and RCMP ensues; exploration resumes under heavy police protection. |
| October 1995 | Innu Nation appoints Innu Task Force on Mining Activities to inform communities about mining and exploration activities and to seek direction from Innu people. |
| March 1996 | Task Force report recommends Innu Nation enter into impacts and benefits agreement negotiations, work to conclude a land claims agreement, and ensure full environmental assessment for any proposed development. |
| April 1996 | Innu begin impacts and benefits agreement negotiations with Diamond Fields Resources. |
| August 1996 | Inco buys property for \$4.5 billion. |
| January 1997 | MOU signed by four parties (Canada, Newfoundland, Labrador Inuit Association, and Innu Nation) for harmonized environmental assessment. Five member independent Review Panel appointed. |
| April 1997 | The Review Panel releases draft environmental impact statement (EIS) guidelines and conducts scoping hearings in communities. |
| May 1997 | Innu and Inuit oppose Inco’s plans to build roads and airstrips to facilitate “advanced exploration”. |
| June 1997 | The Review Panel releases final EIS guidelines. |
| July 1997 | Newfoundland approves ‘advanced exploration’ plans, and Innu and Inuit seek court injunction. Court rules against Innu and Inuit. Inco begins construction. |
| August 1997 | Innu and Inuit mass protest at Voisey’s Bay site. Court of Appeal overturns previous decision, finds that ‘advanced exploration infrastructure’ is part of project under EA review. |
| December 1997 | Inco releases EIS for review. |
| Fall 1998 | Community and technical hearings on EIS. |
| April 1999 | Review Panel releases <i>Report on the Proposed Voisey’s Bay Mine and Mill Project</i> ; recommends conditional approval of the project. |
| July 1999 | Canada and Newfoundland approve the project without requiring Review Panel’s major recommended conditions of completed treaties and impacts and benefits agreements. |
| September 1999 | Innu and Inuit file application for judicial review in Federal Court of inadequate consultation prior to project approval; Four Parties to MOU begin to negotiate an Environmental Management Agreement. |
| December 1999 | Inco and Newfoundland fail to reach agreement on project development. Inco shelves project and impacts and benefits agreement negotiations are suspended. |
| June 2001 | Negotiations resume between Inco and Newfoundland; Inco resumes impact and benefits agreement negotiations with Innu and Inuit. |
| June 2002 | Agreements reached on project development, environmental management, interim measures and impacts and benefits agreement. |
| August 2002 | Project development begins; Innu and Inuit joint venture companies receive majority of contracts for first year of construction. |

Resources mine at Summitville, Colorado. This is generally regarded as one of the worst modern mining environmental disasters in the United States, polluting the Alamosa River with cyanide and other toxins and resulting in ongoing cleanup costs of more than \$US 120 million¹. The Innu found this information useful because it brought public and media scrutiny.

The Innu and the Labrador Inuit Association did not feel that Diamond Fields kept them informed about its plans. Rather, it accelerated the exploration operation at Voisey’s Bay without further consultation and the camp grew to accommodate forty drillers and geologists. Concurrently, a claim staking rush ensued, resulting in more than 13,000 new claims staked in the area in a few weeks.

To protest these actions, more than one hundred Innu from Davis Inlet travelled to the site by snowmobile in February 1995 in an attempt to evict the company. A sixteen-day standoff resulted between the Innu, Diamond Fields and fifty-six RCMP officers. The protest focused front-page national attention on the Aboriginal perspective.

NEGOTIATION AND CONSULTATION

The 1995 protest did little to halt the pace of exploration activities and, by that summer, companies had staked more than 250,000 mineral claims. The exploration camp now supported over one hundred drillers and geologists, and Diamond Fields established semi-permanent buildings and facilities at the site. Over one hundred exploration companies

were now active throughout Innu and Inuit territory. Both Aboriginal groups became increasingly concerned about the direct and cumulative impacts of these activities on the land and their rights. For instance, the Innu and Inuit were very concerned about such impacts ranging from the disturbance of wildlife by helicopter activity to the effects of exploration camps and line cutting, trenching, drilling and blasting operations. However, there was no opportunity for even a basic environmental assessment of any of these activities, as they did not trigger either Newfoundland’s or Canada’s environmental assessment regulations. The Newfoundland government also showed little interest in accommodating Aboriginal concerns. Therefore, the Innu and Inuit decided to negotiate directly with Diamond Fields.

Several months of negotiations concluded in the first framework agreement between the Innu and Diamond Fields, now renamed the Voisey’s Bay Nickel Company (VBNC). The Innu Nation convinced VBNC to fund a consultation process to determine what the Innu people’s goals and objectives were in relation to the project. VBNC agreed, providing about \$500,000 for a six-month consultation process. The Innu Nation initiated the consultation in October 1995 by establishing the Innu Nation Task Force on Mining Activities (the task force).

Three people from each Innu community were selected to listen to the voices, opinions and experiences of the people. The task force had a facilitator and a mandate to inform the communities about mining issues in general and the plans for the project in particular, and to get input from the Innu community.

What about... protests and demonstrations?

While the Innu found that demonstrations and blockades were effective in helping them communicate a message or get action, such activities can be prejudicial to First Nation interests. Direct action can involve significant legal and political risks. Seek legal advice on any direct action to determine what legal consequences might arise. Consult with existing and potential allies – do not assume that they will all be supportive of direct action.

¹ US Department of Justice Press Release, December 21, 2000

What about... negotiating extra EA provisions?

First Nations need not accept the existing provisions of environmental assessment (EA) legislation. It may be possible to negotiate for an EA process that exceeds existing legislative requirements. In this way, the scope of the review and the process can be modified to better accommodate your First Nations' needs. For instance, it may be possible to negotiate procedural issues including translation, use of traditional knowledge or location and timing of hearings.

The task force interviewed community members, gathered and disseminated information on mining, and educated themselves on mining issues. They visited the exploration camp at Voisey's Bay and a mine near Val d'Or, Quebec adjacent the Lac Simon First Nation. At Lac Simon, they discussed impacts of mining developments on that community. The task force also helped plan and produce community newsletters, radio open-line programs, workshops and a final report. They consulted the Innu leaders and had access to technical advisors hired to provide advice on mining and environmental issues.

In March 1996, the task force produced the report *Between a Rock and a Hard Place* (http://www.miningwatch.ca/issues/aboriginal_gathering/workshop_summary.html), summarising a range of mining-related issues identified by the communities and key recommendations to the Innu leadership. The central recommendations focused directly on the need to conclude land rights and impacts and benefits agreements before development. The report also addressed the need for a broad and inclusive approach to environmental assessment in order to make good decisions about the future.

Meanwhile, the Labrador Inuit Association had attempted to negotiate benefits from VBNC from the outset.

▶ THE ENVIRONMENTAL ASSESSMENT

By mid-1996, Inco, one of the world's large nickel producers, purchased the rights to develop the Voisey's Bay project and gained control over VBNC in a deal valued at \$4.5 billion dollars. Inco proposed an aggressive timetable for developing the project into an operating mine and told investors that it planned to produce nickel concentrate by 1998.

This focused the attention of the Innu and Inuit on the environmental assessment process.

The project (development of the mine and construction of the mill) triggered both a *Canadian Environmental Assessment Act (CEAA)* comprehensive study and the *Newfoundland Environmental Assessment Act*. Inco preferred to conduct only a *CEAA* comprehensive study rather than a harmonized review under *CEAA* and the *Newfoundland Environmental Assessment Act*. They argued that mining was proven technology and that the risks were well understood. The Innu and Inuit, together with allies from the environmental movement and within government, challenged this view, pointing to the remote and pristine location of Voisey's Bay and the fact that the adjacent communities were ill prepared to deal with such a major development on their doorstep.

As a result, in September 1996, the Canadian and Newfoundland governments agreed to negotiate a harmonized panel review with the Innu Nation and the Labrador Inuit Association. This review would take into account the requirements of both the Canadian and Newfoundland

environmental assessment legislation while attempting to address Innu and Inuit concerns.

After several months of intensive negotiations, the four parties reached an agreement that set out a single, harmonized process under a Memorandum of Understanding (MOU).

THE EA MOU PROCESS

The MOU established that the environmental assessment process would be consistent with, and meet the requirements of, both CEAA and Newfoundland’s environmental assessment legislation.

The environmental assessment would also account for the special interests of the Innu Nation and the Labrador Inuit Association, through:

- redefining environment and environmental effects to include spiritual aspects of the environment
- appointing panel members on the recommendations of the four parties to the MOU
- translating key documents in written and videotaped forms into Innu-aimun and Inuktitut and providing simultaneous translation of all panel hearings
- providing intervenor funding for the hearings
- prescribing the review process steps and timelines for the review
- prescribing locations where public information would be made available and public hearings would be held

- comprehensively describing the project being assessed
- requiring the panel to report to the four parties instead of only to the Federal and Provincial Ministers of Environment

The MOU set out detailed terms of reference for the review, providing substantial guidance to the panel by setting out factors to consider in the review.

The panel considered factors beyond the scope of CEAA, including:

- the extent to which biological diversity would be affected by the project
- the application of the Precautionary Principle
- oral and written submissions of traditional ecological knowledge
- the relationship between the project and land claims negotiations



Aerial view of Anaktalak Bay. Photo courtesy of Voisey’s Bay Nickel Company.

What about... control of information and knowledge?

First Nations can retain control over the collection and interpretation of community information and the use and presentation of their traditional knowledge within an environmental assessment. For instance, you can enter into contracts with the proponent about how research is to be conducted, and how the information is used. Note, however, that if your information is presented in a public process like an environmental assessment hearing, others may use the information. Be strategic and selective in the use and release of information. Seek legal counsel about intellectual property issues.

PANEL APPOINTMENT, SCOPING AND GUIDELINES

Panel member appointments were by consensus of the four parties. The parties agreed that the panel should include Aboriginal, social science, labour and community, engineering and biological expertise.

The panel released draft guidelines for the environmental impact review in March 1997. A central focus of the guidelines was the concept of sustainable development.

Accordingly, the draft guidelines required Inco to develop an Environmental Impact Statement (EIS) to address three central issues:

- preservation of ecosystem integrity and maintenance of biological diversity
- respect for the right of future generations to the sustainable use of renewable resources
- attainment of durable and equitable social and economic benefits

Using intervenor funding from the federal government, the Innu Nation and Labrador Inuit Association set up an office in Davis Inlet and hired a coordinator for the project review.

The Aboriginal groups realized that dividing their labour would be beneficial because of the scope and complexity of the issues. They agreed that the Innu Nation would focus on terrestrial environmental issues, while the Labrador Inuit Association would consider marine concerns. Each Aboriginal group would address social and cultural issues from their own perspective, and they would cooperate in water quality analysis and engineering matters.

The scoping sessions on the guidelines and the project scheduled for April and May 1997 in the potentially affected communities. The panel ensured they were informal and easy for community members to participate in. Simultaneous translation occurred and the CEAA website hosted verbatim transcripts of each session. The panel carefully considered the Innu Nation’s Task Force Report and a similar document by Labrador Inuit Association entitled *Seeing the Land is Seeing Ourselves*.

One of the major issues discussed in the scoping sessions concerned how Innu and Inuit knowledge could be incorporated into the assessment. Neither Aboriginal group was comfortable having Inco or its consultants gathering and reporting on traditional knowledge. They felt the knowledge would not be presented in a proper context or used respectfully in the EIS.

The panel determined there were two approaches to include traditional knowledge in the assessment. With the full consent of the Innu or Inuit, Inco could try to reflect traditional knowledge in its EIS. Alternatively, Inco could facilitate the presentation of this knowledge directly from the First Nations to the panel.

BASELINE AND IMPACT STUDIES

The panel released its final guidelines for the EIS in June 1997. Inco had started its environmental baseline studies in 1996, but the guidelines required studies over a much larger area than Inco had originally planned.

The Innu and Labrador Inuit Association negotiated agreements with Inco to perform traditional knowledge studies for presentation to the panel. The Innu also negotiated control over socio-economic baseline studies for the Innu communities – the Innu retained complete scientific and editorial control over the work, and were able to retain a degree of control over use of the reports via non-disclosure agreements and copyright protection.

The only conditions placed on the traditional knowledge studies by Inco concerned timeframes – the studies had to be completed prior to the panel hearings. The Innu and Inuit performed some of the baseline work, but believed that Inco should evaluate the impact assessment data itself, since it would be liable for any consequences of the project.

Both Aboriginal groups discussed their views with Inco throughout the study process but decided to present their own views about potential impacts directly to the review panel.

Joint-venture companies were formed between environmental consulting firms and some Innu and Inuit agencies. These companies competed for contracts from Inco to conduct environmental baseline and archaeological assessment work.

Labrador Inuit Association’s economic development agency also operated a company that could provide Inuit field assistants to other environmental consulting firms. Training and employment for several dozen young Innu and Inuit co-researchers resulted from conducting the historical resource assessments at the site. This gave the Innu Nation and Labrador Inuit Association some influence over study methods.

Direct Aboriginal input into the studies had a number of benefits, both for the Aboriginal groups and for Inco. Direct participation increased Innu and Inuit confidence in the results of the historic resources study, while assuring the company it was effectively addressing Aboriginal concerns.

REVIEWING THE EIS

Inco released its 6,000-page EIS in late December 1997.

Because of the mandated timeframes, the Innu had organized several teams of technical reviewers to review different sections of the EIS well in advance of the release date, as follows:

- biologists to review wildlife and fisheries issues
- engineers and geoscientists to review water quality and tailings disposal concerns
- health and safety experts to identify workplace issues
- social scientists and community members to address socio-economic factors and community concerns

What about... community employment?

Collecting baseline data for an EA can be a significant economic opportunity. People in your community might have the necessary skills or interests to participate in field studies. You may be able to negotiate joint ventures with consulting firms, or directly contract to proponents, to provide services. However, some caution is required. It may still be important to critique the work independently. If so, maintain independence by ensuring arms-length relationships between the political and technical body responsible for intervening in the EA process and the economic development or training institution that actually does the work.

- legal counsel to ensure that the guidelines, as well as regulatory and compliance issues were adequately addressed. The legal team also advised on the overall strategy for interventions

Each team of reviewers submitted comments to the Innu Nation, who edited them and compiled a written submission on the adequacy of the EIS. This process identified several deficiencies and the Innu Nation issued press releases outlining the deficiencies that it had identified.

The Labrador Inuit Association undertook a similar process, as did each level of government. The coordinators for the Aboriginal groups and the government reviewers went to great lengths to address all of the major issues identified.

Based on the review of the Inco submission, the panel required additional information as an addendum to the EIS.

INVOLVING THE COMMUNITY – SOCIO-ECONOMIC STUDIES AND TRADITIONAL KNOWLEDGE

Inco paid both Aboriginal groups to research and present traditional knowledge to the panel. These studies involved the communities in the EA process. Many Innu felt that outside researchers were not qualified to understand properly the kinds of issues faced by the communities. They also did not feel that statistics alone about unemployment, wages and education could present an accurate picture of their communities. Most importantly, they thought outside researchers put too much emphasis on “having jobs” when the traditional life was so important to the people. Therefore, the socio-economic baseline studies that the Innu Nation contracted to do for the EIS were different from traditional socio-economic studies.

The Innu Nation hired a coordinator for the project familiar with action research methods. They also hired a group of young Innu researchers who had expressed interest in documenting what life in the communities was like currently and in the past, and what people hoped for in the future. A sociology professor from the University of Manitoba advised this group on research methods and survey design and assisted in data analysis. Over several months, the Innu research team ran workshops, met with people in their homes to discuss issues related to the project and filled out survey questionnaires. An innovative component of the work was the production of a documentary film, *Ntapueu: I am Telling the Truth*. This film presented the conditions in the communities as the Innu themselves understood them. A supplementary document was prepared to provide context for the video, but the powerful images and stories captured on tape spoke effectively about how Innu felt about the project and what was going on in their communities. The Innu gave Inco the video and the report for use in preparing the EIS.

The Innu Nation also developed a submission on Innu knowledge to the panel. Working with an ethno-biologist, a team of Innu researchers and Elders developed a video presentation and report about Innu knowledge

What about... intervenor funding?

Adequate financing for First Nation environmental assessment activities is essential to ensure an effective and thorough review by a First Nation. The Canadian Environmental Assessment Agency (the Agency) made participant funding available to help interested groups participate in the review process. More than \$400,000 provided by the Agency to intervenors for the two phases of the review process. Both the Innu Nation and the Labrador Inuit Association received participant funding from government, as well as additional funding to participate from the proponent, and from charitable foundations.

of the land and how they believed the project would affect the land. Again, the Innu were concerned about presenting their knowledge and concerns in ways that were most meaningful to them. They paid a great deal of attention to the effects of past development projects. The Innu Elders concentrated on what they knew, but avoided making predictions about what the future effects of the Voisey’s Bay project might be. The Innu Nation’s traditional knowledge research remained confidential until the hearings.

The Labrador Inuit Association took a different approach. They formed a panel of Inuit experts including Elders and hunters who knew the area well. The panel of Inuit experts addressed a set of questions focused on key environmental effects of the project until there was a consensus about the potential effects on wildlife, sea ice formation and fishery resources. Some of this information became a document providing additional background on land use, entitled *From Sina to Sikujauluk: Our Footprint*. They made this available to the panel and Inco for use in preparing its EIS.

EXPLORATION SUPPORT WORKS, LITIGATION AND PROTESTS

The summer of 1997 was decisive. In May, Inco announced it intended to construct Exploration Support Works consisting of temporary roads, an airstrip and a camp to facilitate advanced exploration. The Innu Nation and Labrador Inuit Association felt that these facilities were part of the main project under Newfoundland’s environmental assessment

legislation. The review panel also expressed significant concern. However, Newfoundland went ahead and registered the Exploration Support Works request for a separate provincial EA review.

The Aboriginal groups sought a court order to halt the provincial review, arguing that a separate provincial review would split the project. The trial court decided in favour of the province and Inco, so the province granted approval to begin construction in late August of 1997.

Before work began, more than two hundred-fifty Innu and Inuit protestors occupied the construction camp and shut down work at the site for over a week. This focused extensive media coverage on the issues around the proposed mine. An appeal by the Aboriginal groups to the Newfoundland Court of Appeal was successful. The Court ruled the exploration works were in fact part of the project described in the EA MOU and ordered that site work be suspended pending conclusion of the environmental assessment process.

PANEL HEARINGS

Panel hearings commenced in September 1997 and lasted approximately two months.

During the hearings, the Innu Nation and Labrador Inuit Association concentrated on three main points:

- the Innu and Inuit would not consent to the project without Land Rights Agreements and impacts and benefits agreements being in place

What about... hiring a coordinator?

Organizing an effective review of an environmental impact statement particularly of a large and complex project with tight timelines, requires careful coordination. Dedicated staff may be required to fulfill this role. Individuals should have experience with environmental assessment and the important skills of being able to work effectively with technical experts and to facilitate community participation. Working with allies and with government reviewers at this stage can also be effective in identifying issues that may require additional information from the proponent.

What about... Aboriginal rights?

The Voisey’s Bay Panel made some very strong recommendations favouring Aboriginal people, and tried to encourage the governments to act on those recommendations. Governments must take panel recommendations seriously but they are not binding. Court action may be appropriate.

- the environmental, social and cultural impacts of the project could only be effectively mitigated with impacts and benefits agreements in place to ensure that they would have an ongoing role in how the project was designed, built and operated
- the project, could not be a scoop-and-run operation, but had to be designed and carried out in such a way as to ensure at least an entire generation (25 to 30 years) of employment and business opportunities for the people of northern Labrador

The two Aboriginal groups addressed many other technical issues including methods for assessing fish habitat, the movement of contaminants through the food chain and the impacts year-round shipping operations through sea ice would have on the coastal movements of Innu and Inuit people.

Both Aboriginal groups made sure their communities were able to participate effectively in the hearings. The Innu organized workshops in advance of the hearings to discuss issues, present plain language summaries of the expert reviews of the EIS and answer questions from community members. As a result, during the community input sessions of the hearings, it was evident to the panel that people understood the project and its potential impacts. Recommendations from technical experts were also clear. This gave credibility to the Innu and Inuit during the process.

Individual community members became effective intervenors, even in the technical sessions. This was most evident in the Labrador Inuit Association’s presentation of the results of their traditional knowledge studies. Instead of simply summarizing the report for the panel, the Labrador Inuit Association assembled panels of Inuit experts to deal with particular issues. They focused on the environmental conditions and predictions that Inco had made about the project, and provided their own perspective. They worked through a number of key environmental effects in this manner, and panel members were able to put their questions directly to the Inuit experts. This proved to be extremely effective, as their knowledge about the area went beyond the information that Inco and its consultants had collected. It was evident that two or three seasons of environmental baseline data collection by the proponent could not compare to a lifetime of living and learning on the land.

While the hearings did not permit cross-examination of Inco’s experts by the Aboriginal groups, the panel encouraged effective questioning that revealed gaps in the company’s environmental management approach. In the community input sessions, Inco made presentations but was also required to answer questions from the community. The review panel actively facilitated answers from the company when a response was considered evasive or unclear.

Residents spoke clearly and passionately about their concerns, about the history of their experiences with developments and their hopes that this

project could be different. These presentations had a significant effect upon the panel. Community participation was effective because of simultaneous translation, which allowed people to speak their own language.

The Aboriginal groups maintained media interest in the technical hearings by providing reporters advance copies of key issue summaries for each session. Generally, the media covered community sessions well. In addition, the occasional “creative intervention” ensured wide reporting.

THE PANEL REPORT

The panel released its final report at the beginning of April 1999, addressing three key questions:

1. Would the project cause serious or irreversible harm to plants and animals and their habitats?
2. Would the project affect wild foods or prevent Aboriginal people from harvesting them now or in the future?
3. Would the project bring social and economic benefits to many people in northern Labrador or to only a few, and would these benefits last?

The panel concluded that:

- the project would not seriously harm the natural environment or wild foods and people’s ability to harvest them
- with a lifespan as described in the EIS, the project has the potential to offer the people of northern Labrador lasting social and economic benefits through employment and business opportunities

- the project be allowed to go ahead, as long as the recommendations in the review panel report were made part of the conditions of approval

The panel made 106 other recommendations, a number of which directly addressed the three critical issues that the Innu and Inuit had raised during the hearings:

- Canada and Newfoundland should conclude and ratify land claims agreements in principle with the Inuit and the Innu
- Canada and Newfoundland should not issue project approvals until the Inuit and the Innu have each concluded impacts and benefits agreements with Inco
- Newfoundland should include conditions in the mining lease to ensure that, Inco would reduce the annual production rate to extend the mine life to at least 25 to 30 years if it finds less nickel underground than expected

FEDERAL AND PROVINCIAL RESPONSES

The Innu and Inuit enthusiastically supported the panel’s recommendations. After several months, and with minimal consultation with the Innu Nation and Labrador Inuit Association, the Newfoundland Premier made it clear that he was not prepared to make project approvals subject to land claims settlements or impacts and benefits agreements. However, he would accept the report’s recommendations on issues that were of a “straightforward, technical nature”.

What about... involving your community?

Involving your First Nation’s community members in an assessment process can be a difficult task. The technical nature of information about a project and the fact that baseline research is normally done on people instead of with people can be significant barriers. In the Voisey’s Bay assessment, both Aboriginal groups tried to involve community members, particularly those with expert knowledge, in research projects they were controlling and performing. This significantly increased the level of participation in the research by community members and ensured there was broad community consensus about the results. Negotiating inclusive arrangements with proponents is becoming more common, but it is advisable to address these issues in a formal agreement or through the guidelines for the environmental impact statement.

**What about...
sharing traditional
knowledge?**

First Nation’s members often have extensive traditional knowledge about their land. Some knowledge may be privileged and known only by a few. Some knowledge may be widely held and freely shared. First Nations have the right to decide whether to share their knowledge in an environmental assessment process.

If there is sufficient trust between your First Nation and a proponent, you may be comfortable working together to present your knowledge in their environmental impact statement. Alternatively, you may want to maintain more control over how your traditional knowledge is collected and presented, and may be more comfortable presenting this information directly in the review process.

Canada was also unwilling to accept the panel’s recommendations on land claims and impacts and benefits agreements. However, the federal government committed to the development of “a project-specific environmental management mechanism for involving affected Aboriginal groups,” and stated that “no federal approvals will be issued for the Project until the Government of Canada is certain that appropriate consultation processes are in place and that the environmental management mechanism can be implemented.”

In response, the Aboriginal groups filed an application for judicial review in the Federal Court, claiming that the Crown erred when it decided that it could not commit to concluding a land claims agreement in principle or to negotiate equivalent alternative measures with the Innu and Inuit. The application also stated the government had promised to consult and negotiate with the Aboriginal groups but had acted in bad faith by approving the project without allowing a proper opportunity for consultation.

CONCLUSION

In August 1999, Canada and Newfoundland invited the Innu Nation and the Labrador Inuit Association to discuss development of an environmental management agreement for the Voisey’s Bay project. This was to be a project-specific environmental management mechanism to allow the Aboriginal groups to participate in regulation of the Voisey’s Bay project, while enabling the Crown to discharge its consultation obligations.

Comprehensive treaty and self-government negotiations are also underway between the Aboriginal groups and the federal and provincial governments. The Labrador Inuit Association ratified their Agreement-in-Principle (AIP) in July 1999, and all three parties signed the AIP in June 2001. The Final Agreement was initialled by the LIA, Canada, and Newfoundland in August 2003.

Progress on the Innu Nation’s Agreement-in-Principle was also being made, but by January 1999 negotiations were suspended when the Innu pulled out of discussions on the Voisey’s Bay and Lower Churchill developments. Negotiations between Canada, Newfoundland and the Innu Nation resumed in 1999 with a focus on ten outstanding issues identified by the Innu. As of January 2004, AIP negotiations are still underway.

At the same time, impacts and benefits agreement negotiations between Inco and the Aboriginal groups were also proceeding. By late December 1999, the majority of issues had been resolved between Inco and the Aboriginal groups, and there was considerable optimism for successful completion.

While the impacts and benefits agreement and environmental management agreement negotiations were underway, the Province and Inco were in disagreement on other matters. Earlier in the project, Inco promised to build a

smelter/refinery facility in Newfoundland to process ore. Inco now claimed this facility was not feasible, and wanted a release from its earlier commitment. The Province was unwilling to accept this, so in early 2000 Inco and the Province suspended negotiations. This halted negotiations on the environmental management agreement and impacts and benefits agreements with the Innu and Inuit. Inco continued limited exploration activities at the site until late 2000 then shut down the Voisey’s Bay operation.

In June 2001, negotiation of the environmental management agreement resumed between the Aboriginal groups and the governments. Negotiations also began about treaty provisions dealing directly with the Voisey’s Bay Project. Impacts and benefits agreement negotiations also resumed.

In June 2002, members of the Innu Nation and the Labrador Inuit Association ratified the following:

- their respective impacts and benefits agreements
- stand-alone treaty provisions dealing with the Voisey’s Bay Project
- an environmental management agreement that would establish an inter-governmental four party board to oversee all regulatory and permitting issues related to the project

Construction started in August 2002 and Inco expects first production in 2006. Innu and Inuit joint-venture businesses have the majority of contracts for the initial construction phase and Innu and Inuit workers are training for long-term jobs at the site.

What about... more information?

Innu Nation
<http://www.innu.ca>

Labrador Inuit Association
<http://www.nunatsiavut.com/en/indexe.php>
<http://arcticcircle.uconn.edu/SEEJ/voisey/inuit.html>

Voisey’s Bay Nickel Company
<http://www.vbnc.com/>

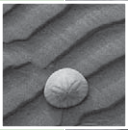
Canadian Environmental Assessment Agency – Public Registry for Voisey’s Bay Project
http://www.ceaa.gc.ca/010/0001/0001/0011/0003/public_hearings.htm



Heavy equipment operators at Voisey’s Bay Nickel Mine. Photo courtesy of Voisey’s Bay Nickel Company.

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

SECTION 12 – DETAILED CASE STUDY – TULSEQUAH CHIEF PROJECT



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

Section 8 – Reviewing Environmental Assessment Reports

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Section 11 – Detailed Case Study – Voisey’s Bay Nickel Mine

 **Section 12 – Detailed Case Study – Tulsequah Chief Project** 

Glossary, References and Index

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Cover photo courtesy of Richard Erhardt, Taku River Tlingit First Nation

This section of the toolkit provides an overview of the EAs and lessons learned during the proposed re-opening of the Tulsequah Chief Project in north-western British Columbia. The proposed project location is entirely within the traditional territory of the Taku River Tlingit First Nation. An EA was conducted by Canada, BC and TRTFN. At the time of publication the *Canadian Environmental Assessment Act* review of the project was still underway and the Supreme Court of Canada had heard the Taku Case and was deliberating the evidence.

This section includes the following:

- Taku River Tlingit First Nation – Overview of History, Land Claim and Status of Treaty Negotiations
- Atlin Community Overview
- Project Description – Mine and 160 Km Road
- EA Process Overview
- TRTFN Strategy and Decision-making Process
- The First Environmental Assessment
- Termination of the Review and a Decision
- First Attempts at Resolving Differences
- Judicial Review
- Court Decision – Supreme Court of BC
- The Reconvened EA Process
- Court Decision – BC Court of Appeals
- Second Provincial Project Approval
- Supreme Court of Canada

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▶ INTRODUCTION

FNEATWG is fortunate to have had this section written by active participants in the Tulsequah Chief Review. This section contains first hand observations and insights of former TRTFN staff and consultants who were involved in the many activities occurring over the ten years of this project's review. Subsequently the information provided in this section is the view of the author(s) and does not necessarily reflect the views of FNEATWG, TRTFN, or the provincial or federal governments.

The environmental assessment of the Tulsequah Chief Project was conducted jointly (the federal government participated in an assessment conducted by the BC Environmental assessment Office) under the 1995 *British Columbia Environmental Assessment Act (BCEAA)* and the *Canadian Environmental Assessment Act (CEAA)*.

The environmental assessment associated with this project was very complex.

It was subject to three different EA/decision-making processes:

- the BC Mine Development Assessment Process, and later *BCEAA* (established in 1995)
- *CEAA*
- Taku River Tlingit First Nation (TRTFN or Tlingit)

This case study highlights the key lessons learned by the Taku River Tlingit First Nation during these processes. It also discusses generally the community decision-making process that was undertaken by TRTFN leadership to guide TRTFN representatives' involvement in the EA and government-to-government negotiations associated with this project. For TRTFN, full engagement in the EA process meant the involvement of a large team of people who were committed to expressing and protecting TRTFN's interests. Project Committee participation was done by two key people, a Tlingit Citizen and an EA advisor. They worked with guidance and decision-making based on a community consultation process that included work with Elders, leaders, active TRTFN harvesters, TRTFN staff and Atlin community members. Participation also required the use of legal and expert reviewers for highly technical reports or complex parts of the company's submissions.

The key lessons highlighted illustrate the difficulties a First Nation may encounter while participating in an environmental assessment and how a First Nation can effectively protect its interests in the face of EA's associated with major developments. While the experience of the Taku River Tlingit First Nation may not be typical, the lessons learned by TRTFN are relevant for First Nations participating in any EA process. The most significant lesson for TRTFN has been the need for constant vigilance on a wide range of issues and clarification of the necessity of full participation in the EA associated with any potential developments in their traditional territory.

▶ TAKU RIVER TLINGIT FIRST NATION – OVERVIEW OF HISTORY, LAND CLAIM AND STATUS OF TREATY NEGOTIATIONS

To date archaeological research shows evidence that the Taku Tlingit have occupied their traditional territory for at least 6,000 years. Oral history indicates that Tlingit occupation (use and management) of the area is dated back to the time when mountains were being formed. The first recorded contact between coastal Tlingits and Europeans occurred in

CHRONOLOGY OF TULSEQUAH CHIEF PROJECT

| | |
|-------------------------|---|
| 1994 | Redfern Resources applies to BC government to re-open Cominco’s abandoned Tulsequah Chief mine. |
| June 1995 | New <i>BC Environmental Assessment Act (BCEAA)</i> proclaimed; project transferred into new EA process. Canada was involved in the EA process since 1994, however the project officially triggered the <i>Canadian Environmental Assessment Act (CEAA)</i> in 1997. A joint federal-provincial EA was initiated. |
| Aug 1995 | Taku River Tlingit First Nation join Tulsequah Chief Project Committee. |
| Nov 1996 | Redfern submits Project Report. |
| May 1997 | Project Committee rejects Project Report on inadequacy of Tlingit land use impacts assessment. |
| July 1997 | Redfern submits revised Project Report. EAO hires independent consultant to do Tlingit land use impact study. |
| Sept 1997 | Public review of Project Report commences. |
| Dec 1997 | Tlingit land use impact study completed and distributed. |
| Mar 1998 | EA terminated abruptly; Minister of Energy and Mines (MEM) and Minister of Sustainable Resource Management approve the project. Tlingit submit dissenting report to the ministers. <i>CEAA</i> signs off on screening report. There are numerous outstanding issues to be addressed in subsequent permitting processes. |
| July 1998 – Nov 1998 | Tlingit conduct negotiations with BC government and Redfern to attempt to reach a Cooperation Agreement regarding Environmental Management and Impacts and Benefits of the Project. Negotiations do not result in an agreement. |
| Feb 1999 | Tlingit file for judicial review of ministers’ decision. |
| June 2000 | Tlingit win judicial review; ministers’ approval overturned. |
| Sept 2000 | BC launches appeal of Trial Court decision. |
| Fall 2000 | Joint federal and provincial EA reconvened. |
| Feb 2002 | BC Court of Appeal finds in favour of Tlingit. |
| April 2002 | BC launches appeal to Supreme Court of Canada (SCC). |
| Nov 2002 | SCC agrees to hear the case. |
| Dec 2002 | Provincial minister’s re-issue project approval certificate; federal review still underway. |
| March 2004 | SCC heard the Taku (and Haida) cases. |
| | Ruling is expected in October 2004. |



Aerial view of the Tulsequah Chief Project mine site showing the remnants of the former mine that was operated in the late 1950's. Photo courtesy of Kim Heinemeyer, Round River Conservation Studies.

1741 when Russian explorer Alexei Chriokov lost two boats in an (evidently hostile) encounter.

Since these first encounters, the Taku River Tlingit First Nation have maintained a strong sense of their culture, history, and ownership and responsibility toward their land and resources. TRTFN continue to actively utilize resources harvested throughout their traditional territory.

TRTFN filed a Comprehensive Claim in 1987 to the Federal Claims Commission. However, it was not until 1994 that treaty negotiations began. For the past 10 years TRTFN has been involved in negotiating a treaty with BC and Canada. These negotiations have not yet resulted in an agreement to address the land question for the area of land that would be affected by the proposed Tulsequah Chief Project. Therefore, one of the key issues in

this case is the potential for the Tulsequah Chief Project to impact on TRTFN's Aboriginal rights and title in relation to treaty negotiations, land use planning, and current and future harvesting.

▶ ATLIN COMMUNITY OVERVIEW

Atlin is located in north-western BC and is the only community that is located within the project proposal area. The population is about 400 during the winter and increases during the summer months to between 450 and 550. The unemployment rate is exceedingly high during the winter months (about 50%) and can decrease during the summer months to as low as 10 to 15%. TRTFN members make up about 25 to 30% of the total population of Atlin. In addition, TRTFN is the largest employer in the community of Atlin, providing employment to TRTFN and non-Aboriginal people throughout the year. Local placer mines, the government office, local Atlin businesses and entrepreneurs provide the remainder of employment for locals. Numerous Atlin households also rely on subsistence harvest to contribute to the household economy.

▶ PROJECT DESCRIPTION – MINE AND 160 KM ROAD

In 1994, Redfern Resources Ltd. (Redfern) applied to the BC government for approval to re-open an abandoned zinc, copper-lead and precious metals mine on the Tulsequah River. The mine, formerly owned by Cominco, was operated commercially from 1952 to 1957. Little remains at the site, other than the old camp and acidic mine tailings that continue to drain into the Tulsequah River. The small mine is located a few miles above the confluence of the Tulsequah River and the Taku River, and upstream from the BC/Alaska border. Existing access to the site is by boat, river barge or aircraft.

The proposed mine re-opening was for an underground operation lasting approximately eight years.

The project also included:

- the construction of a 160km road from Atlin to the mine site through sensitive¹ wildlife areas and unstable terrain
- an airstrip
- construction and maintenance of a tailings pond, treatment plant and lime quarry
- facilities for housing up to 200 staff to support mine operation

EA PROCESS OVERVIEW

The EA process associated with the Tulsequah Chief Project began in 1994 when the proponent (Redfern Resources Ltd.) submitted its “pre-application” for the project to the BC government for approval. Since that time, two joint federal-provincial environmental assessments have been conducted, two court cases have been heard, the BC government has issued two project approval certificates and the process is still not over.

The CEAA review is still underway and the Supreme Court of Canada (SCC) heard the Taku (and Haida) cases in March 2004. A SCC decision is expected in October 2004.

This case study attempts to highlight the many lessons learned by the TRTFN during their participation in this lengthy and complicated EA process.

PROJECT PRE-APPLICATION

Although the TRTFN were invited to join the pre-application review to represent their interests, they did not get actively involved in the EA process until 1995 when the BC government initiated the EA of the project under the newly established BCEAA legislation.

There were two seats on the Project Committee held by local Atlinites, one for TRTFN and one for the Atlin Area Planning Committee.

This section focuses on the work of TRTFN during the Tulsequah Chief Project review process.

TRTFN STRATEGY AND DECISION-MAKING PROCESS

The TRTFN leadership directed the technicians working on the Tulsequah Chief Project EA to focus on the numerous environmental concerns and to ensure that Aboriginal rights and title were recognized and protected.

TRTFN developed an approach that included:

- Phase 1 – Environmental Assessment and Decision-making Agreement:
 - This agreement would be in place throughout the EA process associated with the project. It included arrangements for information sharing (TRTFN traditional knowledge) and funding to retain expert reviewers to help develop and support comments regarding First Nations concerns on the proponent’s application report.

What about... community consultation?

Taking time at the outset of an environmental assessment to consult broadly within your community is essential to ensure that the leadership has support and a clear mandate for dealing with the proponent and with the government agencies. It is also the best way to educate your community about the project and the issues it brings. Consider preparing a consultation report, and making it widely available within and outside of your community.

Scoping and consultation documents prepared by the communities can be extremely helpful to panels who may not be familiar with the broader issues faced by a First Nation. They can focus scoping sessions on key issues, and facilitate better communication between panel members and the community.

¹ Traditional knowledge sources and provincial TEM habitat classification.

- Phase 2 – Impacts and Benefits Agreement (IBA)
 - No substantive IBA negotiations ever took place – only preliminary scoping discussions. Issues related to the EA were never resolved and TRTFN ended up going to court.

TRTFN attempted to negotiate an environmental management agreement between TRTFN, BC and the proponent for the life of the project. (See **First Attempts at Resolving Differences** on page 11 of this section).

The overall focus of the strategy on protecting TRTFN rights and title led to TRTFN’s “success” in protecting their interests within an EA process.

Two approaches that are important to mention are:

1. TRTFN held countless meetings (partly funded by the federal government) and sent out numerous information packages to their citizens to keep them up to date about what was happening in the review process. This ensured that when community members needed to make decisions, they were made with as much information as possible.
2. TRTFN utilized government funding sources to fund different aspects of the EA. Funding was secured specifically for community consultation regarding the project and associated EA. There was also funding to have an “EA advisor” who worked closely with TRTFN’s Project Committee member. This advisor worked closely with TRTFN representatives and helped to identify when additional studies and assessments were needed to identify and track issues to be raised in the review process and eventually the court system.



Mount Lester Jones in the upper part of the Taku Watershed. Photo courtesy of Round River Conservation Studies.

Throughout the review process TRTFN’s leadership held regular meetings at the community level. Technical reports were summarized by technicians and reviewed by community members, Elders and leaders. TRTFN’s governance process requires that TRTFN achieve consensus for its decision-making. During all the meetings and decisions, TRTFN achieved consensus each time on how to participate in the EA and twice on the decision to launch a judicial review, thereby deciding to defend their rights, title and interests in court.

THE FIRST ENVIRONMENTAL ASSESSMENT

In June 1995 the project review came under the newly established *BCEAA*. In addition, the project triggered *CEAA* and would be jointly reviewed under both the federal and provincial processes. To operate the project, the proponent would require numerous permits from a wide range of provincial and federal agencies.

THE PROJECT REPORT SPECIFICATIONS

The regulators from the provincial and federal governments held seats on the provincially established Project Committee.

The Project Committee's first task was to develop the Project Report Specifications (PRS), which established what information the proponent would need to provide in the Project Report. The Project Committee would review the Project Report and provide a recommendation to the ministers who would decide if the project were approved.

The Tlingit identified a TRTFN member to be their representative on the Project Committee. In addition, they retained an advisor to work on the project with key staff and leaders. Based on the leaders' direction, TRTFN participated in this part of the process by submitting a report entitled *What We Need to Know*. The document outlined what information TRTFN would require to make a decision regarding the project.

TRTFN had to ensure government officials accepted the document entitled *What We Need to Know* as part of the official information requirements because the information requirements laid out by TRTFN were different from the provincial government representatives. The TRTFN submission became part of the official requirements of the Project Report Specifications and was attached to the official document as an appendix.

TRTFN AND PROPONENT - NEGOTIATION OF FRAMEWORK AGREEMENT

During this phase of the EA, the Tlingit and the proponent were negotiating the details of their working relationship throughout the assessment process. Among other details, the company wanted information on Tlingit harvest and land use to complete a cultural and sustenance impacts study. The Tlingit wanted access to detailed project information and required a number of conditions regarding sharing and management of the harvest and land use information that they would provide. In addition, TRTFN required financial assistance to pay for expert reviews of key sections of the project report. The Tlingit had identified concerns and risks associated with certain aspects of the project (e.g., new acid mine drainage engineering, unproven access management techniques, uncertain predictions for impacts to salmon, fish and wildlife).

These discussions led to a Framework Agreement between the TRTFN and Redfern, which addressed issues such as information sharing, TRTFN participation in the EA and funding for specific expert analysis of information contained in the Project Report. This agreement was to cover the EA period associated with the project and had terms to ensure TRTFN involvement in establishing a terms of reference for the TRTFN Land Use Impact Assessment.

THE PROJECT REPORT

On November 26, 1996, Redfern submitted its Project Report. The Project Committee met to determine if the report addressed

PROJECT COMMITTEE MEMBERS

Environmental Assessment Office (EAO)

BC Ministry of Environment Lands and Parks (MELP)

BC Ministry of Energy and Mines (MEM)

BC Ministry of Transportation and Highways (MoTH)

BC Ministry of Forests (MoF)

BC Ministry of Small Business, Tourism and Culture (MSBTC)

Taku River Tlingit First Nation (TRTFN)

Environment Canada (EC)

Department of Fisheries and Oceans (DFO)

Department of Indian Affairs and Northern Development (DIAND)

Yukon Territorial Government

U.S. Environmental Protection Agency (EPA)

U.S. Department of the Interior (DOI)

Office of the Governor, Alaska (Alaska)

Atlin Advisory Planning Commission (AAPC)

What about... technical experts?

Technical reviewers should be credible and have direct or related expertise in the kind of issues that they are providing comments on. You may be able to rely on in-house staff or expertise in your community, but often outside expertise is required. Other First Nations that have dealt with similar issues may be able to suggest people they have found to be effective.

Technical expertise can be expensive, and given resource constraints, most First Nations must select when to make technical interventions. Prioritize issues in relation to your concerns, and concentrate on developing the most effective interventions. Certain issues will be more important to you than to other intervenors – it may be possible to coordinate resources with allies to avoid duplication while ensuring you address all your important issues.

the Project Report Specifications developed by the Project Committee, as required under *BCEAA*.

The Tlingit informed the Project Committee the project report was unacceptable for the committee to review because the following information was not contained in the proponent's submission:

- no adequate Tlingit land use impact assessment
- no complete community impacts analysis for Atlin and its residents
- watershed-wide information on distribution of animals, habitat, movement patterns or corridors
- no determination of regional significance of predicted wildlife impacts
- no assessment of cumulative impacts to wildlife populations from other road users

During the study period for preparing and submitting the Project Report (proponent's application), the proponent selected the consultant and set the terms of reference for the Tlingit Land Use Impact Analysis without TRTFN involvement. This resulted in completion of a study that was later determined by TRTFN to be inadequate (this determination was made based on an expert review completed by an anthropologist). Therefore, an additional study needed to be done. The BC EAO and TRTFN worked out the details to hire consultants to complete the project. Again, the assessment was inaccurate and insufficient, and an addendum to the second study was completed (Staples Addendum) which provided a more accurate description and predications of the potential impacts to TRTFN from the project.

While the TRTFN Land Use Impact Assessment was being completed the Project Report was accepted for review and the Project Committee agreed to make a decision regarding the project based on the information contained in the Project Report. The report was then distributed for public and technical reviews. The Staples Addendum was circulated after the Project Report. See www.trtfn.com for more details.

During the public comment period TRTFN retained a number of experts to review technical components of the Project Report.

This included:

- acid mine drainage expert
- wildlife biologists
- anthropologist – to review the traditional use study and determine its acceptability for documenting and determining impacts to current and future land use activities

THE WORK OF SUBCOMMITTEES

After the public comment period, various subcommittees met to work through and resolve outstanding issues that were raised by the public and Project Committee members in the review period for the Project

Report. The subcommittees were composed of some Project Committee members as well as technical staff and advisors to various Project Committee members. TRTFN maintained a seat on each subcommittee and attended every official meeting. The subcommittees were one forum where they brought forward concerns and issues of interest to their First Nation. The entire process was very dynamic and there was dialogue going on continuously among subcommittee members, provincial and federal staff and TRTFN.

The subcommittees formed included:

- fish
- wildlife
- water quality
- access management and road construction

The Project Committee tasked subcommittees with resolving (or highlighting unresolved) complex issues. This provided information for the Project Committee to use when formulating recommendations to the ministers.

The wildlife subcommittee identified a number of situations where either the information provided by the proponent did not meet the Project Report Specifications or, in some cases, issues were not addressed adequately in the Project Report.

Issues identified by the subcommittee included:

- two year's wildlife baseline data not provided
- issues had not been considered at the landscape level

- systematic coverage of key habitats or vulnerable populations had not been done
- monitoring programs for ungulates and grizzly bears were unacceptable
- information had not been provided about Shazah Pass goat behaviour and movements
- information had not been provided about the Southern Lakes Caribou and Recovery Program

Despite working through a number of substantive issues at the subcommittee level, it became apparent that there were still information deficiencies that could not be addressed without additional fieldwork (throughout the subcommittee work TRTFN had maintained that the required

baseline work had not been completed). Eventually, and at a point unknown to TRTFN, a provincial senior civil servant determined that the wildlife work done (two years of largely monitoring and population surveys) was acceptable for reconnaissance level baseline data. Up until this point, provincial wildlife biologists and the TRTFN were in agreement that the wildlife information contained in the Project Report did not meet the Project Report Specifications.



Grizzly bears and salmon are highly important to TRTFN. Photo courtesy of Mark Connor, Habitat Steward, TRTFN.

What about... major lessons

During the Tulsequah Chief EA process, the Tlingit learned to:

- negotiate an interim agreement with the proponent to obtain resources such as funding, access to experts and information, to assist with participation in the EA
- clearly express concerns regarding the project
- push regulators to make sure their legislation is followed
- clearly articulate the information TRTFN required for decision-making
- ensure that the community got accurate information from both the proponent and regulators

continued on page 11

It was indicated on the “issues tracking document” maintained by the EAO that TRTFN representatives were the only Project Committee members who believed more information was needed to properly assess the impacts to wildlife. For TRTFN this provided an indication that there was political interference in the EA associated with the Tulsequah Chief Project.

▶ TERMINATION OF THE REVIEW AND A DECISION

TRTFN received notice from the EAO that it had terminated the EA process. At this point in the review the Project Committee had applied for and received at least two time extensions and the provincial government was under a great deal of pressure to approve the project. The notice clarified that the EAO would complete the Project Committee’s Recommendations Report. The draft report would be distributed on March 2, 1998 and other Project Committee members (TRTFN, Canada and US delegates) were given 48 hours to provide their comments.

Outlined in the draft report was the BC approval of the Tulsequah Chief Project. In fact, the BC government determined that the project was unlikely to cause significant adverse environmental effects. The Recommendations Report, as drafted by the EAO, concluded that:

“With respect to the issues identified in the Project Report Specifications ... there is no reason not to grant a project approval certificate.”

On March 4, 1998 a number of Project Committee members (Canada, Alaska, the US EPA and the Tlingit) expressed concern over the abrupt termination of the review by BC.

Since TRTFN viewed the Project Committee’s report as deficient in addressing their concerns, TRTFN began writing up the findings of their assessment of key project components. TRTFN, because of the short time frame for submissions, focused their report on two main sections: 1) road construction and access management, and 2) impacts to wildlife and Tlingit. The potential impacts in these two areas of the project’s development posed significant risks for TRTFN’s future sustainability.

TRTFN submitted their Recommendations Report to the EAO, on March 6, 1998.

The report outlined a number of TRTFN concerns including:

- inadequate information was provided in the Project Report to support sound decision-making and conduct a proper assessment of impacts
- there were numerous outstanding environmental management issues, namely access management, predicted wildlife impacts and water quality issues
- there was a threat to the Tlingit long-term sustainability

TRTFN maintained that substantive issues had not been addressed or discussed by the full Project Committee. TRTFN also continued to voice concerns with the way the Recommendations Report failed to address their concerns and protect their interests.

FIRST ATTEMPTS AT RESOLVING DIFFERENCES

Although TRTFN had numerous concerns regarding the conduct of the provincial government during the final stages of the EA, it attempted to resolve its concerns without proceeding immediately with legal action.

As a first attempt to address outstanding matters, TRTFN entered into co-operation agreement negotiations with the proponent and the provincial government on the development of an environmental management agreement for the life of the project. In addition, the negotiations dealt with potential benefits that may be realized by TRTFN and Atlin community during the life of the project. The negotiations did not result in an agreement and TRTFN still had numerous concerns regarding the projects. The TRTFN made the decision to proceed with the Judicial Review during two Joint Clan Meetings. In each meeting consensus was achieved to proceed with legal action.

JUDICIAL REVIEW

In February 1999, the Tlingit filed for a judicial review of the provincial ministers’ decision in the Supreme Court of BC.

Among other things, the Tlingit asked the court to overturn the project approval certificate because:

- the environmental review was not an open, accountable or neutrally administered process as required under the Act
- the Project Committee did not carry out a thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of the project
- the Project Committee was wrong to prepare aspects of Redfern’s project proposal themselves
- the BC ministers considered some irrelevant matters when they issued the certificate, and did not adequately address the substantive issues raised during the assessment process. Their decision did not address the concerns and issues raised by TRTFN in their Recommendations Report.
- the certificate granted approval to a project that would undermine, rather than promote sustainability and that would unjustifiably infringe on the Tlingit’s exercise of their Aboriginal rights and title

COURT DECISION – SUPREME COURT OF BRITISH COLUMBIA

In June 2000, the BC Supreme Court ruled in favour of the Tlingit and quashed the certificate that had resulted from the provincial ministers decision to approve the project. The basis of the decision was on the grounds of procedural flaws in

What about... major lessons con’t

- have peer reviews of technical studies done for an EA, particularly of key areas such as land use and cultural impact studies
- engage the process fully and carefully at every step
- track and verify every decision along the way and review any written record of proceedings
- keep a set of minutes to compare against the minutes of other parties
- if the proponent will not complete the necessary studies, find other ways of getting studies done such as developing partnerships with like minded organizations
- have focused workshops to bring experts together to address outstanding issues
- continue working to expand the First Nation consultation requirements and involvement in EA decision making

What about... sustainability and EAs

Under the 1995 *BCEAA* under which the Tulsequah Chief Mine Project was reviewed, there was a provision for assessing sustainability. That provision does not exist under the current *BCEAA*.

Sustainability can still be included in a review when *CEAA* is triggered (see Section 5). One of the lessons learned from the Tulsequah Chief Project is that it is difficult to assess sustainability in the absence of government policy. To date, a generally accepted quantitative methodological approach to applying sustainability principles in EAs has not been developed.

the assessment process. The facts showed that the Project Committee's recommendations and the minister's decision to issue the certificate did not substantively address the Tlingit's issues. **The judge required the ministers to reconsider their decision after receiving a new Recommendation Report from the Project Committee.**

▶ THE RECONVENED EA PROCESS

In the fall of 2000, the EAO reconvened the Project Committee to address the Tlingit's issues that had not been addressed in the first environmental assessment. The federal review under *CEAA* was also re-convened as a result of changes to the project, which would require new authorizations by the Department of Fisheries and Oceans.

While the second review was underway, the province launched a concurrent appeal of the BC Supreme Court's decision in the BC Court of Appeals.

The reconvened Project Committee focussed on an assessment of impacts of the road route alternatives on wildlife, and an in-depth investigation into the sustainability aspects of the project for the Tlingit.

Subcommittees were established within the reconvened process as well. Representatives from Canada, BC and TRTFN each held seats on the subcommittees.

The subcommittees during the second review focused on the following:

- access management
- fisheries
- wildlife
- water quality
- Shazah Fan and tailings pond
- sustainability
- cumulative effects assessment
- "recommendations report" writing

The Project Committee retained an advisor to assist the committee in conducting a sustainability assessment of the project. The sustainability assessment would look at the long-term potential for impacts and consider how this would affect TRTFN's ability to sustain its people, land and resources throughout the life of the project. The sustainability working group was established to create an assessment lens through which to view impacts from the Tulsequah Chief Project. The assessment lens was developed in a matrix layout. Specific issues related to sustainability would be assessed based on predicted impacts to resources and TRTFN. This proved to be a very challenging task for the subcommittee, because sustainability, until this point, had not been

specifically addressed in environmental assessments. This work was never completed because the BC Court of Appeals decision resulted in the termination of the reconvened EA process (see page 13).

At the same time, Canada initiated a substantive assessment of the project’s cumulative effects.

During the BC court process and the second review period, the BC Ministry of Forests and the Ministry of Environment Lands and Parks continued field studies and refined the wildlife and geotechnical information along the road corridor. This proved to the Tlingits that there had not been sufficient information to make a decision regarding the project. In fact, the reports compiled by BC and submitted to the reconvened (or second review) process regarding road routing and associated impacts demonstrated that the project approval certificate had approved the route that posed the greatest risk to wildlife.

COURT DECISION – BRITISH COLUMBIA COURT OF APPEALS

While the reconvened EA was underway, the BC Court of Appeals (BCCA) rendered its decision in February 2002. The BCCA decision resulted in the ministers terminating the reconvened EA. But the court ruled in favour of the Tlingit, determining that the Province had a duty to meaningfully consider the Tlingit interests. **The court ruled further that the ministers already had sufficient information to make a decision. The work of the**

reconvened Project Committee was immediately stopped. The court ordered the ministers to reconsider the decision to issue the project approval certificate.

SECOND PROVINCIAL PROJECT APPROVAL

In December 2002, the provincial ministers re-issued a project approval certificate without any additional consultation with the TRTFN. At the time of publication the CEAA review by the federal government is still underway and there remain over 100 outstanding issues related to all aspects of the project.

SUPREME COURT OF CANADA

The Province appealed the BC A decision to the Supreme Court of Canada (SCC) in April 2002. The SCC heard the Taku (and Haida) cases in March 2004 and, at the time of publication, was deliberating the evidence. A decision is expected in October 2004.

While the initial BC Supreme Court decision was based on EA procedural flaws, the case has evolved to deal more fundamentally with the nature of Aboriginal rights and title and the obligations of government and industry associated with them. The cases before the SCC regarding these issues may result in a decision that requires substantive consultation between government, industry and First Nations without a First Nation having to prove their title to land.

What about... key points to remember

- Negotiations do not always meet your needs or protect your interests.
- Legal action may be appropriate to review a minister’s decision.
- Focus on your First Nation’s interests and concerns – your future is in your hands.
- Be willing to build appropriate alliances and partnerships.

What about... more information?

BC Environmental Assessment Office
www.eao.gov.bc.ca

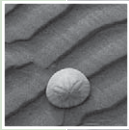
Redfern Resources Ltd.
www.redfern.bc.ca

Mining Watch
www.miningwatch.ca

Taku River Tlingit First Nation
www.trtfn.com

FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT

G L O S S A R Y , R E F E R E N C E S A N D I N D E X



Section 1 – Introduction to Toolkit

Section 2 – Environmental Assessment Basics

Section 3 – Environmental Assessment from a First Nation Perspective

Section 4 – British Columbia’s Environmental Assessment Process

Section 5 – Canada’s Environmental Assessment Process

Section 6 – Joint Review Processes

Section 7 – Traditional Knowledge and Environmental Assessment

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Section 12 – Detailed Case Study – Tulsequah Chief Project

 **Glossary, References and Index**

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Cover photo courtesy of Adobe



ABBREVIATION LIST

| | | | |
|-------|---|---------|--|
| ATK | Aboriginal Traditional Knowledge | MoF | BC Ministry of Forests |
| BC | British Columbia | MoTH | BC Ministry of Transportation and Highways |
| BCEAA | British Columbia Environmental Assessment Act | MOU | Memorandum of Understanding |
| CEAA | Canadian Environmental Assessment Act | MSBTC | BC Ministry of Small Business, Tourism and Culture |
| CEA | Cumulative Effects Assessment | Redfern | Redfern Resources Limited |
| DIAND | Department of Indian Affairs and Northern Development | RA | Responsible Authority |
| DFO | Department of Fisheries and Oceans | TK | Traditional Knowledge |
| DOI | U.S. Department of the Interior | TEK | Traditional Ecological Knowledge |
| EA | Environmental Assessment | TRTFN | Taku River Tlingit First Nation |
| EAO | Environmental Assessment Office (in British Columbia) | VEC | Valued Ecosystem Components |
| EC | Environment Canada | | |
| EIS | Environmental Impact Statement | | |
| EMP | Environmental Management Plan | | |
| EMS | Environmental Management System | | |
| EPA | U.S. Environmental Protection Agency | | |
| IK | Indigenous Knowledge | | |
| INAC | Indian and Northern Affairs Canada | | |
| MDAP | Mine Development Assessment Process | | |
| MELP | BC Ministry of Environment Lands and Parks | | |
| MEM | BC Ministry of Energy and Mines | | |

GLOSSARY

Abandonment

The post-closure stage of a project when the site has been fully decommissioned and reclaimed, and the owner has no continuing responsibilities or obligations to the site.

Aboriginal or First Nation's Interests

In the context of environmental assessment, Aboriginal interests are the interests that are specific to each Aboriginal group or First Nation that may be impacted by a proposed project, including but not limited to environmental, cultural, social, and legal interests.

Aboriginal Rights

Aboriginal rights are the customs, practices and traditions that are integral to a First Nation. These rights are recognized and protected under Section 35 of the Constitution Act, 1982. Aboriginal rights vary from group to group depending on the customs, practices, traditions, treaties and agreements that have formed part of their distinctive cultures.

Aboriginal Title

Aboriginal title is an Aboriginal right that is distinct from other Aboriginal rights because it arises when the connection of a First Nation with a particular piece of land is of central significance to the distinctive culture of that land. Aboriginal title is a right of a First Nation to use the land for a variety of activities.

Adaptive Management

A rigorous science-based management approach that requires decision-makers to utilize new data gathered during project implementation to guide decision-making associated with the project.

Action Research

A type of research that combines action or change with research. It is a way of trying out ideas within a group and looking at the results of the actions. It is often done either by people within a organization or with the direct participation of people within an organization. The aim of action research is often to create a change in the way an organization functions.

Aquatic

Fresh water, as in aquatic ecology.

Assessment Framework

A system or tool for organizing actions and concepts to help guide an assessment.

Authorization

Any approval, permit, license granted by a government and required for a project or activity to proceed.

Baseline Information

Information about conditions in the environment or a community prior to a project being constructed.

Biophysical Change

A natural or human-induced change in the state of an ecosystem or culture.

Capacity

The ability to do something. Many factors contribute to capacity in a human organization such as human resources, education, skills, energy, money and time.

Case Studies

Studies of past experiences that illustrate a concept or situation.

Class Screening

A type of assessment used for projects that are routinely done and for which the environmental effects and mitigation measures are well known.

 **GLOSSARY** *continued*
Closure

The stage of a project's lifecycle when the operator of the project permanently or temporarily shuts down the project and leaves the site.

Common Law

Common law is law that is established by the courts rather than through a legislative process. The law is found in court decisions rather than in statutes and regulations. The common law can change over time with new court decisions. Common law, like other laws, can govern the actions of government.

Compliance Monitoring

Compliance monitoring is the process used to check that the terms and conditions of regulatory permits are being met. The requirement for a proponent to collect and analyze water samples from their wastewater system or to measure the levels of air emissions from their processing plant would be an example of compliance monitoring.

Comprehensive Study

A form of environmental assessment conducted under CEAA that comprises a thorough technical review of a proposed project.

Comprehensive Study List Regulations

Describes types of projects that require a comprehensive study under CEAA.

Confidence Limits

These express the degree of certainty an assessor has about his or her conclusions. "Margin of error" is a similar concept. For example, if survey results are reported as being 95% accurate 9 times out of 10, these are the confidence limits of the survey.

Consultation

A process of communication between two parties that seeks to make clear the concerns of the parties about a particular issue and attempts to address or accommodate the concerns so that both parties are satisfied. With respect to Aboriginal rights, a component of the "Sparrow Test" that may be applied by governments to justify infringement of the rights.

Crown

The symbol of authority for the federal and provincial governments.

Cultural Impacts

Impacts on the cultural characteristics unique to an affected community or people.

Cumulative Effects

Two or more environmental effects interacting or combining with each other.

Cumulative Effects Assessment

The assessment of the interacting effects of two or more projects. This term can also refer to the assessment of two different effects of a single project, which interact to form a combined effect on an environmental component.

Data

A group of raw facts or statistics that can be processed or assembled into "information".

Database

A collection of data stored in a systematic manner such that the information can be retrieved. Databases are commonly computerized

Decommissioning

The process of shutting down all physical and processing facilities of a project such as buildings, machinery, plants, roads, pipelines and other infrastructure that was formerly part of the project.

GLOSSARY *continued*

Development Agreement

A written agreed upon arrangement between a First Nation and a proponent about how a project will be carried out and about how the two parties will relate during the life of the project. Other common names for development agreements are: impacts and benefits agreements, protection and benefits agreements, cooperation agreements, or a memorandum of understanding.

Dispute Resolution

A process for resolving disputes between two or more parties.

Ecological Risk Assessment

A procedure to evaluate the likelihood or probability that adverse ecological effects may occur or are occurring as a result of exposure to one or more stressors (e.g., chemicals).

Ecosystem

The system of living organisms (plants, animals, fungi, and micro-organisms), together with their non-living environment (soil, water, air, nutrients) that function together to circulate nutrients, water and energy. This circulation creates biomass, a trophic structure (foodweb), and a change in ecosystem form and function over time. Ecosystems are characterized by composition (species and other components), structure (arrangement of the parts and linkages between them), and function (processes).

Ecosystem Structure

The arrangement of the various parts or components of an ecosystem.

Ecosystem Function

The many living and non-living processes that make an ecosystem work, including biogeochemical processes, nutrient cycling, decomposition, regeneration, and succession.

Effect

A human-induced change in an environmental or social characteristic.

Environmental Assessment

EA is used in the toolkit to mean the assessment of project impacts on the environment. EAs are sometimes referred to as environmental impact assessments (EIAs).

Environmental Assessment Certificate

A certificate of approval-in-principle issued by the ministers for a reviewable project under the British Columbia Environmental Assessment Act (BCEAA)

Environmental Assessment Office (EAO)

the branch of the British Columbia government that coordinates and manages environmental assessments under BCEAA.

Environmental Assessment Report

A document that presents the results of an environmental impact assessment. Environmental assessment reports usually include a project description, baseline description, impact analysis, mitigation measures, residual impact description and determination of significance of impacts.

Environmental Audit

A “snap-shot” survey of the state of the environment or a particular component of it at any given moment in a project’s life-time. A comprehensive assessment of the impacts of a project or business implemented after project startup.

Environmental Effect

Generally, any change in the environment caused by a project or activity, including biophysical, socio-economic and cultural environments.

Environmental Impact Assessment

A process for identifying and evaluating environmental impacts of proposed projects.

GLOSSARY *continued*

Environmental Management Plan

A document describing the environmental management procedures for a particular aspect of a project. For example, a Hazardous Wastes Management Plan might be one of several environmental management plans.

Environmental Management System

A documented system describing in detail how environmental management will be conducted and environmental management plans for a project will be integrated.

Environmental Quality

A characteristic assigned by people to a wide array of qualities deemed desirable or essential to human health and well-being, such as clean air and water, wilderness and wildlife, healthy forests and natural ecosystems, etc.

Exclusion List Regulations

Identifies those undertakings with respect to a physical work that do not require an environmental assessment under CEAA. For example, routine maintenance of existing physical works and construction of small buildings are in the Exclusion List Regulations.

Federal Authority

Under CEAA, includes federal Ministers; departments and agencies of the federal government; federal departments or departmental corporations listed in Schedule I or II of the Financial Administration Act; and bodies listed in regulations under CEAA.

Follow-up Program

A comprehensive environmental audit done at the completion or post-closure stage of a project. Its main purpose is to determine how successful the original environmental assessment was in predicting what would happen, and in prescribing effective management and mitigation measures. Follow-up programs are sometimes referred to as post-project impact assessments.

Grandparented Project

Under BCEAA, a project that would normally be classified as reviewable but does not require an assessment, either because it was started before the regulation came into effect or it was reviewed by another process and granted approval.

Impact

Human-induced change in an environmental, socio-economic, or cultural factor.

Impacts and Benefits Agreement

A bilateral agreement between a First Nation and a project proponent that describes how a particular project in the First Nation’s territory will be managed, how the parties will interact and how the First Nation will benefit economically and otherwise from the project. It is also called a “development agreement”.

Inclusion List Regulations

The Inclusion List Regulations define those projects which are physical activities not relating to a physical work that are be subject of the Canadian Environmental Assessment Act. Physical activities not relating to a physical work are generally projects which are not constructed or built, but nonetheless may have environmental impacts. Low level flying and ocean dumping are examples of activities requiring an environmental assessment under these regulations.

Indicators

A single aspect of part of a system that indicates a change in an environmental condition. For example a change in the abundance of salmon in a stream could be an indicator of a change in the environmental condition of the stream.

 **GLOSSARY** *continued*
Interim Agreement

An agreement that defines the initial working relationship between some or all of the parties involved in an EA up to the point where a longer-term agreement, if desired, can be established. Typically negotiated for the interim or review period prior to when a development agreement negotiated. It may even reference or clarify the process for development agreement negotiations.

Inter-montaine Valley

A valley in between mountains.

Key Questions

Key questions are questions about the potential effects of the project on specific environmental components.

Judicial Review

A court review of a decision of the federal or provincial government.

Land-based Economy

The composite of traditional land use activities and practices that bring income (food and materials) along with spiritual and cultural sustenance into an indigenous household or community.

Law List Regulations

The Law List Regulations outline the federal permits or authorizations that are triggers for the Canadian Environmental Assessment Act. For instance, an authorization required under section 35(2) of the Fisheries Act to harmfully alter fish habitat, is listed under the Law List Regulations, and would trigger CEAA.

Leopold Matrix

A table that plots development activities against environmental variable of concern to determine if there is a potential interaction between them.

Linkage Diagram

A tool in environmental assessment to help identify potential impacts from a proposed project. A linkage diagram visually shows the potential cause and effect pathways between project activities, environmental changes and key questions.

Mediation

A process for resolving disputes that uses a neutral third party to facilitate communication between the disputing parties.

Mitigation

The elimination, reduction or control of the adverse environmental effects of a project.

Monitoring

Measuring variables in the environment to detect change, particularly change caused by a project.

Panel Review

One of four types of environmental assessments under CEAA that is conducted by an independent panel that has been appointed by the Minister of the Environment. The panel conducts a series of public hearings about the project and submits its recommendations to the Minister in the form of a Panel Report.

Own Source Revenue (OSR)

Revenue that a First Nation generates independently of government transfer payments, such as through its economic development initiatives.

Post-project Impact Assessment

Another term for follow-up. Post-project impact assessments are used to determine how successful the original environmental assessment was in predicting what would happen, and in prescribing effective management and mitigation measures.

GLOSSARY *continued*

Precautionary Principle

Taking precautionary action to prevent environmental damage before one has scientific certainty of cause and effect.

Physical Works

Under CEAA, physical works are things such as bridges or buildings that are constructed or manufactured by humans and have a fixed location.

Prescribe

To lay down as a guide, direction or rule of action. Prescribe is used in this toolkit in the context of BCEAA prescribing regulations.

Project

In the context of this toolkit, project is a proposed development activity. Under BCEAA a project is defined as any activity that has or may have adverse effects, or construction, operation, modification, dismantling or abandonment of a physical work. Under CEAA, a project is specifically defined as either an undertaking in relation to a physical work or any proposed physical activity that is not a physical work but is defined as a project for the purposes of CEAA in the Inclusion List Regulations.

Project Information Centre

(formerly called the Project Registry) Under BCEAA, this is an internet accessible database of all projects under provincial review. It provides the status of each review and project-related documents.

Proponent

Person or organization proposing a project.

Public Registry

Under CEAA, the responsible authority must establish a Public Registry for the purpose of facilitating public access to records relating to environmental assessments and operate the Public Registry in a way that ensures convenient public access.

Reclamation

The stage in a project life-cycle when the site is being cleaned up and modified after a project has been shut down to make the site physically and chemically stable and safe. Reclamation sometimes includes revegetation and restoring natural streams and drainages.

Residual Impacts

In an impact analysis, residual impacts are predicted impacts remaining after all mitigation measures have been applied. These are the impacts that are expected to occur if the project proceeds.

Responsible Authority

For projects to which CEAA applies, the federal government department or agency conducting the environmental assessment. The RA is usually the department or agency that has proposed the project or been asked to provide support or approval in the form of funding, land, a permit, a licence or other approval.

Risk Assessment

A procedure to evaluate the likelihood or probability that an adverse effect may occur.

Scoping

In this toolkit, the term scoping is used in several different ways. "Scope of the project" refers to the components of the project that will be included in the EA (e.g., mine site, access road). "Scope of the EA" refers to the factors that the EA will consider, such as, environmental effects and mitigation

Screening

- i. Can be used to refer to the determination of whether or not an environmental assessment is required for a particular project;
- ii. Under CEAA, a screening is one of four possible types of environmental assessments conducted under that Act.

GLOSSARY *continued*

Screening Report

An environmental assessment report summarizing the results of a screening under CEAA.

Significance

In the context of this toolkit, significance is the importance or relative concern related to a predicted residual effect of a proposed project. Under CEAA, the decision about whether or not to allow a project to proceed is based on whether or not there are likely to be significant adverse environmental effects even after mitigation measures have been applied.

Spatial Boundaries

Spatial means pertaining to space. In this toolkit, the term spatial boundaries is used in reference to the geographic boundaries of an EA. A study area would be an example of a spatial boundary.

Statistical Analysis

A collection of procedures used on a particular data collection to determine whether there is a difference between data sets that is larger than would be expected by chance. Statistical analyses are sometimes used in environmental assessment and monitoring to determine if change is occurring, and whether the change is due to natural variability or to a human-caused effect.

Sustainability

The ability of an ecosystem to maintain ecological processes and functions, biological diversity, and productivity over time. Used also to refer to the ability of social and cultural systems to maintain the characteristics that are critical to their survival, well-being, and cultural development.

Synergistic effect

The combined action of more than one thing that causes an effect. If an effect is synergistic, the effect is greater than the sum of the each thing acting independently.

Temporal Boundaries

Temporal means pertaining to time. Temporal boundaries are the time frame associated with EA predictions, a project or an impact. For example, the temporal boundaries for an EA may extend from the date defined as baseline to the many years after project closure. A project may span 15 years but impacts to wildlife might last several years beyond project closure if wildlife continued to avoid an area. Therefore, the temporal boundaries for EA predictions would extend from baseline to 25 years in the future.

Threshold

A critical point or value in the measurement of a variable or indicator which, if exceeded, could result in an adverse effect.

Toxic

Poisonous.

Treaty Rights

Rights that are described in a written agreement (e.g., treaty, land claim or self-government agreement) between a First Nation and the Crown and protected by section 35 of the Constitution Act, 1982.

Valued Ecosystem Components (VEC)

Any part of the environment that is considered important by the proponent, public, scientists or government involved in the environmental assessment process. Importance may be determined on the basis of cultural values or scientific concern. An example of a VEC might be a specific wildlife species, or fish species that the assessment will focus on.

Zones of Influence

Areas on which a project has an impact.

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- Canadian Council of Ministers of the Environment. <http://www.ccme.ca>
- Canadian Environmental Assessment Agency. <http://www.ceaa.gc.ca/>
- Centre for Indigenous Environmental Resources (CIER). <http://www.cier.ca>
- dmoz: impact assessment – for international links. http://dmoz.org/Science/Environment/Impact_Assessment/
- Econetworth: a network for the evaluation of third world EIAs: EIA documents. <http://www.oneworld.org/econetworth/EIAdocs.html>
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- Vegetation Resources Inventory Site. This site has information specifically about the Vegetation Resources Inventory (VRI), including VRI Standards and Procedures and Training Information. At <http://srmwww.gov.bc.ca/tib/vri/index.htm>
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The purpose of this toolkit is to assist First Nations in British Columbia to participate effectively in environmental assessments (EAs). This toolkit is focused on EA processes in BC. However, many parts of this toolkit would be useful to indigenous organizations and communities in Canada and other parts of the world.

This toolkit was prepared by the First Nations Environmental Assessment Technical Working Group (FNEATWG). FNEATWG acts as a resource body on First Nation EA practices for interested First Nations, First Nations organizations, the Environmental Assessment Office and other concerned agencies and organizations.

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