

# Guide to Consensus-Seeking under the *Environmental Assessment Act, 2018*

VERSION 1.0

APRIL 2020

ISSUED BY:



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**EAO**

Environmental  
Assessment Office

This document provides guidance to help environmental assessment participants and the public better understand British Columbia's environmental assessment process. It is not advice and does not replace requirements of the *Environmental Assessment Act, 2018* or its regulations, or bind any decision-maker.

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## 1.0 INTRODUCTION

### 1.1. Background

The *Environmental Assessment Act, 2018* (the Act) establishes that one of the purposes of the Environmental Assessment Office (EAO) is to support reconciliation with Indigenous peoples in British Columbia by:

- Supporting the implementation of the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UN Declaration);
- Recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision-making in matters that would affect their rights;
- Collaborating with Indigenous nations in relation to reviewable projects, consistent with the UN Declaration; and
- Acknowledging Indigenous peoples' rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision-making under this Act.

#### Links:

[Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples \(Draft Principles\)](#)

[United Nations Declaration on the Rights of Indigenous Peoples](#)

[Free, Prior and Informed Consent within the context of UNDRIP and Environmental Assessments](#)

The Act also reflects the [Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples](#).

The EAO will seek to engage with Indigenous governments through collaborative approaches to assessing proposed projects in support of Indigenous and provincial decision-making. This engagement will recognize the inherent jurisdiction and authority Indigenous leaders have over their communities concerning major projects. A goal of this engagement is to build shared understanding of the Indigenous nation's history, culture, traditions and connection to the land and resources. This includes how the Indigenous nation has determined its priorities, visions, governance and land use planning aspirations into the future.

The EA process is designed to support Indigenous nations in making informed decisions in relation to projects that may affect them. This is an objective that all environmental assessment (EA) participants should be working to achieve, by working together in good faith and seeking to achieve mutually acceptable solutions that are built upon consensus<sup>1</sup>. For more information on the application of free, prior and informed consent within the EA context visit [here](#).

The Act seeks to incorporate consensus-seeking throughout the EA process, rather than through a single action or point in time. This approach is also consistent with the United Nation's interpretation of free, prior and informed consent which emphasizes the importance of the process of dialogue and negotiation over the course of a project from planning to implementation<sup>2</sup>. Consensus-seeking occurs through the EA Readiness Decision, Process Planning, Application Development and Review, Effects Assessment, and Recommendations and Decision phases. Under the Act, the provincial

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<sup>1</sup> Human Rights Council. 2018. Free, prior and informed consent: a human rights-base approach, study of the expert mechanism on the Rights of Indigenous Peoples. Thirty-ninth session, 10-28 September 2018, Agenda items 3 and 5.

<sup>2</sup> Human Rights Council. 2018. Free, prior and informed consent: a human rights-base approach, study of the expert mechanism on the Rights of Indigenous Peoples. Thirty-ninth session, 10-28 September 2018, Agenda items 3 and 5.

Minister must consider notifications by a participating Indigenous nation of their consent or lack of consent at the Readiness Decision stage (when a project may be terminated or exempted), or in advance of the decision by Ministers regarding whether to issue an Environmental Assessment Certificate (EA Certificate).

The EAO will seek to engage with participating Indigenous nations in a consensus-based relationship on all phases of the EA as it pertains to the interests of the Indigenous nation. The objective of consensus-seeking is to address issues of concern in a timely manner, consistent with the timelines under the Act, at the appropriate phase of the EA process and in a manner that is mutually agreeable. Through consensus-seeking, EAO will seek to meet the needs of Indigenous communities and other British Columbians, and work to ensure that decision-makers are fully informed.

## 1.2. Purpose of this Guidance

The Act allows for different approaches to consensus-seeking which recognize and seek to uphold the objectives of the UN Declaration. These approaches may vary based on the participating Indigenous nations involved, the nature of the projects, and the potential effects of the project on the nation.

Recognizing that consensus-seeking will not look the same for all participating Indigenous nations, this high-level guidance outlines processes for working together that can be adapted and tailored according to specific project effects on Indigenous nations and the specific governance and decision-making requirements of a participating Indigenous nation. This guidance is intended to support EAO staff and participating Indigenous nations in undertaking an effective and transparent approach to consensus-seeking throughout the EA process by:

- Explaining consensus-seeking in the context of the Act;
- Identifying consensus-seeking requirements at key EA milestones in relation to the timelines set out in the Act;
- Outlining consensus-seeking activities that support achieving consensus and alignment of Indigenous and provincial decision-making at each phase of the EA process;
- Providing tools for documenting and communicating consensus-seeking activities and outcomes; and,
- Identifying methods for resolving issues where consensus is sought but not achieved, prior to utilizing Dispute Resolution facilitation under the Act.

Proponents may use this guidance to better understand the consensus-seeking requirements of the EA processes that apply to the EAO and participating Indigenous nations. The EAO encourages proponents to build collaborative relationships with Indigenous nations as early as possible, seek to address their interests and contribute to consensus-seeking activities, where appropriate. Collaboration amongst all participants is essential for a transparent and timely EA process.

## 2.0 TERMINOLOGY

In order to promote a clear and fair process to all participants, the EAO has developed terminology with respect to consensus-seeking through collaborative engagement with Indigenous nations during the development of the Act. Participating Indigenous nations may also have their own approaches to consensus-seeking or terminology that is specific to their nation. EAO will seek to understand and align approaches and terminology where possible, in order to avoid diverging views on whether consensus has been reached.

## 2.1. Consensus

Consensus is achieved when an action is supported by a participating Indigenous nation and the EAO; or at least is not objected to by a participating Indigenous nation. Neither supporting an action during an EA process, nor choosing not to object to it, precludes the nation from deciding to provide notification to the Chief Executive Assessment Officer (CEAO) of its consent or lack of consent.

## 2.2. Seeking Consensus

Consensus-seeking activities are undertaken through cooperation between the EAO and representatives of a participating Indigenous nation in an effort to achieve consensus on process decisions or recommendations. Seeking consensus throughout the EA is foundational to free, prior, and informed consent. Processes that seek consensus:

- Inform, but are distinct from, a decision by a participating Indigenous nation to provide notification of their consent or lack of consent at the conclusion of an EA process;
- Inform, but are distinct from, a decision by a statutory decision-maker under the Act; or,
- May be informed by, but are in addition to, Indigenous participation in any Technical or Community Advisory Committee.

Consensus-seeking can be approached by working together throughout the EA process to seek solutions that meet the needs of all participants and support a nation in making an informed decision regarding consent.

By the end of each phase of the EA, points of consensus and non-consensus, and actions taken to attempt to reach consensus and the outcome(s) will be documented. By that time, it may be that issues:

- have been resolved;
- are being carried forward to a subsequent EA phase for further consensus-seeking or may be carried forward to a subsequent regulatory process;
- are out of scope of the EA and may be better addressed through other avenues;
- have not achieved consensus and will not be addressed in later phases of the EA; and,
- may require Dispute Resolution.

## 2.3. Consent

A desired outcome of consensus-seeking through the EA process, is to fully inform an Indigenous nation's decision on consent. While consensus may not be reached on every issue, consensus-seeking can help the EAO and participating Indigenous nations identify the issues that the nation requires resolution to, in order to make an informed decision. It is relevant to note that:

- Participating Indigenous nations make decisions on consent based on their own laws and traditions; this is an expression of their right to Indigenous self-determination and self-government;
- Consensus-seeking is a process that, under the Act, takes place at many stages of an EA;
- Consensus-seeking should be distinguished from a notification of consent or lack of consent under the Act, which results from the informed decision made by a participating Indigenous nation at a specific point in time;
- Consensus-seeking and a notification of consent are related as the collaborative and iterative process of consensus-seeking supports an informed decision by the Indigenous nation regarding consent;
- A participating Indigenous nation may choose to provide a notification of consent or lack of consent and reasons

(through the authorized representative of the participating Indigenous nation) and following the nation's own governance and procedural requirements. This notification would typically take the form of a letter provided by the Indigenous nation that states its position on consent and provides reasons for the participating Indigenous nation's decision, to assist decision-makers in understanding the notification; and,

- Provincial decision-makers are required by the Act to consider the notification of consent or lack of consent provided by participating Indigenous nations before making their decisions.

The scope of this guidance document does not include an interpretation of s. 7 of the Act and how any agreements under s. 7 of the Act would function in relation to the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act). Both pieces of legislation provide the Province and Indigenous nations with additional tools to build effective relationships and clear processes that support transparent, cooperative and staged approaches to making decisions on matters that affect Indigenous peoples and their rights. As an example, agreements can be developed under the Declaration Act, through a comprehensive or treaty mandate by Cabinet and these agreements may contain a requirement for consent regarding environmental assessment projects. In these cases, the consent requirement under s. 7 of the Act would be enabled.

## 3.0 APPLYING CONSENSUS-SEEKING

### 3.1. All EA Phases

The EAO will work to seek consensus with participating Indigenous nations throughout the EA process as defined in the Act (Figure 1). Consensus-seeking activities contribute to predictable and timely assessments that aim to address the interests of participating Indigenous nations. Consensus is an outcome that can be achieved by engaging in meaningful, collaborative activities that support the sharing and analysis of information to inform decision-making.

Consensus-seeking generally occurs between technical staff who work on behalf of the participating Indigenous nation and EAO staff. EAO will engage in consensus-seeking with the participating Indigenous nation through the representative who has been chosen by the Indigenous nation to represent their interests.

There are many activities that support consensus-seeking that may be applicable to all phases of an EA. Some examples of these activities that support the requirements of the Act include:

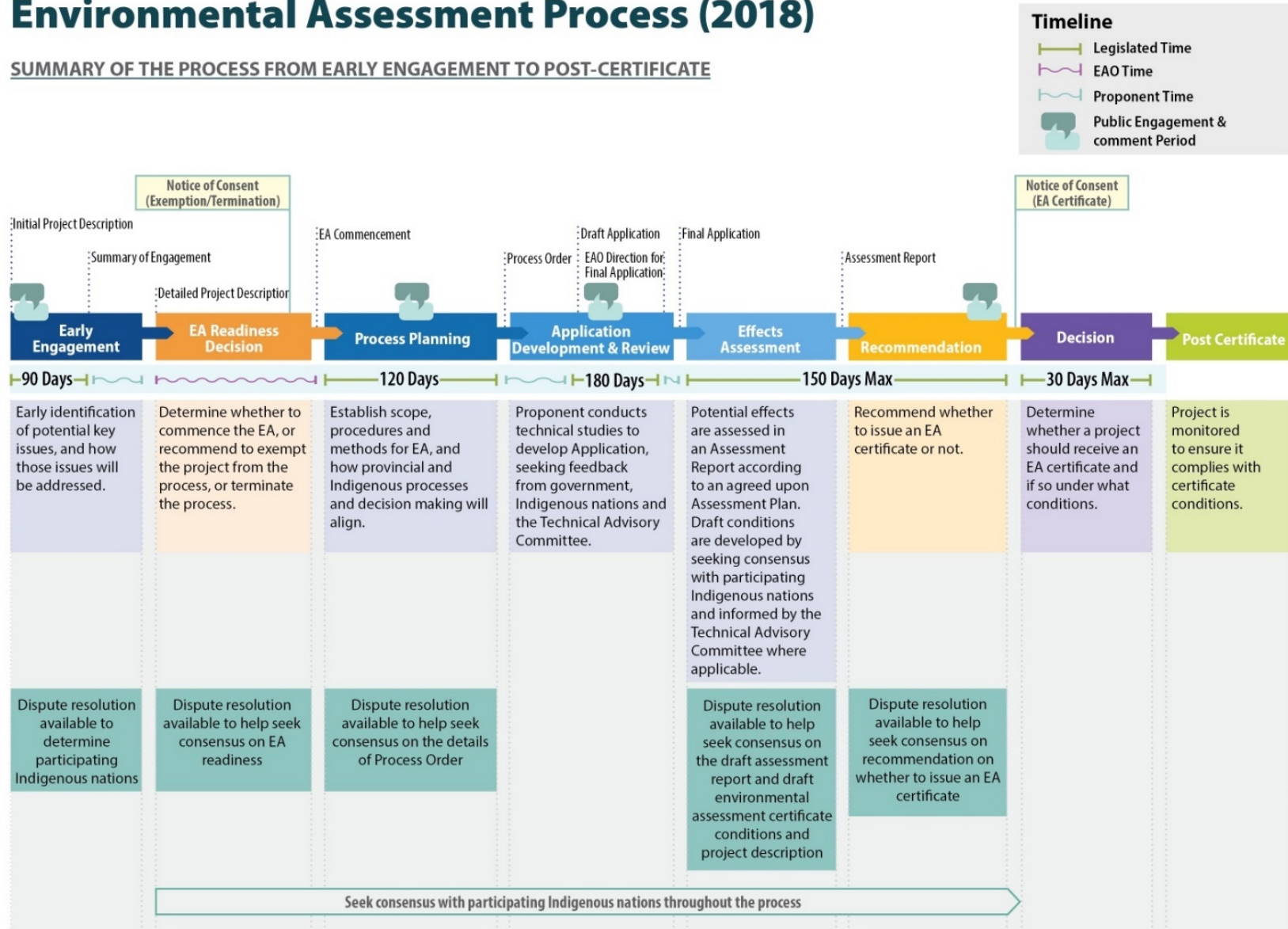
- Meetings, including community meetings and meetings of technical experts, relating to both technical or process-related matters;
- Documenting points of consensus and non-consensus using an appropriate consensus tracking tool;
- Identifying the participating Indigenous nation's internal process and decision-making steps and the timing of these steps at each phase of the EA;
- Undertaking a comprehensive review of consensus and non-consensus points at the end of each phase of the EA process to allow for the ongoing and iterative resolution of issues through a clear identification of the steps required to achieve resolution; and,
- Establishing collaborative working groups that allow for consensus-seeking to provide the opportunity for issues-resolution prior to Dispute Resolution (if applicable) and where appropriate, sharing the outcomes of this consensus-seeking with other Provincial agencies to inform subsequent regulatory processes.

Sections 3.2 – 3.5 of this Guide describe the focus of consensus-seeking at each phase of the EA process. The Act includes additional consensus-seeking requirements outside of the standard EA process (Appendix A), for example on amendments, that will be addressed on an individual basis.

Figure 1: Environmental Assessment Process and Timelines

# Environmental Assessment Process (2018)

## SUMMARY OF THE PROCESS FROM EARLY ENGAGEMENT TO POST-CERTIFICATE





## Objective and Outcomes of Consensus-Seeking

Consensus-seeking activities at the relevant phases of the EA process are intended to:

- function together in a cumulative manner, so that consensus-seeking activities in each EA phase build upon the previous phase and inform the next;
- ensure that appropriate efforts are made to resolve issues at the most suitable phase of the EA and avoid inefficiencies such as revisiting the same issue numerous times;
- support ensuring issues raised by Indigenous nations are understood and, where not able to be addressed in an EA process, they are recorded to be communicated with other parties, such as subsequent permitting agencies;
- build trust that the EA process, in its entirety, adequately considers Indigenous interests; and
- seek to ensure that Indigenous nations are fully informed of how a project may affect them so that they can make an informed decision regarding consent.

The EAO will take appropriate steps to ensure that participating Indigenous nations understand how a project may affect them and that concerns expressed by Indigenous nations have been fully considered and appropriately addressed. The steps, process, and outcomes of, consensus-seeking will be documented in a mutually acceptable manner, with consideration for the governance and decision-making requirements of participating Indigenous nations and the EAO.

At the conclusion of each phase of the EA process in which consensus must be sought, the EAO will document: the consensus-seeking activities undertaken; the points where consensus was reached; the points where consensus was not reached; and a summary of the unresolved issues to be brought forward to the next phase of the EA process. It should be noted that a lack of consensus on matters determined during previous phases of an EA should not deter the EAO and participating Indigenous nations from seeking consensus on other matters at later stages.

Documenting matters of consensus and non-consensus at each EA phase is important to ensure that matters are addressed at the most suitable point in the EA process; provide clarity for all parties regarding when consensus-seeking on specific matters has concluded, allowing for the EA process to move forward while avoiding re-opening issues that have been addressed; and identify which issues may require further consensus-seeking during subsequent EA phases. Matters of consensus and non-consensus will be also documented in the final Assessment Report to inform both Indigenous and provincial decision-makers.

There are several potential ways that issues expressed by a participating Indigenous nation may be addressed:

### **1. Consensus is reached between the participating Indigenous nation and the EAO – issue resolved**

In this case, the EAO and the participating Indigenous nation resolve the issue(s) in a mutually acceptable manner. Details about the issue(s) and the agreed to resolution will be recorded by the EAO to ensure Indigenous and provincial decision-makers are fully informed about these resolved issues.

### **2. Consensus between the participating Indigenous nation and the EAO that the issue is better resolved at a later stage of the regulatory process – issue carried forward to next EA phase or to a subsequent regulatory process**

In some cases, issues may arise that cannot be resolved until a later phase of the EA process or potentially, through a subsequent regulatory process (i.e. permitting) or government initiative. In these cases, the issues should be documented for resolution at a later EA stage or regulatory process. This is to ensure the issues are not missed, to document the consensus that the project can proceed to the next EA phase, even though some issues will be carried forward to facilitate meeting the timelines specified in the Act. The EAO will work with participating Indigenous nations and provincial agencies to identify matters that may be better or further addressed during permitting. These matters may be documented in the Regulatory Coordination Plan for further consideration during these processes.

The Regulatory Coordination Plan will also be provided to decision-makers at the conclusion of the EA process (see the Process Planning Policy for more information on the Regulatory Coordination Plan, found [here](#)).

**3. Consensus between the participating Indigenous nation and the EAO that the issue is better resolved through a broader process or approach – issue moved to outside EA process**

In some cases, important issues may be brought forward by the participating Indigenous nation during an EA process that are outside the scope of the EA or go beyond project impacts and cannot be resolved through the EA process. In these instances, the EAO and participating Indigenous nations may seek to work with other agencies or parties to identify broader approaches or processes for resolving these issues. These issues and any solutions identified, or commitments made, will be documented by the EAO in the Regulatory Coordination Plan.

**4. Consensus is not reached between the participating Indigenous nation and the EAO – issue closed and will not affect consent provision**

In some cases, despite reasonable efforts to identify mutually acceptable solutions, the EAO and a participating Indigenous nation may not reach consensus. In these instances, Dispute Resolution may be available to the EAO and Indigenous nation. If Dispute Resolution is available and is utilized but does not result in consensus, the EAO and Indigenous nation should document the issue and include reasons for why the issue remains unresolved. If the issue does not require resolution in order to determine whether or not consent can be provided, this should be documented as well. Issues that are closed off in this manner will not require further consensus-seeking during the EA process.

**5. Consensus is not reached between the participating Indigenous nation and the EAO – issue documented and will affect consent provision**

The EAO and participating Indigenous nations will work to avoid this outcome and it is the objective of the EAO to reach consensus with participating Indigenous nations where possible. After reasonable efforts are made to identify mutually acceptable solutions, while respecting the timelines within the Act and following Dispute Resolution (if available and utilized), the EAO and Indigenous nation should document the issue and include reasons for why the issue remains unresolved. Any referral to decision-makers should clearly articulate the outstanding issues, each party's views on the issue, and the steps taken to resolve the issues.

## 3.2. Early Engagement and Readiness Decision

### Early Engagement

During Early Engagement, the EAO will discuss with participating Indigenous nations approaches to working together in the EA process (which will typically be articulated subsequently in the Process Order). For more information on how the scope of engagement is determined, please see the Early Engagement Policy, found [here](#).

As early as possible and during the 90 days between when the EAO posts the Initial Project Description and the time when the EAO provides a Summary of Engagement to the proponent, under s. 13(5) of the Act, to guide the development of a Detailed Project Description, the EAO and participating Indigenous nations should also seek to reach a shared understanding of an

#### Relevant Section(s) of the Act:

Section 13: Initial Project Description and Engagement Plans

Section 14: Participating Indigenous nations

Section 16: Recommendation whether to proceed with assessment

Section 17: Minister's decision whether to terminate a project

Section 18: CEAO's Decision on Type of Assessment

Section 5: Dispute Resolution

Indigenous nation's priorities, governance mechanisms, connection to the land and interests in the project area (referred to as an "understanding of interests") in order to:

- Identify specific procedural requirements of the Indigenous nation for EAs, including Indigenous governance and decision-making requirements (including processes and information requirements);
- Identify any processes or governance agreements entered into by Indigenous nations with respect to working together in areas of overlap or shared territory;
- Develop a deep understanding of a nation's unique connection, past and future uses of the project area or interests that may be affected by the project; and,
- Apply the outcomes of these collaborative discussions towards an understanding of the nation's governance of their rights and interests that could be affected by the project.

The understanding of interests will inform decisions respecting the conduct of the assessment and the interests that will be the focus of consensus-seeking at each EA phase. The information needs, process requirements, and decision-making processes that are identified will be further discussed during the Process Planning phase and confirmed through the Process Order.

During Early Engagement, the EAO and participating Indigenous nations should also seek to reach an understanding of the specific information that the nation requests to be in the Detailed Project Description (DPD). Overall collaboration between the EAO, proponents, and participating Indigenous nations, leading up to and during Early Engagement sets the foundation for consensus-seeking in later EA phases.

### Readiness Decision

The Readiness Decision phase begins when the proponent submits the DPD.

The EAO will seek consensus with participating Indigenous nations, within applicable timelines on which of the options under s. 16(2) and 18 under of the Act should be exercised:

1. Require that the proponent prepare a revised DPD;
2. Proceed to an EA;
3. Refer to the Minister with recommendation that an assessment body conduct the assessment under s. 24;
4. Recommend that the Minister exempt the project from the requirement for an EA; or,
5. Recommend that the Minister order that the project may not proceed (i.e. terminate the project from the process).

It is important to emphasize that all of these options will be considered at this stage, and must be the subject of consensus-seeking with participating Indigenous nations. If consensus cannot be reached before exercising one of the options (1-5) above, Dispute Resolution is available. For more information refer to the Readiness Decision Policy, found [here](#).

In the case where a proponent is seeking an exemption order, in addition to the consensus-seeking on the options set out above, the CEAO will seek consensus with the participating Indigenous nation, within applicable timelines, regarding the Recommendations Report prepared to inform the Minister's decision on the exemption order.

In cases where potential extraordinarily adverse effects have been identified, including through the Summary of Engagement, or where a project is clearly incompatible with a government policy, in addition to the consensus-seeking on

the options set out above, the CEAO will seek consensus with participating Indigenous nations, within applicable timelines, regarding the Recommendations Report prepared to inform the Minister's decision on the termination order.

The Act requires that the Minister consider any notification by a participating Indigenous nation with respect to their consent or lack of consent to an exemption or termination order. If the Minister decides to issue an exemption or termination order and a notification received from a participating Indigenous nation indicates a lack of consent to the issuance of the order, the Minister must provide reasons for why the decision to issue the order was made.

#### Key focuses of engagement during Early Engagement and the Readiness Decision Phases to support consensus-seeking:

- **Roles and responsibilities during the EA Process:** The EAO and participating Indigenous nations should collaboratively begin to discuss requirements for the EA process. This will include: timelines, roles and responsibilities; requirements for any assessment conducted under s. 19(4) of the Act; how the parties will work together and communicate; and any specific information or procedural requirements of the nation that should be addressed. These matters will inform the Process Order.
- **Developing an understanding of interests:** Develop an understanding of interests in the proposed project area, and the nation's governance requirements and decision-making needs. The understanding of interests helps to inform the scope of the EA and assists the EAO and decision-makers in appropriately considering the perspectives of the nations. For more information on the understanding of interests, see the Early Engagement Policy, found [here](#).
- **Clarify requirements for DPD:** Determine if there are matters that participating Indigenous nations would like to be addressed in the DPD. This information is shared with the proponent as part of the Summary of Engagement and is foundational for consensus-seeking during the Readiness Decision phase.
- **Reviewing the DPD:** Collaboration between proponents, participating Indigenous nations and participants to resolve issues prior to the Proponent submitting the DPD will support an efficient and timely Readiness Decision phase. The EAO and participating Indigenous nations should review the DPD collaboratively to determine its adequacy, including whether it responds to matters raised in the Summary of Engagement. The EAO and participating Indigenous nations should review the DPD collaboratively to determine its adequacy and consistency with guidance provided during the Early Engagement Phase. Proponents are encouraged to provide a draft of the DPD during Early Engagement to participating Indigenous nations in order to address any issues early on.

### 3.3. Process Planning

During Process Planning, the EAO and participating Indigenous nations continue the collaborative engagement that began in Early Engagement and the Readiness Decision phase regarding scoping the EA. During Process Planning, the EAO and participating Indigenous nations confirm the Indigenous interests that will be included in the assessment and seek consensus on the Process Order, including the Assessment Plan and Application Information Requirements. For more information on the Process Order and Process Planning Phase, see the Process Planning Policy, found [here](#).

Relevant Section(s) of the Act:

Section 19: Process planning by the CEAO.

Sub-sections: (2)(b)(i)

Activities that support consensus-seeking during the Process Planning phase should lead to a thorough mutual understanding of how the EAO and each participating Indigenous nation will undertake the technical work associated with the EA and establish the process by which the EAO and a participating Indigenous nation will seek consensus on procedural decisions for the remainder of the EA.

Through consensus-seeking on the Process Order, the roles and responsibilities of the EAO and participating Indigenous nations, including the role of the Technical Advisory Committee (TAC), will be clarified and detailed in the Assessment Plan. In some cases, it may be helpful to undertake work planning to further describe the details of how a participating Indigenous nation and the EAO will work together throughout the EA process and collaboratively utilize the TAC for advice on technical matters related to the assessment. For more information on the TAC, see the Technical Advisory Committee Guidelines, found [here](#).

Throughout the Process Planning phase, the EAO and participating Indigenous nations should document points of consensus and points of non-consensus either to be resolved through additional consensus-seeking efforts during the Process Planning phase, during subsequent phases of the EA, through another agreed-to process or to be documented for consideration by decision-makers at the conclusion of the EA.

If consensus cannot be reached regarding the Process Order within the 120 day Process Planning Phase, Dispute Resolution is available.

#### Key focus of engagement during the Process Planning Phase to support consensus-seeking:

- **Process Order:** Starting in Early Engagement and extending into Process Planning, the EAO will engage participating Indigenous nations on the development of the Process Order, including: the roles and responsibilities for undertaking the assessment of s. 25(1) matters; information requirements (which may include requirements respecting Indigenous knowledge); and methods for undertaking the assessment of s. 25(1) matters. If an Indigenous nation intends to conduct a portion of the assessment under s. 19(4) of the Act, then the scope and timing of this portion will be confirmed in the Process Order. The Process Order will typically also include the information requirements of the s. 19(4) assessment and a general understanding of the methodology. For more information about s. 19(4) assessment see the Process Planning Policy, found [here](#).
- **Project work planning:** For many projects, more detailed work plans with timelines are developed as the EA process proceeds. Work planning is a useful tool to provide additional detail as to how the EAO and a participating Indigenous nation will work together during the EA process, including during Application Development and Review and the Effects Assessment and Recommendation phases.

### 3.4. Application Development & Review

The Application Development and Review phase begins when the Process Order is issued and ends when the EAO posts a Notification of Application Acceptance.

#### Application Development

Proponents should engage with participating Indigenous nations during the development of their Application. Proponents can reduce uncertainty related to the review of their Application by working closely with participating Indigenous nations to ensure the Application addresses their interests appropriately. Technical issues are resolved, where possible, within the TAC. The involvement of participating Indigenous nations in the TAC is essential to resolving these issues.

The Application must include the information required by the Process Order, which will typically include the information necessary for completion of that part of the assessment conducted by a participating Indigenous nation under s. 19(4) of the Act. In addition, the information requirements may include requirements for Indigenous knowledge.

## Application Review

During Application Review, the EAO, participating Indigenous nations, the TAC, any Community Advisory Committee (CAC), and the public, review and comment on the Application. This includes reviewing whether the Application contains the information required by the Process Order, addresses advice provided by the TAC or CAC, and any other matters that the EAO directed the proponent to address. The CEAO must then provide notice to the proponent regarding any matters to be addressed in a revised application. This notice under s. 27(2) of the Act, to the proponent must be provided within 180 days of receiving the Application from the proponent.

Prior to the decision on whether to accept a revised Application, the EAO will seek consensus with participating Indigenous nations on the sufficiency of the revised Application in terms of whether or not it has met the requirements of the s. 27(2) notice.

### Key Focus of Engagement During Application Review to Support Consensus-Seeking on the Revised Application:

- **Engagement on the s. 27(2) notice:** The EAO and participating Indigenous nations should review the proponent's Application in a timely manner to inform the notice provided by the CEAO to the proponent with regards to matters to be addressed in their revised Application. Any deficiencies in the Application that are identified by the EAO and participating Indigenous nations will be the subject of consensus-seeking with regards to the sufficiency of the revised Application. The EAO will remain sensitive to the review considerations of the participating Indigenous nation (which may be identified through project work planning) to ensure the participating Indigenous nation has sufficient time to review and evaluate information relating to its interests.

## 3.5. Effects Assessment and Recommendations Phases

The Effects Assessment phase and Recommendations phase begin when the EAO posts a Notice of Application Acceptance and ends when final versions of the Assessment Report, draft certificate including proposed conditions and draft project description (Referral Package) are complete, and the Referral Package and CEAO Recommendations (under s. 29(2)(b) of the Act) are submitted to decision-makers.

During this phase, the assessment of the project, consistent with the requirements of the Process Order, is completed with participating Indigenous nations and within the timelines set out in the Act. For more information refer to the Effects Assessment Policy found [here](#).

If a participating Indigenous nation elects to conduct an assessment of the potential effects of the project on the nation and on its rights (under s. 19(4) of the Act), the EAO and the participating Indigenous nation will engage throughout the assessment and seek to reach a common understanding of the conclusions of that assessment. In some cases, the EAO may need to document its views in response to the conclusions of the s. 19(4) assessment if there are points where the EAO and a participating Indigenous nation do not reach consensus, or where the methods in the s. 19(4) assessment diverge significantly from the EAO's methods described in the Effects Assessment Policy.

Regardless of whether the assessment is conducted by the EAO or a participating Indigenous nation, the EAO and participating Indigenous nations should work towards a common understanding of the project's effects on Indigenous interests to inform the Referral Package, including through the consideration of Indigenous knowledge where appropriate (see Guide to Indigenous Knowledge in Environmental Assessments, found [here](#)). An important objective of the

#### Relevant Section(s) of the Act:

Section 28: Effects assessment

Subsections: (2)(a)(i), (2)(a)(ii), (2)(b), (2)(c); (3)

Section 29: Decision on application for an environmental assessment certificate

Subsections: (2)(b); (3); (6)(b)

Effects Assessment phase is to resolve all issues subject to consensus-seeking that will materially inform a participating Indigenous nation's notification of consent or lack of consent to issuing the EA Certificate for the project.

After the effects assessment and the draft Referral Package are complete, the draft Referral Package is posted online for 30 days for public comment.

During the public comment period, a participating Indigenous nation may choose to provide a notification of consent or lack of consent to issuing the EA Certificate for the project and reasons, consistent with the nation's own governance and procedural requirements and by the authorized representative of the nation. A nation's notification of consent or lack of consent would typically take the form of a letter and represent the perspective of the participating Indigenous nation regarding whether or not the nation supports or does not support the project.

It is the objective of the entire EA process, that both Indigenous and provincial decision-makers are able to make fully informed decisions regarding whether or not a project should proceed. It should be noted that, if a participating Indigenous nation does not provide a notification of consent or lack of consent for issuance of an EA Certificate for the project and reasons, the Minister will not be able to draw conclusions, with respect to a nation's decision on consent, but may take into consideration the fact that the nation chose not to provide a notification.

Upon completion of the public comment period, the EAO will seek consensus with participating Indigenous nations to finalize the Referral Package in response to comments received during the public comment period. Consensus-seeking at this stage is aimed at resolving any outstanding matters pertaining to Indigenous interests, including those related to the assessment matters under s. 25 of the Act. If substantial changes are required to the Referral Package as a result of the public comment period or the consensus-seeking on the final Referral Package, the participating Indigenous nation may choose to amend their notification of consent or lack of consent.

The final Referral Package and any notifications of consent or lack of consent and reasons provided by participating Indigenous nations, are considered by the CEAO in developing the CEAO Recommendations to the Minister. At this stage, the CEAO builds upon the consensus-seeking that occurred during the finalization of the Referral Package and seeks consensus with participating Indigenous nations regarding the project's consistency with the promotion of sustainability (s. 29(3) of the Act) which directly informs the Minister's decision as to whether or not to issue an EA Certificate for the project.

Dispute Resolution will be available regarding the Referral Package referenced in s. 28 of the Act.

### 3.6. Decision

The Decision phase begins when a referral is made to Ministers and ends when the decision is made on whether to issue an EA Certificate, and reasons for decision are issued. Once the Ministers receive the CEAO Recommendations, they will have 30 days to make a decision regarding whether or not to issue an EA Certificate.

#### Relevant Section(s) of the Act:

Section 29: Decision on application for an environmental assessment certificate

Subsections: (2)(b); (3); (6)

If the CEAO Recommendations made to Ministers respecting the project's consistency with the promotion of sustainability are contrary to a notification by a participating Indigenous nation of the nation's consent or lack of consent to issuing an EA Certificate, the Ministers will offer to meet with that participating Indigenous nation prior to making a decision on the EA Certificate. If the participating Indigenous nation accepts a meeting (acceptance must be within three days of offer) then the Ministers must provide notification to the proponent that a meeting is taking place to attempt to achieve consensus with the participating Indigenous nation on the decision. If new information is provided by the participating Indigenous nation, the EAO must share this information with the proponent. As a result of this consensus-seeking process, the participating

Indigenous nation may choose to amend their notification of consent or lack of consent that was provided during the 30 day public comment period on the draft Referral Package.

Ministers are required to publish reasons for their decision. In the case where a notification of a participating Indigenous nation indicates a lack of consent for issuance of an EA Certificate, and the Ministers' decision is to issue an EA Certificate, the Ministers must also provide reasons for why the decision to issue the EA Certificate was made.

It is expected that, in most cases, the consensus-seeking undertaken over the course of the EA and any dispute resolution facilitation that may have occurred at earlier EA phases would be effective in resolving substantive issues prior to the recommendations phase. In some circumstances, it is possible that dispute resolution between a participating Indigenous nation and the CEAO could be appropriate following referral to the Ministers but prior to the Ministers' decision under s. 29(4) of the Act, to address matters not captured in the final Assessment Report or EA Certificate. This facilitation could be in addition to or in conjunction with a participating Indigenous nation's meeting with Ministers pursuant to s. 29(6) of the Act.

### **3.7. Amendments**

Under s. 32(7) of the Act, the CEAO must seek to achieve consensus with participating Indigenous nations with respect to amendments to project EA Certificates. The EAO has developed a Conceptual Framework for Amendments which provides clarity on the process steps and consensus-seeking activities that may apply to typical or complex amendments under the Act.

The scope and nature of each project and amendment will be considered on an individual basis in order to identify appropriate amendment procedures including in relation to consensus-seeking.



## 4.0 APPENDIX A: CONSENSUS-SEEKING REQUIREMENTS UNDER THE ACT OUTSIDE OF THE STANDARD EA PROCESS

### Section 31 (Subsections (4)(a), (4b); (5)): Duration and effect of certificate

Requires the CEAO to seek consensus with participating Indigenous nations on a decision to extend or refuse to extend the deadline of an environmental assessment certificate.

### Section 32 (Subsections: (7), (8)): Amending environmental assessment certificate

Before deciding to amend a certificate or exemption order, or to refuse to amend a certificate or exemption order, the CEAO must seek to achieve, with respect to the amendment, consensus with participating Indigenous nations.

If the decision to amend a certificate or order is made without application from the Holder (under 32 (5)(a)) the CEAO must be satisfied that the applicable person, board, tribunal or agency referred to in subsection 32(5)(a) sought to achieve, with respect to the amendment, consensus with participating Indigenous nations.

### Section 34 (Subsections (2), (3), (4)): Class assessments and their effect on application requirements

The CEAO may undertake and approve partial class or full class assessments that address the matters referred to in s. 25 in relation to a specified category of reviewable projects. Class assessments do not replace the assessment of individual projects, it provides a solid foundation on which information requirements and conditions unique to the individual project can be added.

Before exercising a power related to the type or requirement of a class assessment (subsections 34 (1) or (2)), the CEAO must seek to achieve consensus with Indigenous nations having rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* that could be affected by the assessment.

This section of the Act is only enabled once the applicable Regulation is in place.

### Section 35 (Subsections (2)): Regional Assessments

When directed by the Minister, targeted regional assessments can be used to fill information gaps and provide recommendations for future project-specific EAs in that region. Any decision to issue a certificate would be accompanied by reasons explaining the extent to which the decision is consistent with any applicable regional assessments. The EAO will be engaging on the development of a regulation that will set up the scope, conduct and function of regional assessments.

Before making a direction with respect to undertaking a regional assessment, the Minister must seek to achieve consensus respecting the direction and the terms of reference with Indigenous nations having rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* that could be affected by the assessment.

This section of the Act is only enabled once the applicable Regulation is in place.

### Section 41 (Subsections (1); (5); (6)): Agreements

The Minister may enter into an agreement with respect to any aspect of an assessment or of an assessment under s. 35 (regional assessments) or 73 (strategic assessments) and must be satisfied that substituted assessment will (among other things) respect the consensus-seeking with participating Indigenous nations obligations under the Act.

The Minister may not enter into an agreement under subsection (1) if the agreement would alter an obligation to seek consensus with participating Indigenous nations under the Act or limit a participating Indigenous nation's opportunity to provide their notification of consent or lack of consent under s. 29 (2) (c).

### **Section 73: Strategic Assessments**

The Minister may direct the CEAO to do the following, in accordance with terms of reference established by the Minister:

- undertake an assessment of any policy, enactment, plan, practice or procedure of the government;
- provide a report and recommendations to the Minister at the conclusion of the assessment.

Before making a direction under subsection (1), the Minister must seek to achieve, with respect to the direction and the terms of reference, consensus with Indigenous nations having rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* that could be affected by the assessment.