

Citxw Nlaka'pamux Assembly

BC Environmental Assessment Revitalization

REVIEW OF REVITALIZATION DISCUSSION PAPER
TERRITORIAL STEWARDSHIP DEPARTMENT, JULY 2018



“[IT] ALWAYS GOES BACK TO SUSTAINABILITY, WE
NEED TO BE ABLE TO CARRY OUT WHO WE ARE
WITHOUT A RISK OF DEPLETING OUR
RESOURCES.”-NLAKA’PAMUX ELDER

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BACKGROUND

The Citxw Nlaka'pamux Assembly (CNA), is a not-for-profit organization formed by eight Nlaka'pamux Bands for the purposes of administering a Participation Agreement with Teck Highland Valley Copper (HVC) and an Economic and Community Development Agreement (ECDA) with the Province of British Columbia. In 2015 the CNA formed the Territorial Stewardship Department (TSD) as in-house technical expertise relating to the environment and regulatory aspects of the agreements. As the TSD has developed capacity over-time they have also been directed to support the CNA in technical reviews of legislation relating to the department's operations.

In March 2018, the Minister of Environment and Climate Change Strategy announced that the Province would undertake a revitalization of the current Environmental Assessment (EA) process "to ensure the legal right of First Nations are respected, and the public's expectation of a strong transparent process is met." Since the announcement, they have embarked on engagement with First Nations both directly and through workshops facilitated by the First Nations Energy and Mining Council (FNEMC). Further to this, EAO has engagement with stakeholder groups and also formed an EA Advisory Committee as an independent forum to provide recommendations. The revitalization process is detailed in Appendix I.

In June, a discussion paper was released for public comment which highlighted common themes heard throughout the aforementioned engagement. The CNA TSD has conducted a review of the paper, focusing on the questions posed within the document. The review has been organized to align with the key themes/sections and questions posed within the discussion paper and makes reference to specific sections in the paper for further detail. The TSD anticipates further engagement and recommendations as the revitalization process progresses.

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REVITALIZATION FOCUS

FOCUS ON PUBLIC CONFIDENCE

The revitalization of EA should ensure that public confidence and meaningful participation are achieved. The discussion paper highlights several activities they are considering to support this including: clarity in legislation about the framework for EA, public participating funding, transparent posting of project information, decision criteria and decision rationale, and project materials being provided in an accessible way (e.g. plain language). The full activities list can be found on pg. 8 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- Do these proposals support public confidence in EA and ensure meaningful participation?
- What should be included in a purpose section of the EA Act?

TSD RECOMMENDATIONS:

- **The TSD agrees that activities proposed in the paper are in support of increasing public confidence and meaningful participation.**
- **Transparency is key and it is important that not only project information be shared but also the process and rationale for decisions made around whether to provide an EA certificate or not.**

FOCUS ON RECONCILIATION

The revitalization of EA is being approached in a way that focuses on advancing reconciliation with First Nations, this includes the implementation of the UN Declaration on the Rights of Indigenous Peoples. Activities proposed include: recognition of indigenous-led EA, dispute resolution processes, inclusion of indigenous knowledge, early engagement, development of collaboration-type agreements, and timely funding. Full activities can be found on pg. 9 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- What types of agreements or arrangements would need to be in place at the technical level for consensus-based processes between EAO and Indigenous nations to be effective?
- At what points in the process are decisions i.e., free, prior informed consent from indigenous governing bodies required?

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TSD RECOMMENDATIONS:

- **Agreements around timely information sharing and capacity funding or key to ensuring that technical level consensus-based processes between EAO and Indigenous nations can be achieved. The exact terms and details of these agreements/arrangements may differ from nation to nation.**
- **EAO should work with Indigenous nations in order to determine key process milestones for decision making. Determination of this should be driven by the Indigenous nation.**
- **EAO should ensure that the space is clearly made in legislation and regulation for Indigenous-led assessments.**
- **Engagement with EAO and other regulatory agencies needs to happen in the appropriate manner. For example, the Discussion Paper was circulated for review during a time that many First Nations are often busy on the land gathering traditional resources and is not an ideal time to engage on legislation that has potential to impact a First Nation's rights and interests.**
- **It needs to be recognized that the proposed project/activities that are reviewable have potential to impact section 35 rights and that they cannot necessarily be "lumped" into the environment. As such there needs to be an understanding of how impacts to or "displacement" of rights will be dealt with, with respect to reviewable projects or otherwise.**
- **Shared-decision making and recognition of Indigenous decision making is key. The onus should not always be on the Indigenous nation to bring a case to court due to lack of recognition of rights and title or adequate assessment (reconciliation includes respect of Indigenous law, title, rights and processes). Therefore EA revitalization should seek to integrate these concepts or provide a clear linkage between the EA process and Indigenous nations' processes.**
- **EAO should seek to understand how they can operationalize BC's "Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples," in the revitalized EA process.**

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FOCUS ON THE ENVIRONMENT, SUSTAINABLE PROJECT APPROVALS

EAO is considering activities to revitalize EA that will produce decisions that protect the environment and offer clear pathways to sustainable project approvals. Activities being considered include: cumulative effects assessed in all EA and are informed by established frameworks as well as regional considerations, resourcing for regional/strategic assessments to inform individual project assessments, assessments will include consideration of risk and uncertainty. All activities can be found on pg. 11 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- Do these proposals support protecting the environment and offering clear pathways to sustainable project development?
- How would you apply sustainability criteria and precautionary principle in the context of EA?

TSD RECOMMENDATIONS:

- **Criteria should consider an Indigenous nation's ability to carry out culture, rights and traditions on the land, and the sustainability of the land to provide for intergenerational teachings.**
- **Regional and strategic level assessments should seek to include management plans, stewardship policies etc. from Indigenous nations in the region in question.**

PROCESS CERTAINTY AND PREDICTABILITY

The EA revitalization will provide a clear understanding of roles in EA as well as a process that provides certainty and predictability. Activities identified to provide certainty and predictability include: clarity to proponents about whether a project will be assessed, early communication of assessment costs to proponents, early identification of issues, details on process, timelines, information requirements and roles, clear stage timelines, promotion of the one project, one assessment concept, and interaction between EA and permitting clarified. All activities associated with process certainty and predictability can be found on pg. 12 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- Do these proposals support process certainty and predictability of the EA process?

TSD RECOMMENDATIONS:

- **Ensure that EA timelines are clear but allow for adequate planning between EAO and Indigenous jurisdictions.**

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- **Funding from the Provincial/Federal government to support Indigenous-led Territory/regional land planning that clearly identifies cultural areas closed to development. Supports identifying an irreconcilable projects early on.**
- **Early engagement between proponents and Indigenous nations to support early identification of substantive issues.**
- **Timely capacity funding for Indigenous nations.**

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THE REVITALIZED ENVIRONMENTAL ASSESSMENT PROCESS

WHAT PROJECT GETS ASSESSED

EA will be revitalized to ensure that projects that have the potential to result in adverse effects will be assessed; specifically, there was mention of moving away from production capacity-based outputs to criteria more reflective of potential adverse effects. Activities to support this include: clarifying reviewable project regulation, identification of projects and activities that should be reviewable, identifying appropriate triggers and thresholds, including regional considerations, consideration of request from Indigenous nations for reviewable projects. Full details of ideas being considered can be found on pg. 14 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- What are key topics to consider in the upcoming consultation on the reviewable project regulation?
- What criteria should be applied for designation projects not on the list as reviewable?

TSD RECOMMENDATIONS:

- **Criteria and thresholds for what projects and activities get assessed needs to be engaged on with Indigenous nations to ensure that impacts are adequately considered.**
- **A clear mechanism for Indigenous nations to request a project or activity be opted into the EA process needs to be developed.**
- **Thresholds should be expanded to consider other qualifying factors such as cumulative effects.**
- **Criteria should consider cultural effects and aboriginal rights and interests.**

PROPOSED ENVIRONMENTAL ASSESSMENT PROCESS

The discussion paper highlights eight phases associated with EA (Appendix II):

- Early Engagement
- Readiness Gate
- Process Planning
- Application Development and Review
- Effects Assessment
- Recommendation
- Decision
- Post Certificate

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The paper also references building blocks, which should be in place to support a strong foundation for EA. This includes regulatory and regional contexts as well as related cumulative effects information. EAO is looking for insight into what timelines, if any, should be applied to each phase.

TSD RECOMMENDATIONS:

- **Timelines need to ensure that there is adequate time for planning, coordination, resourcing on the part of the impacted Indigenous nation.**

BUILDING BLOCKS

EA revitalization recognizes that there are important building blocks that should feed into the EA process, these include: Indigenous relationships, improved information and data, strategic and regional assessments, relationship between EA and permitting, and priority provincial government initiatives. More details on these building blocks can be found on pg. 16 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- Are these the right building blocks needed to support a clear, effective EA process? Are there others?

TSD RECOMMENDATIONS:

- **Indigenous nations' strategic plans, land use plans, policies, assessment frameworks etc. should also be considered as building blocks.**

EARLY ENGAGEMENT

The Discussion paper proposes several key features to be considered for early engagement in the EA process including: earlier engagement with First Nations, earlier project descriptions to support engagement, early discussion around timelines. More details on the key features can be found on pg. 17 of the discussion paper.

EAO DISCUSSION PAPER QUESTIONS:

- What feature are needed to support an early understanding of project issues and opportunities?

TSD RECOMMENDATIONS:

- **Early engagement that identifies capacity/funding needs of Indigenous nations, as well as responsibilities and roles throughout the EA.**

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- **Early engagement to determine how Indigenous nation wants to proceed with assessment (independent, collaborative etc.) to support developing Assessment Plan identified in the Process Planning phase (pg. 8).**
- **Engagement needs to happen in a manner that is appropriate/meaningful for the Indigenous nation being engaged.**
- **Engagement should be approached in a manner that recognizes Indigenous decision making (i.e. not just duty to consult but shared decision making).**
- **Project description should include recognition of Indigenous lands and traditional knowledge.**

READINESS GATE

The Discussion Paper proposes a stage called the Readiness Gate, which would serve as a key decision point on whether a project would enter the EA process. This is specific to the EAO and Indigenous nations and will provide an opportunity for the identification of key issues that need to be addressed. Key proposed features of this phase include: Indigenous nations and EAO determining adequacy of early project description, evaluation of adequacy of proponent's engagement, early decision on irreconcilable projects, dispute resolution. More detail on this phase can be found on pg. 18 of the Discussion Paper.

EAO DISCUSSION PAPER QUESTIONS:

- What factors/criteria should be considered for this decision?

TSD RECOMMENDATIONS:

- **There needs to be a clear criteria set out for assessing the adequacy of proponents engagement and penalties associated with not carrying out adequate engagement (i.e. engagement with Indigenous nations cannot be an exercise in "box-ticking").**
- **Funding from the Provincial/Federal government to support Indigenous-led Territory/regional land planning that clearly identifies cultural areas closed to development. Supports identifying an irreconcilable projects early on.**

PROCESS PLANNING

The Process Planning phase will take place before commencing an EA, and will set out the scope, procedures and methods for the EA in an Assessment Plan. This includes alignment with Indigenous decision making processes and Indigenous-led assessments (including funding, timelines etc.). Key features of this phase include: project specific application information requirements, assessment plan will outline how the proponent will develop its application and how the review will take place, identification of specific engagement and tools, phase would take place in 180 days.

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BC EAO DISCUSSION PAPER QUESTIONS:

- What needs to be included as part of the Assessment Plan?

TSD RECOMMENDATIONS:

- **Ensuring clear linkages to Indigenous-led processes and assessment and project milestones.**
- **Community engagement type plans can be developed to support timely and appropriate engagement.**
- **Information requirements to be collaboratively developed with Indigenous nation to ensure adequate information for decision making and assessment.**

APPLICATION DEVELOPMENT AND REVIEW

EA revitalization will seek to ensure that application development and review is iterative and provides for a participatory approach. Key features proposed to support this approach include: earlier review of application, collaborative development of application between proponent and Indigenous nations, iterative development of application to ensure timely considerations from government agencies and Indigenous nations. More detail on the Application Development and Review phase can be found on pg. 21 of the Discussion paper.

BC EAO DISCUSSION PAPER QUESTIONS:

- What else would give you confidence in the data and studies that inform EA?

TSD RECOMMENDATIONS:

- **TK integration consideration throughout assessment process and application development.**
- **Clear linkages to Indigenous-led processes to ensure an iterative approach and timely consideration of any concerns that arise through application development.**

EFFECTS ASSESSMENT AND RECOMMENDATIONS

EA revitalization seeks to ensure that a robust approach is applied to effects assessment that incorporates expertise from government, independent experts and Indigenous nations. Activities proposed to support this include: assessments including information to support both government and Indigenous decision makers, opportunity for Indigenous-led assessments, collaborative development of conditions, recommendations as provided for in the Assessment Plan, legislated decision criteria, assessment phase would range from 100-200 days. More detail on the Effects Assessment and Recommendations phase can be found on pg. 22 of the Discussion Paper.

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BC EAO DISCUSSION PAPER QUESTIONS:

- What else would give you confidence in the assessment and recommendations that inform the EA decision?
- How would you like to be engaged in this stage?

TSD RECOMMENDATIONS:

- **Assessment should be approached in a manner that creates the space for the affected Indigenous nation to assess impacts to Rights and Title from the proposed project/activity in a way that aligns with their own law, traditions, knowledge.**
- **It needs to be recognized that the proposed project/activities that are reviewable have potential to impact section 35 rights and that they cannot necessarily be “lumped” into the environment.**
- **Cumulative effects assessment to consider impacts to the rights, values and interests of Indigenous nation.**
- **Opportunity for Indigenous nations to develop conditions based in their own law and tradition.**

DECISION

EA revitalization will seek to provide for consistency between provincial and Indigenous decisions about EA outcomes. Potential key features to support this include: collaboration throughout EA process as provided by in the Assessment Plan, Indigenous decision-making, time-bound dispute resolution, legislated decision making factors and criteria for transparency, decisions would occur within 45 days. More detail on the Decision phase can be found on pg. 23 of the Discussion Paper.

BC EAO DISCUSSION PAPER QUESTIONS:

- What factors/criteria should be applied in the decision to issue a certificate?

TSD RECOMMENDATIONS:

- **Indigenous decision making needs to be recognized here.**
- **There needs to be transparency around how decisions are made.**
- **Needs to be a clear understanding of how Aboriginal Rights and Title will be addressed in decision. How will this fit with *Canadian Environmental Assessment Act* amendments, Crown relations and section 35.**

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POST CERTIFICATE

Post certificate monitoring ensures that potential effects on values assessed does not exceed what was accounted for in the certificate's conditions. Key features to support this include: enhanced linkages to other agencies, modernized compliance and enforcement regime, opportunity for co-administration with Indigenous nations, compliance and enforcement on all EA certificate conditions. Full detail on the Post Certificate phase can be found on pg. 24 of the Discussion Paper.

EAO DISCUSSION PAPER QUESTIONS:

- What else should be done to ensure projects are in compliance with their certificates?

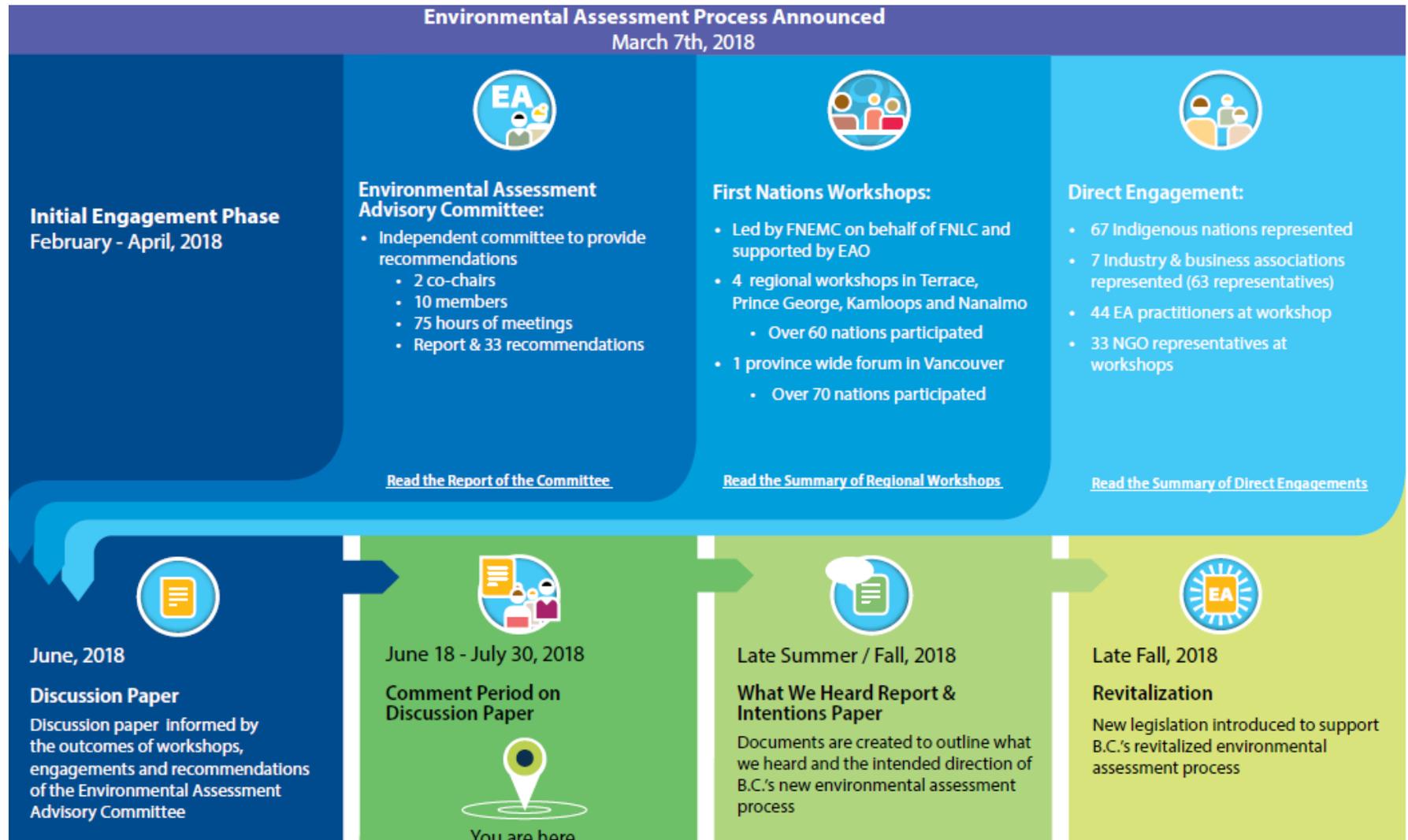
TSD RECOMMENDATIONS:

- **Capacity funding for Indigenous nations to participate in compliance monitoring.**

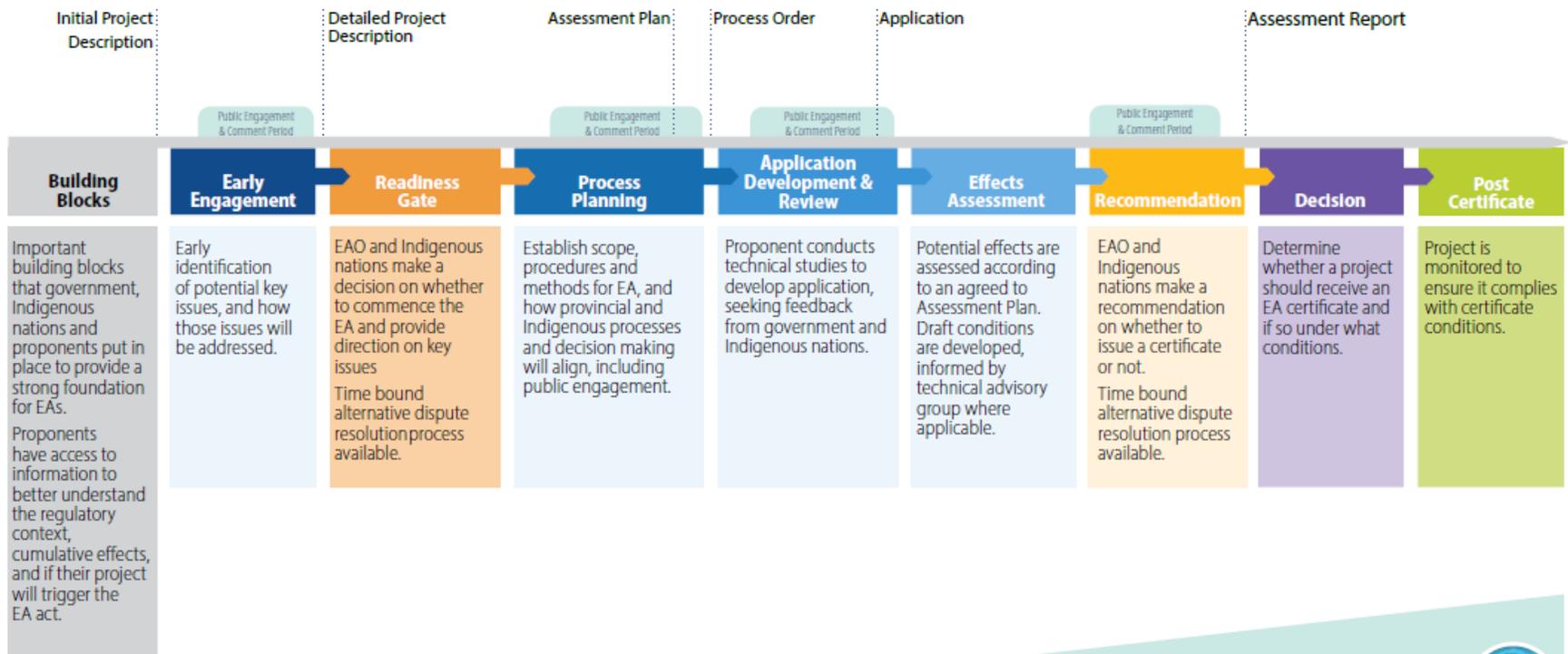
NEXT STEPS

This document provides the CNA TSD's technical comments and recommendations relating to the key topics and question provided for in the BC EAO Discussion Paper. As revitalization activities progress into the fall the TSD recommends engagement between EAO, technical staff and CNA leadership.

Appendix I: BC EA Revitalization Process



Appendix II: Proposed EA Phases



Consensus among parties increases as process progresses, consistent with the United Nations Declaration on the Rights of Indigenous Peoples

