Introduction

The Government of Canada consults with Aboriginal peoples for a variety of reasons, including: statutory and contractual obligations, policy and good governance, building effective relationships with Aboriginal groups, and the constitutional duty to consult. Through the consultation process, the Government of Canada, as the Crown, seeks to reconcile Aboriginal interests with the Crown and other societal interests. The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise such as environmental assessment (EA) and regulatory approval processes in which Aboriginal consultation activities may be necessary.

The Government of Canada takes a "Whole of Government" approach to Aboriginal consultation in the context of EAs to ensure that Aboriginal groups are sufficiently consulted when the Crown (federal government) contemplates action(s) that may adversely impact the exercise of potential or established Aboriginal or Treaty rights (Aboriginal and Treaty rights) that are recognized and affirmed under Section 35(1) of the Constitution Act, 1982. For the EA process, the Canadian Environmental Assessment Agency will act as the Crown Consultation Coordinator to integrate the Government of Canada's Aboriginal consultation activities into the EA process to the greatest extent possible.

How is Aboriginal consultation integrated into federal EA?

- The federal Crown relies on the EA process to collect information on potential project impacts on Aboriginal and Treaty rights, including information that helps inform the federal Crown's understanding as to the seriousness of those potential impacts.

- The federal Crown may supplement the EA process with additional consultation where issues arising during the consultation are beyond the mandate of the existing process and additional consultation is required to allow for appropriate meaningful consultation.

- There is a natural overlap between the environmental effects of a project on Aboriginal people and impacts on Aboriginal and Treaty rights (see diagram below). The EA process involves assessing how a project will affect the natural landscape and environment and this assessment lens is well suited to also examining how Aboriginal and Treaty rights exercised on that landscape or in the environment may be affected by the project.

- The review panel process is used by the Crown to gather information and hear different perspectives on how the project could adversely impact Aboriginal and Treaty rights.

- For environmental effects examined during the EA, the review panel process can be used to examine, discuss or provide different perspectives and conclusions on what the various parties have provided through the process. For example, if an Aboriginal group disagrees with a proponent’s conclusion or methodology presented in the Environmental Impact Statement, they can share their disagreement and suggestions with the Review Panel.
• Aboriginal traditional knowledge is expected to be considered by the proponent and the Review Panel when undertaking analysis, reaching conclusions and making recommendations related to project effects and proposing mitigation.

• The federal Crown may, when appropriate, rely on mitigation related to environmental effects proposed during the EA process as accommodation for impacts on Aboriginal rights that may arise from those environmental effects.

Assessing impacts on Aboriginal rights in EA

• The Review Panel will take assertions of Aboriginal rights at face value during the EA process. The Panel’s findings and conclusions with respect to environmental effects will help to inform the Crown’s assessment of potential impacts of the Project on Aboriginal and Treaty rights.

• The Crown’s goal in this regard is to avoid or reduce potential impacts on Aboriginal and Treaty rights that relate to environmental effects, regardless of whether or not the federal Crown recognizes the Aboriginal right that is being asserted. This could be achieved through mechanisms such as project design, modification and appropriate mitigation or other measures as appropriate.
• The EA process is used to collect the information the Minister will require to make a decision on whether or not the project is likely to result in significant adverse environmental effects, including those in relation to Aboriginal peoples, and whether the project will effect Aboriginal and Treaty rights and, if necessary, whether or not those likely significant adverse environmental effects are justified in the circumstances. Before making these decisions, the Government of Canada must be satisfied that the consultation, including accommodation, has been adequate. The primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on such rights.

• When the federal Crown assesses the seriousness of potential adverse impacts on the exercise of Aboriginal and Treaty rights, various considerations will guide federal officials conducting the initial assessment. These may include the following factors:

  a. The certainty of adverse impacts – what is the likelihood that the impact will occur?
  b. The magnitude of the adverse impacts – what is the nature and degree of the impact?
  c. The duration and frequency of the adverse impacts – how often will the impact occur? Will these occurrences be short or long term?
  d. Reversibility – is the adverse impact reversible (are impacts of a permanent or temporary nature?)
  e. The extent of the adverse impacts – will these be localized in nature or broader? How does the geographic extent of the adverse impact relate to the geographic extent of the right, as practiced?
  f. Context- Aboriginal perspective on the importance, uniqueness or value of a particular use, area, activity or species, including consideration of any past potential impacts.
  g. Historical context – are there past impacts to Aboriginal rights that would help in understanding potential impacts?
  h. Accommodation- are there any accommodation measures proposed that would reduce the seriousness of the impact on the exercise of rights?

In addition, federal officials may differentiate between high, medium and low impacts as follows:

  a. High impact – ability to exercise that right has been significantly diminished
  b. Moderate impact – ability to exercise that right has been diminished or disrupted
  c. Low impact – ability to exercise the right is minimally disrupted
The federal Crown is open to considering other criteria and concepts from Aboriginal groups, as the federal Crown recognizes that each Aboriginal group is unique and the circumstances which may cause a serious impact on their Aboriginal or Treaty rights needs to be examined on a case-by-case basis. Specific information from Aboriginal groups such as baseline data, benchmarks and related measurements that relate to each Aboriginal group’s rights, culture and well-being are important and can aid the federal Crown’s understanding of the seriousness of potential adverse impact on Aboriginal or Treaty rights.

Aboriginal consultation for RBT2 Review Panel

The draft Review Panel terms of reference state that the Review Panel may receive information from Aboriginal groups about the impacts of the project on Aboriginal and Treaty rights. The panel may also receive information about how serious Aboriginal groups believe those impacts are and how they reached those conclusions (i.e. suggested methodologies for how to assess impacts to a particular group’s rights, what criteria, baseline and thresholds may be appropriate to use). Aboriginal groups who have suggestions on how to avoid or mitigate any potential adverse impact on the exercise of Aboriginal or Treaty rights can present that information to the panel as well for their consideration and if those suggestions are tied to environmental effects, the panel has the option to incorporate those into their recommendations in their report to the Minister.

The federal Crown will use this information presented to the Review Panel to inform its understanding of how the project could impact the exercise of Aboriginal and Treaty rights and for its considerations related to potential accommodation measures.

The Province of BC intends to rely principally on the federal Review Panel EA of the proposed Project for the information needed for the province’s assessment of the project, including consultation conducted by the Canadian Environmental Assessment Agency with Aboriginal groups whose Aboriginal or Treaty rights are potentially affected.

Considerations for presenting information to the panel

The panel is assessing environmental effects of the project, including the effects on Aboriginal people’s current use of lands and resources for traditional purposes and physical and cultural heritage. The Review Panel is mandated to provide rationale, conclusions and recommendations related to these environmental effects of the project in their report to the Minister. At the same time, the federal Crown is using the panel process to gather information about the seriousness of adverse impacts of the project on Aboriginal and Treaty rights. It would be helpful to the federal Crown if Aboriginal groups could explain when information they are providing is in relation to potential environmental effects of the project, when it is in relation to impacts on Aboriginal rights and when it should be considered for both categories.
**Consultation on the Review Panel Report and EA conditions**

Once the Review Panel issues its report to the Minister and that report is made public, the Agency will be contacting Aboriginal groups to request their written views on the panel report, asking whether the Review Panel captured their concerns correctly, whether there are any outstanding issues and, if so, what the Aboriginal group’s suggestions are to address those outstanding issues.

In addition, during this time period the federal Crown will contemplate the conditions which may be appropriate to include in the EA Decision statement should the Minister decide to approve the project. The federal Crown will consult potentially impacted Aboriginal groups about the draft proposed EA conditions to see if there are opportunities to mitigate environmental effects that may have been identified during the EA process or accommodate potential adverse impacts on Aboriginal and Treaty rights.

At the close of the process, Aboriginal groups are invited to provide a 2 to 3 page submission that will be provided directly to the Minister about their views on the project, any outstanding impacts to their Aboriginal and Treaty rights and their suggestions on accommodation measures.

**EA Decision**

If the Minister decides to approve the project, the EA decision statement is one tool to address concerns Aboriginal groups have with respect to potential adverse impacts on their Aboriginal or Treaty rights, through mitigation measures that can reduce environmental effects of the project. Proponent actions or commitments can also be considered as potential measures and the Crown can explore other tools within the federal and provincial government’s jurisdiction to address relevant impacts tied to Crown decisions. Given that consultation is an ongoing process that can continue well beyond the EA decision (should there be an approval of the project), there are opportunities to continue to discuss issues with the Crown and the proponent that may be outstanding at the point of the EA decision.

CEAA 2012 requires that the Minister determine whether, taking into account the implementation of any mitigation measures that the Minister considers appropriate, the designated project is likely to cause significant adverse environmental effects. Aboriginal considerations as they relate to environmental effects will be considered under section 5(1)(c) of CEAA. The Minister’s decision is specifically focused on the environmental effects of the Project as defined under CEAA 2012. Before making decisions under CEAA 2012, the Government of Canada must be satisfied that the process of consultation and accommodation with Aboriginal groups has been adequate for that purpose.

**Consultation in the permitting phase**

If the project receives approval at the EA phase, the proponent would then need to work with the appropriate federal and provincial entities to secure the necessary permits. For the federal government, these could include consultation with Fisheries and Oceans Canada and Environment Canada.
**Environment Canada Disposal at Sea Permitting**

Disposal at sea activities are an integral component of the Roberts Bank Terminal 2 project. Consultation on the proposed disposal at sea activities will be undertaken throughout the environmental assessment and regulatory review process for the project.

The federal Review Panel is an important opportunity to consider potential impacts of Roberts Bank Terminal 2 disposal at sea activities on Aboriginal or Treaty rights and interests. Environment Canada will participate in the Review Panel process to learn about Aboriginal concerns and to ask questions of Port Metro Vancouver. The environmental assessment phase is recognized by the department as fundamental to establishing if and how proposed disposal at sea activities could be undertaken in an acceptable manner.

The *Regulations Amending the Disposal at Sea Regulations* introduce a 90-day service standard for Environment Canada to reach a permit decision once an applicant has been notified by Environment Canada that their application is complete. The 90-day service standard may not apply in some situations, listed in paragraphs 8.2(3) and 8.2(4) of these regulations. A disposal at sea permit decision can be reached after a Minister’s environmental assessment decision, should the decision allow the project to proceed. A permit application must reflect environmental assessment results. However, detailed technical elements of the application that may not be available during the EA will require consideration. Environment Canada is interested in consulting with potentially affected Aboriginal groups on such elements, and any other outstanding disposal at sea concerns as part of the permit application review.

This approach allows for ample discussion on disposal at sea matters during the environmental assessment and the permit application review.

**Fisheries and Oceans Canada – Fisheries Act and Species at Risk Act**

Fisheries and Oceans Canada (DFO) will be participating in Aboriginal consultation during the EA process.

If any permits are necessary and applied for by the proponent under the *Fisheries Act* or the *Species at Risk Act*, consultation with Aboriginal groups would be undertaken by DFO in the regulatory phase if the issuance of such permits might adversely impact potential or established Aboriginal or Treaty rights, or if consultation is required by statute.

Such permits could include a section 73 permit pursuant to the Species at Risk Act that could allow the Proponent to engage in activities incidentally affecting a listed wildlife species, or any part of that species’ critical habitat. Additionally, the proponent may apply for an Authorization for works, undertakings or activities associated with the development that cause serious harm to fish that are part of, or support commercial, recreational or Aboriginal fisheries pursuant to section 35(2)(b) of the Fisheries Act.