

## SECTION 3

## Advancing Indigenous Jurisdiction by Participating in EAs

### How Jurisdiction over EAs is Divided Between Federal and Provincial Governments and First Nations

Given Canada's constitution, outside of reserve lands,<sup>62</sup> the federal government is responsible for reviewing some projects and Ontario is responsible for others. The Canadian *Impact Assessment Act* and Ontario's *Environmental Assessment Act* set out which types of projects each will review. Canada reviews certain mines, oil facilities, bridges, some roads and some dams, but this list is subject to change.<sup>63</sup> Ontario reviews electricity

projects, certain mines, forestry, municipal infrastructure projects, waste management, transit, and transportation projects. Some projects, such as certain mines and nuclear projects, will be reviewed by both Canada and Ontario.

#### **To determine which level of government will review a given project off-reserve, look at Canada's and Ontario's regulations to see if a project falls within that government's jurisdiction.**

For projects on-reserve, Canada and a First Nation may share jurisdiction

depending on the project and the laws applicable on the particular reserve. For example, if a First Nation has a Land Code under the *First Nations Land Management Act*, the First Nation may enact its own EA law that will apply to projects on its reserve. Note that if a project is both on and off reserve, there will likely be mixed requirements for the EA. The off-reserve portion of the project may be reviewed by Ontario and/or Canada, whereas the on-reserve portion may have different requirements. For example, the Henvey Inlet Wind Transmission Line Project included the

<sup>62</sup> In this Toolkit, "reserve" has the same definition as it is defined in [s. 2\(1\)](#) of the [Indian Act](#), RSC 1985 c I-5, being "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."

<sup>63</sup> The recent reference before the Supreme Court of Canada regarding the *Impact Assessment Act* could change the types of projects that will be reviewable by the federal government: see Reference re [Impact Assessment Act](#), 2023 SCC 23.

construction of a transmission line both off-reserve and crossing Shawanaga First Nation's reserve. The portion of the transmission line off-reserve underwent an EA under Ontario law. The portion of the transmission line crossing Shawanaga First Nation's reserve underwent an EA led by Shawanaga First Nation pursuant to the *First Nations Land Management Act*.<sup>64</sup>

Some Indigenous governments also have jurisdiction over EAs for projects in their territory through treaties or agreements with the federal and provincial/territorial governments. For example, in the Northwest Territories, the Inuvialuit, Sahtu Dene First Nations, Gwich'in and Tłıchǫ all have final agreements with Canada and the Northwest Territories that give them seats on review boards that review development in their territory.

But a First Nation does not need to have an agreement with Canada or the province/territory to conduct an EA for a project proposed in the First Nation's traditional territory. There are examples from across Canada of **First Nations asserting that jurisdiction and not waiting for approval from the federal or provincial government**. As explored in Section 1 of this Module on UNDRIP, Słkwx wú7mesh Úxwumixw (Squamish

Nation) created their own impact review process for a liquefied natural gas project proposed in their traditional territory in British Columbia. Squamish Nation did not wait for British Columbia and Canada to agree to their process or give it validity. Instead, Squamish Nation went directly to the proponent and got the proponent to agree to the process.<sup>65</sup> In effect, Squamish Nation became a regulator of the proposed project, and the proponent agreed to the conditions that the Squamish Nation placed on the project as an outcome of their review process. First Nations can learn from the success of Squamish Nation and others, and look at the building blocks needed to build your own EA process for proposed projects in your traditional territory.

<sup>64</sup> Henvey Inlet Wind LP. Henvey Inlet wind transmission line: Shawanaga First Nation reserve land overview – Determination of environmental effects. June 2017. <https://shawanagafirstnation.ca/wp-content/uploads/2017/08/Overview-Determination-of-Environmental-Effects.pdf>

<sup>65</sup> This case study was explained in Papillon M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

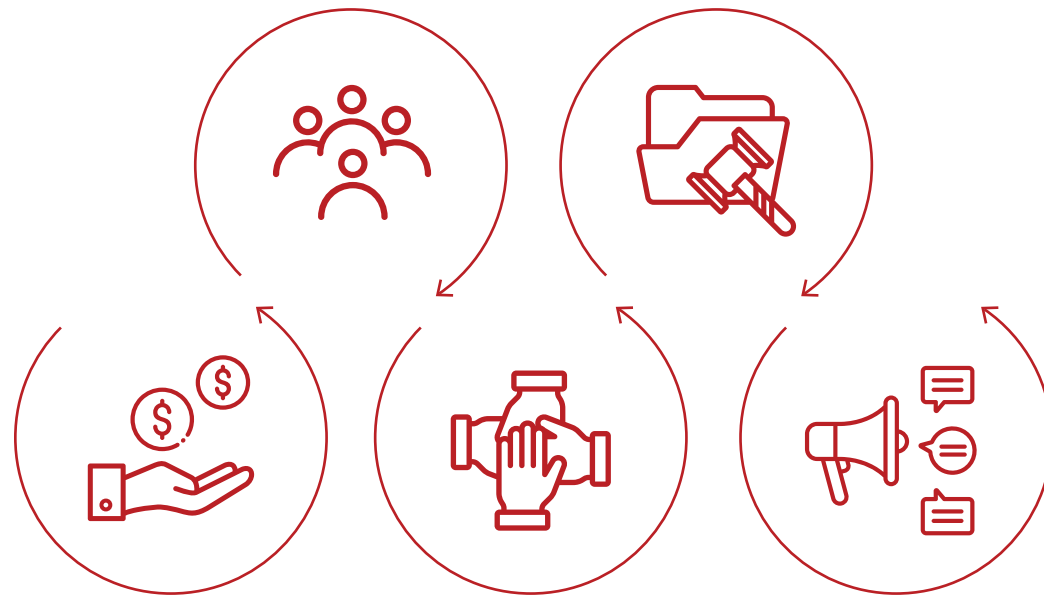
## Building Blocks for Creating Your Own Enforceable EA Process

### Strong Team

Need skilled **lawyers, negotiators, technical experts, IK experts, staff and leaders** to do the work

### Legal Case

Need **legal uncertainty** by building a strong legal case for why a project should not go ahead without your consent



### Financial Capacity

Need **significant funding** (internally or externally sourced) for all of the building blocks

### Partnerships

Consider **partnering with neighbouring First Nations** to share the costs, contribute to the team, and add strength to political and legal uncertainty

### Advocacy

Create **political uncertainty** by showing that the public will not support the project without your consent through public campaigns, direct action, and negotiation

## EAs and the Duty to Consult and Accommodate

To fulfill its duty to consult, the Crown can rely on:

- the information gathered during the EA process;
- the opportunities that First Nations had to participate in the EA process; and
- the terms and conditions imposed as part of the EA decision.<sup>66</sup>

But the Crown must maintain oversight to make sure that the duty is met.<sup>67</sup>

Practically, what this means is that for most projects, the **EA process is a key part of the Crown's consultation process with First Nations.**

If Canada or Ontario decide that there will be **no EA for a proposed project** in a First Nation's traditional territory, that is not the end of the story. **First Nations can still demand that the Crown consult with the First Nation about the project and accommodate the First Nation's rights and interests** regardless of whether or not there is an EA. **The tools and tips in this Module may be useful for First Nations even if there is no formal EA for a project.**

<sup>66</sup> [Tsleil-Waututh Nation v Canada](#), 2018 FCA 153 at para 517, 548-549, 753-763.

<sup>67</sup> [Michipicoten First Nation v Ontario \(Minister of Natural Resources and Forests\)](#), 2016 ONSC 6899 at para 86.

## Opportunities and Challenges at Each Step in the EA

While EAs differ in breadth and scope, in general, **all EAs follow five steps:**

1. Determine if an EA is required
2. Scope the EA
3. Conduct the EA
4. EA decision
5. Follow-up

Throughout the EA process, First Nations may face both opportunities and challenges.

### Environmental Assessments Opportunities & Challenges

#### ✓ Opportunities



Prepare own studies and collect IK to inform EA



Hire technical advisors to critique proponent studies



Co-draft parts of the EA report and conditions



Input on mitigation measures



Funding to participate in the process and do studies



Add enforceable conditions to make sure monitoring happens



If done well, can lead to consent

#### ✗ Challenges



Tight timelines



Western science focused



Expensive and time consuming to participate



Adversarial process



Based on guesses



EA may not look at all related parts of project



Follow-up and monitoring difficult without agreement

## STEP 1 Is an EA Required?

Most EAs start with an application from a proponent to a government permitting agency. Once the application has been received, the first step is for the government to decide if an EA is required.

Ontario and Canada have regulations and policies that guide this decision. Some types of projects never require an EA, while others will require them if they meet certain thresholds. For example, an electricity transmission project of a certain size may trigger an EA, while small projects will not be reviewed. You should look up the latest rules on the federal and Ontario EA websites.

### Opportunities at this Step

- **Notify the Crown, EA decision maker** (if different from the body conducting the Crown consultation) **and proponent** that you have **rights and land uses in the area of the project that may be impacted** if the project goes ahead.
- Review the federal or Ontario EA rules for the type of project, determine what type of EA may be possible and ask the government to require the most **in-depth EA possible**.

- Discuss with the Crown and **EA decision maker** (if different from the body conducting the Crown consultation) **how you will be involved in the EA process** going forward and how the duty to consult and accommodate will be fulfilled. Sometimes the EA and consultation processes are combined into one, and other times they are kept as separate but overlapping processes. There may be a formal application process where you will need to apply to be an Intervenor or Participant in the EA. There are usually time limits to apply, so ensure that you have a staff or advisor tasked with watching for application deadlines related to EAs so you do not miss anything.
- Send the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent any **consultation or engagement protocols, Traditional Knowledge protocols and shareable Indigenous laws** that you have, in order to inform the EA process.
- Notify the Crown and EA decision maker (if different from the body conducting the Crown consultation) of **your expectation to engage in a meaningful consultation process** related to the project and your expectation that the project will be approved only with your **free, prior and informed consent**.

- Ask the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent for **funding to support your participation in the EA process**, including funding so that you can hire advisors and experts, and funding to conduct further studies such as Traditional Knowledge studies. There may be funding application deadlines so, again, it is a good practice to assign a staff member or advisor to keep track of EA-related deadlines.
- **Reach out to the proponent** to discuss the project, your rights, and the process going forward to review the impacts of the project.
- **Gather your team of experts, advisors, staff and political representatives** (see the section Gathering Your Team).

### Challenges at this Step

- Throughout the EA process, **you may not get adequate funding** for you to participate fully.
- At this stage and throughout the process, **First Nations may be stretched to fully participate**. Depending on how many projects are going on in your territory, you may struggle with having enough human resources to devote time to participating in all consultations. This is why funding and gathering a good support team are so important.

- The federal and provincial/territorial laws may not require an EA, or the EA decision maker may decide one is not needed for the particular project. Remember that an EA is just one way in which the Crown discharges its duty to consult and accommodate you. If there is no EA, the Crown still needs to consult meaningfully with you about the project through another process if the project may adversely impact your rights. **It is important to put the Crown on notice that if there is no EA, you have a right to be, and expect to be, meaningfully consulted.**
- **EAs have tight timelines at each stage** and it can be difficult to participate meaningfully under those timelines. For example, you may only be given a month to comment on an initial project description and provide input for why an EA is needed. To get the most out of an EA, you should try to do as much preparation work as possible before the EA starts, for example by gathering previously collected Traditional Knowledge (maps, study reports, etc.). This will require that you are aware of proposed projects before they get to the EA stage. If you have the resources, it can be helpful to assign staff to the job of monitoring for upcoming projects so that you are prepared. However, without adequate funding or resources, this is difficult.

## STEP 2 Scope the EA

Once it has been decided that an EA is required, the applicable legislation will set out the scope of the EA, or the EA decision maker will “scope” the EA. If the EA decision maker scopes the EA, this means that they will decide:

- The **scope of the project**
  - » What parts of the project are going to be looked at during the EA?
  - » The principal project (e.g., a mine) will obviously be included. But what about additional projects, such as access roads, worker accommodations, etc.?
- The **scope of the EA**
  - » What factors will be looked at during the EA? Some of the common factors are:
    - environmental effects,
    - impacts on traditional uses,
    - cumulative effects,
    - health,
    - cultural and socio-economic factors,
    - mitigation measures,
    - alternatives to the project,
    - project purpose, and
    - significance of environmental effects.
  - » What type of EA will be done? Will there be a public hearing? (Canada and Ontario each have different levels of EA they can do; see their websites

for the latest information on the options for an EA.)

- The **scope of the factors** to be considered during the EA
  - » For each factor to be considered during the EA, what will be examined?
  - » What geographic area will be included?
  - » Which species will be looked at?
  - » What water parameters will be assessed?

The EA decision maker may prepare or approve a scoping document that sets out what the EA will examine. This document has different names under different legislation. For example, it may be called Terms of Reference or Tailored Impact Statement Guidelines. The proponent will have a role in preparing the scoping document, but **you should be given an opportunity to comment on the scoping document** for the EA before the EA decision maker finalizes the scope of the EA. It is key that you are involved in scoping the EA so you can ensure that all issues of importance to you are included.

### Opportunities at this Step

- Notify the EA decision maker of your expectation to be involved in developing the scope of the EA.
- **Engage with your community to gather Traditional Knowledge and input**

### on issues of importance for the EA.

Develop your own Traditional Knowledge protocol or process to enable you to share relevant Traditional Knowledge with the EA decision maker and proponent, as well as ensure the protection of your knowledge.

- **Engage your own experts and advisors** to help prepare your input on the scoping document.
- Provide the EA decision maker with your **comments on the issues that should be looked at during the EA and the parameters for the scope.**
- Identify what **studies you want to undertake** during the EA and ask the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent to fund the studies. Request that the scoping document require that the results of your studies be considered and incorporated into the EA.

### Challenges at this Step

- There is no guarantee that the EA decision maker will listen to you when scoping the EA, and they **may leave out aspects of the project** or parameters that you think are important. If this happens, you may be able to judicially review the scoping decision.<sup>68</sup> You may also be able to demand that

the Crown consult with you separately on those issues not included in the EA.

- The federal and Ontario governments have laws and policies that guide what level of EA is required for a particular type of project. **If the project does not trigger a larger scoped EA, you may face a challenge convincing the government to bump the project up to a fuller review.**
- The federal or Ontario government may rely on the **proponent to prepare the initial scoping document** for the EA, which may make it more difficult for you to influence the contents of the scoping document.
- The EA decision maker may not require the level of EA you want. Remember that an EA is just one way in which the Crown discharges its duty to consult and accommodate you. If there is no EA or the EA is not comprehensive enough, the Crown still needs to consult meaningfully with you about the project through another process. **It is important to put the Crown on notice that if there is no EA or the EA is not comprehensive enough, you still have the right to consultation, and expect to be meaningfully consulted.**

### STEP 3

#### Conduct the EA

During the EA process, the EA decision maker will gather various types of information to assess the project, including:

- a project description;
- the purpose of the project;
- an identification of alternative means of carrying out the project;
- 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; and
- a determination of significance of the residual impacts.

Information will be gathered from the proponent, the public, other government agencies, the EA decision maker's own experts, and impacted First Nations. This information may be gathered during a public hearing or through written submissions and meetings held during the EA process.

The EA decision maker will then use various analysis methods to **evaluate the**

<sup>68</sup> [Tsleil-Waututh v Canada \(Attorney General\)](#), 2018 FCA 153 at paras 5, 87, 409.

**impacts of the project** based on the information gathered. Once the impacts have been assessed, the next step is to **identify and evaluate ways to avoid or mitigate those impacts**. The EA decision maker will decide which impacts cannot be fully avoided or mitigated, and those are considered the **residual impacts**. The residual impacts are the impacts that the project will cause.

### Opportunities at this Step

- Participate in the EA process.
- First Nations can submit their own studies to add to the information considered in the EA, such as Land Use and Occupancy Studies, Traditional Knowledge, and your own western science studies and technical reviews.
- First Nations can insist that the EA process include meetings held locally and in their own language. For example, for the Hammond Reef Gold Project, the proponent and some of the impacted First Nations organized Elders' forums with interpreters to discuss the project.<sup>69</sup>
- Demand **funding** from the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent to participate fully in the EA process, including funding for your own scientific experts; for gather-

ing, presenting and protecting Traditional Knowledge; for conducting your own studies; for advisors; and for community engagement.

### Challenges at this Step

- EAs are an **adversarial process**, which may not be how you like to interact.
- **Western science usually dominates** at an EA. It is useful to hire your own western scientists to review and critique the proponent's and government body's science reports, and to advise you on that science.
- EA decision makers are including Traditional Knowledge in EAs more often now than in the past, but they do not always give Traditional Knowledge the same weight as western science.<sup>70</sup> This is something you will need to work against during the EA process, and advocate for your knowledge to be considered and incorporated into the decision. Ask the EA decision maker to show you how they have included Traditional Knowledge in their decision making. (See the Traditional Knowledge Module for more

on how to gather, use and safeguard your Traditional Knowledge.)

### STEP 4 EA Decision

The next step is for the EA decision maker to decide **if the project should be allowed to go ahead and what terms and conditions, if any, should apply to the approval**.

To make that decision, the EA decision maker will assess the **significance of the residual impacts**. This is a judgement about whether or not the impact is acceptable or unacceptable.

Different EA decision makers have their own ways of deciding the significance of a residual impact. But some of the **criteria used to assess significance** include:

- regulatory standards for environmental conditions (for example, clean air and water quality standards);
- statistical tests;
- level of public concern;
- scientific and professional judgement;

<sup>69</sup> Canadian Environmental Assessment Agency. 2019. *Hammond Reef Project comprehensive study report*, at pp 8, 113, 140. <https://iaac-aeic.gc.ca/050/documents/p63174/123876E.pdf>

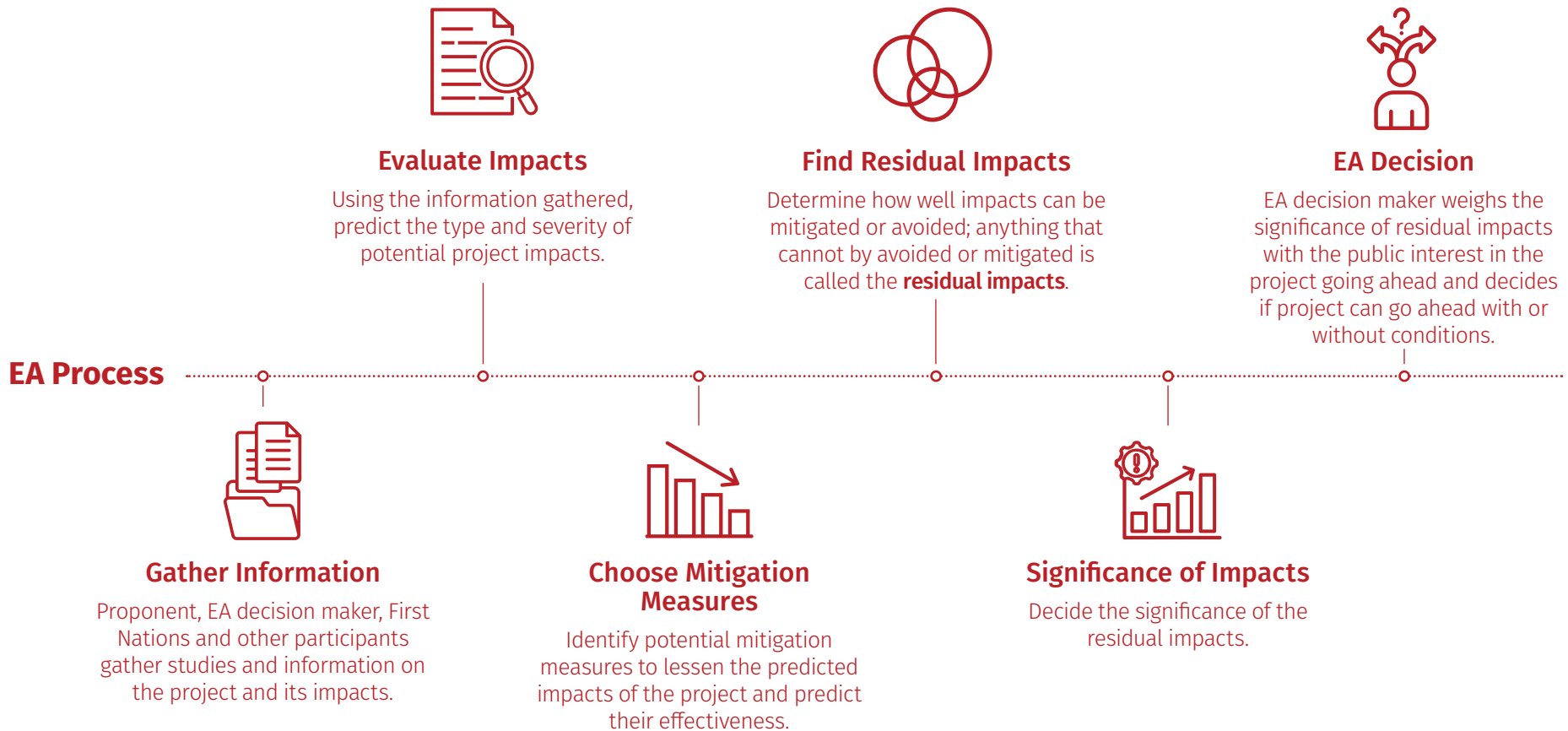
<sup>70</sup> Sallenave, J. Undated. Giving traditional ecological knowledge its rightful place in environmental impact assessment. Indigenous Centre for Cumulative Effects, at 5-6. <https://www.icce-caec.ca/knowledge-centre/giving-traditional-ecological-knowledge-its-rightful-place-in-environmental-impact-assessment/>

- Traditional Knowledge;
- disturbance or disruption of valued ecosystem components; and
- degree of negative impact on social values and quality of life.

The factors that the EA decision maker can take into account when making the

EA decision vary (see the latest federal and Ontario EA laws). In general, the EA decision maker needs to decide if the project should go ahead by **weighing the significance of the residual impacts of the project versus the public interest in the project going ahead.**

First Nations are encouraged to push EA decision makers to fully consider Traditional Knowledge alongside scientific knowledge, and to identify where and how Traditional Knowledge was included in the EA decision maker's analysis.



## Opportunities at this Step

---

- If given the opportunity, **comment on the draft EA decision**. Rely on your legal and technical advisors to help you prepare your comments. Engage with your community and Traditional Knowledge holders to obtain community input too.
- In some cases, **First Nations may be able to participate in the decision making for all or part of the EA**. Under the federal *Impact Assessment Act*, there are ways in which First Nations may be able to formally collaborate or partner on the EA, if the project is taking place on reserve. First Nations could enter into agreements with the federal Impact Assessment Agency to lead studies and co-draft parts of the assessment report. There are also opportunities for some First Nations to partner on the EA by contributing to results of the EA, including under your own Indigenous laws or protocols. The federal *Impact Assessment Act* also allows Canada to enter into co-operation agreements with First Nations that enable the First Nation to exercise powers and duties under the *Impact Assessment Act* for projects taking place on reserve.
- Many First Nations have been able to get agreements to co-draft portions of

the EA decision. For example, for the Blackwater Gold Project in British Columbia, two of the impacted First Nations, the Lhoosk'uz Dené Nation and the Ulkatcho First Nation, entered into an Memorandum of Understanding (MOU) with Canada and British Columbia for the EA, and the parties agreed that they would try to reach consensus on measures needed to address potential adverse effects on Aboriginal and treaty rights. The First Nations were also allowed to co-draft sections of the EA decision and were members of a working group (along with Canada, British Columbia and local municipalities) that gave advice on the drafting of the decision.<sup>71</sup>

- Seek clarification on how the decision was made. Insist that the decision be clear and transparent. How were your rights considered? How was your Traditional Knowledge used, or not used? Were your technical comments addressed? If not, why not?
- Once a final decision is made, review the EA decision right away. If you are unhappy with the decision, you will need to act quickly to challenge the

decision – most likely through a **judicial review**. This means that you will apply to the court to review the government decision maker's decision, and the court has rules on how quickly you need to file an application. You should seek legal advice about your rights and your particular situation whenever you are considering bringing an application in court.

- If you are unhappy with the results of the EA and question whether your interests and concerns have been sufficiently considered through consultation and accommodation, **push the Crown for further meaningful consultation and accommodation before the project is approved**.

## Challenges at this Step

---

- First Nations may not be given the opportunity to participate in the drafting of the EA decision or to participate in the decision-making process.
- Your rights and knowledge may not be adequately considered in the final decision.

---

<sup>71</sup> Keefer Ecological Services Ltd. 2019. *Assessment of impacts on the Lhooskuz Dené Nation and Ulkatcho First Nations' Aboriginal title, rights, and interests from the Blackwater Gold Project*. <https://ceaa-acee.gc.ca/050/documents/p80017/130537E.pdf>; Canadian Environmental Assessment Agency. 2019. *Blackwater Gold Project environmental assessment report*. <https://ceaa-acee.gc.ca/050/documents/p80017/129204E.pdf> at pp. iv, 3 and 154-162

## What to Do if You are Unhappy with an EA Decision



**Ask the Crown for more consultation** outside of the EA process



**Negotiate with the proponent** for an agreement related to the project to address impacts outside of the EA



**Judicially review the EA decision** in court (you may also need to apply for an injunction to stop the project while the case is heard)



**Take direct action** to convince the federal or Ontario government that there is not enough public support for the project

### STEP 5 EA Decision

The EA decision should include an evaluation of **planned monitoring or follow-up programs**. The requirements for the follow-up program should be included in the terms and conditions for project approval.

#### Opportunities at this Step

- During the earlier EA phases, advocate for the EA decision to include **enforceable** and **measurable** mitigation measures and a public monitoring process. There needs to be a mechanism in place to monitor what the proponent does during the life of the project, measure if the mitigation measures are working as predicted, and deal with problems if they arise.
- Participate in the follow-up program.
- **Ensure that the relevant government bodies and the proponent are doing what is required under the agreed follow-up program.** If they do not do what is required, notify them. If they do not fix the problem, you may have other legal options under an agreement with the proponent (like an impact benefit agreement) or through a judicial review of the government action. You should seek legal advice about your rights and your particular

situation if you are considering a legal challenge.

#### Challenges at this Step

- It is key that proponents and relevant government bodies conduct **ongoing monitoring** of projects to assess the impacts of the project and see if mitigation measures are working as expected. If impacts are more than what was expected, your rights may be more adversely affected. So, it is important that there are mechanisms in place to require the proponent to change the mitigation measures if they do not work as expected. These mechanisms could be put into the **terms and conditions for the approval, or be part of an impact benefit agreement with the proponent.**
- It is important that First Nations, relevant government bodies and the proponent have strong communication mechanisms in place for the duration of the project; otherwise, follow-up and monitoring may not happen or you may not know what is happening.
- **Unless there are formal requirements for the proponent or relevant government body to continue to monitor and adapt, they may not do it.**

## Checklist for Participating in an EA Process

### STEP 1

#### Is an EA required?

- ✓ Notify government and proponent about your rights, knowledge, and interests that may be impacted by the project
- ✓ Review Canada and Ontario rules to see type of EA possible and advocate for the EA you want
- ✓ Send Canada /Ontario and proponent a copy of any consultation/engagement protocol, Indigenous laws and Indigenous knowledge protocol that is relevant to the EA
- ✓ Notify Canada/Ontario that you expect to engage in meaningful consultation re project and discuss how you will be involved in EA
- ✓ Reach out to the proponent to talk about the project, your rights and interests, your Indigenous knowledge, and the process going forward to review the impacts and get to consent
- ✓ Ask Canada/Ontario and the proponent for funding to support your participation in the EA

### STEP 2

#### Scope the EA

- ✓ Notify the Crown that you want to be involved in scoping the EA and how you want to be involved in the EA process
- ✓ Provide comments on the EA scoping document
- ✓ Engage your own experts, advisors and Knowledge Holders to help you prepare your input on the scoping document

### STEP 3

#### Conduct the EA

- ✓ Participate in the EA process by commenting on the proponent's submissions
- ✓ Prepare and submit your own studies about the impacts, including an Indigenous knowledge study
- ✓ Request that parts of the EA process happen in your community and in your language
- ✓ Demand funding to cover your costs of participating, including doing your studies

## Checklist for Participating in an EA Process continued

### STEP 4

#### EA Decision

- ✓ Participate in decision-making process
- ✓ Comment on the draft EA report if possible
- ✓ If the decision is not clear on how your Traditional Knowledge and input were considered, seek clarification and transparency in how decision was made and information relied upon
- ✓ If you are unhappy with the decision, consider if you want to judicially review the decision (challenge the decision in court). Note that there may be tight timelines to do this
- ✓ If you are unhappy with the consultation and accommodation that may have happened in the EA process, ask the Crown for more consultation outside the EA

### STEP 5

#### Follow-up and Monitoring

- ✓ Participate in the follow-up program
- ✓ Make sure that the proponent and Crown are doing what they promised they would do. If they are not, look at your legal options to force them to do monitoring and respond to unexpected impacts
- ✓ If you have an IBA with the proponent, ensure that the proponent is following through on all of their promises

## Gathering Your Team

In order to get the most out of the EA process, you will need a strong team of people to help you understand the impacts, and to advocate for your rights and consideration of your knowledge.

Some of the team members you may want:

- **Staff** who coordinate and oversee consultations and EA participation;
- **Legal advisors** to advise you on your rights, support negotiations, draft agreements and represent you in the EA process;
- **Western science technical advisors** (ecologists, aquatic biologists, archeologists, hydrogeologists, etc.) to review and critique the proponent's information and to prepare your own studies;
- **Political representation**, selected according to your Indigenous laws and protocols, to represent your government in negotiations, consultation processes and the EA process; and
- **Traditional Knowledge holders and experts** on gathering and presenting Traditional Knowledge.

The EA process can be proponent driven, meaning that the proponent prepares the studies. It is important that you also

prepare your own technical reviews and studies in order to be able to challenge the proponent's information, add to the EA analysis, and suggest mitigation measures. You may also need to gather information to support your claims that you have rights, knowledge and interests that may be adversely impacted by the project. Some of the work you should consider doing includes:

1. **Technical reviews** of proponent studies and government documents;
2. **Land use and occupancy study;**
3. **Gather and study Traditional Knowledge;**
4. **Cultural impact assessment;**
5. **Cumulative effects assessment;**
6. **Rights impact assessment;**
7. **Socio-economic study;**
8. **Archeological and heritage studies;**
9. **Health studies;**
10. **Harvest and food security studies;**
11. **Ecological studies;**

12. **Gender-based analysis plus (GBA+) on the impacts of the project;**

13. **Gather baseline data;** and

14. **Scope the issues of importance** to your First Nation.

You will need **funding to properly participate in the EA process** and to pay for your team and the necessary studies. The federal and Ontario governments may provide **participant funding**. You may also be able to get **funding from the proponent**. As discussed in Section 2 on the duty to consult and accommodate, in order for consultation to be meaningful, you must have the resources to participate and it is reasonable to take the position that the proponent or the Crown provide this funding.

---

If the Crown wants to use the EA process to discharge its duty to consult, the Crown must make sure that you have enough resources to fully participate in the EA process.

---

## Equitable Participation in EA Processes

First Nations are often engaged in EA and in consultation through their leadership. It is important for First Nations to think about how to engage and consult with their members, ensuring that they are part of the process.

Indigenous women, girls and two-spirited people (“IWG2S”) need to be uniquely considered in EA processes. This unique consideration is important because IWG2S experience specific burdens from resource development. For example, the risk of violence toward IWG2S increases when large influxes of (mostly male) workers move in or near communities.<sup>72</sup> The sudden influx of workers can also strain the local housing market, making it challenging for IWG2S to find affordable, or any, housing. The increasing unaffordability of housing and in-migration can also lead to an increased number of IWG2S being drawn into sex work. Sex work is associated with several health and safety risks, including increased rates of sexually transmitted infections (STIs) and violence. If IWG2S are unable to find housing, they become susceptible to other risk factors, such as mental and physical health impacts. Due to these risk factors, whether conducting your own EA, participating in a federal or pro-

vincial EA or partnering with a proponent to conduct an EA, it will be important for your First Nation to consider the impacts of a project on IWG2S.<sup>73</sup>

First Nations can incorporate the concerns of IWG2S in the EA process by conducting a gender-based analysis plus (GBA+). GBA+ is an analytical tool used to assess systemic inequalities and to assess how different groups of people may experience policies, programs and initiatives. The “plus” in GBA+ acknowledges that GBA+ is not just about differences between biological (sexes) and socio-cultural (genders) considerations. GBA+ considers many other identity factors such as race, ethnicity, religion, age, and mental or physical disability, and how the interaction between these factors influences the way individuals might experience government policies and initiatives.<sup>74</sup>

Your First Nation can bring GBA+ into the EA process by insisting that the

proponent or Crown fund a GBA+ for the project and also by including GBA+ into your studies and submissions for the EA so that these issues are heard and considered in the EA.

- 
- 72** Johnston, A. 2022. Gender-based analysis-plus in impact assessment: What it is, and why it is important (hint: it's not just about jobs). West Coast Environmental Law. <https://www.wcel.org/blog/gender-based-analysis-plus-in-impact-assessment-what-it-and-why-it-important-hint-its-not-just>
- 73** Zingel, A. 2019. Study gendered impacts of resource development: MMIWG inquiry. *CBC Online*. <https://www.cbc.ca/news/canada/north/gendered-impacts-resource-extraction-mmiwg-1.5195580>
- 74** Government of Canada. 2021. What is gender-based analysis plus. <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>

## Best Practices for Including Gender-based Analysis & in EA



### First Nation is doing own EA

Involve IWG2S in revitalizing Indigenous laws (role as historians, focus groups, researchers)

Consider IWG2S when revitalizing Indigenous laws (what are our laws that protect IWG2S? What is the role of IWG2S in decision making?)

When conducting your EA, ask how the project may impact rights practised by IWG2S

When conducting your EA, ask how the project may impact the physical, mental, emotional and spiritual health of IWG2S



### Participating in federal/provincial EA

Ask the Crown and proponent for funding for a GBA+

Ask your team of experts and advisors to include an analysis of how the project may impact IWG2S in particular in your materials for the EA

When commenting on EA documents, include comments on the particular impacts of the project on the rights practised and interests of IWG2S

Ensure that follow-up and monitoring include specific monitoring for the unique impacts on the rights and interests of IWG2S

### REFERENCES

See the References & Resources Module for a full list of references to this section.