

# The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management

July 28, 2014

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# Contents

<b>1. INTRODUCTION</b> .....	<b>1</b>
A. PURPOSE OF THE <i>GUIDELINES</i> .....	1
B. CROWN’S DUTY TO CONSULT AND ACCOMMODATE.....	1
<b>2. ROLES AND RESPONSIBILITIES IN THE CONSULTATION PROCESS</b> .....	<b>2</b>
A. THE GOA.....	2
i. <i>Alberta Aboriginal Relations, Aboriginal Consultation Office</i> .....	3
ii. <i>Alberta Environment and Sustainable Resource Development</i> .....	4
iii. <i>Alberta Culture, Historic Resource Management Branch</i> .....	4
iv. <i>Alberta Tourism, Parks and Recreation</i> .....	5
v. <i>Alberta Municipal Affairs</i> .....	5
vi. <i>Alberta Transportation</i> .....	6
vii. <i>Alberta Infrastructure</i> .....	6
B. PROPONENTS .....	6
C. FIRST NATIONS .....	7
D. ALBERTA ENERGY REGULATOR .....	7
<b>3. PROCESS FOR CONSULTATION</b> .....	<b>8</b>
A. CONSULTATION TRIGGERS.....	8
B. STAGES OF THE CONSULTATION PROCESS .....	9
C. CONSULTATION PROCESS FLOWCHART .....	9
D. PROCESSING TIMELINES.....	11
E. CONSULTATION PROCESS TIMELINES .....	12
F. STAGES OF CONSULTATION .....	13
i. <i>Pre-consultation Assessment</i> .....	13
ii. <i>Information Sharing</i> .....	14
a. Information review.....	14
b. Determining the level of consultation.....	15
c. Information package to First Nations.....	15
d. Follow-up with First Nation.....	15
e. Consultation monitoring .....	16
iii. <i>Exploring Concerns</i> .....	16
iv. <i>Verifying the Consultation Record</i> .....	16
v. <i>Determining Consultation Adequacy</i> .....	17
G. REVIEW .....	17
H. CONTACT INFORMATION.....	17
<b>APPENDIX A: SECTOR-SPECIFIC CONSULTATION MATRICES</b> .....	<b>A1</b>
<b>APPENDIX B: SECTOR-SPECIFIC ACTIVITIES THAT MAY NOT REQUIRE CONSULTATION</b> .....	<b>B1</b>
<b>APPENDIX C: NON SECTOR-SPECIFIC ACTIVITIES THAT DO NOT REQUIRE CONSULTATION</b> .....	<b>C1</b>
<b>APPENDIX D: GLOSSARY</b> .....	<b>D1</b>



# 1. Introduction

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*The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (2013 Policy)* was released on August 16, 2013. The *2013 Policy* and this document, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (Guidelines)*, replace the 2005 policy and the guidelines established in 2007. To fully implement the *2013 Policy*, the Government of Alberta (GoA) committed to developing these *Guidelines* along with sector-specific consultation matrices (Appendix A). The *Guidelines* are intended to be responsive to operational needs and informed by best practices. For this reason, the GoA will review the *Guidelines* annually and will engage with First Nations, industry, and government ministries when doing so. For the purposes of these *Guidelines*, the term "Crown" is used interchangeably with "GoA" and "Alberta".

These *Guidelines* will come into effect on the date of their official release. Any consultation process initiated prior to the official release of the *Guidelines* will be concluded under the direction of the guidelines established in 2007.

## A. Purpose of the *Guidelines*

The *Guidelines* are intended to clarify the expectations of all parties engaged in the consultation process. They provide an overview of the procedures to follow in the consultation process and demonstrate how the GoA is seeking to fulfil its duty to consult. Because consultation is fact-specific, these *Guidelines* encourage a process that remains flexible enough to allow the GoA to assess consultation requirements on a case-by-case basis. Therefore, these *Guidelines* only represent a starting point. Each step within the *Guidelines* must be undertaken in good faith towards: 1) gaining a better understanding of First Nations concerns regarding potential adverse impacts of a project on the exercise of Treaty rights and traditional uses, 2) substantially addressing the concerns through a meaningful process, and 3) developing positive working relationships.

The *Guidelines* apply to all strategic and project-specific decisions that have the potential to adversely impact the continued exercise of Treaty rights and traditional uses as defined in the *2013 Policy*.

## B. Crown's Duty to Consult and Accommodate

Various decisions made by the Supreme Court of Canada and the Court of Appeal of Alberta have confirmed that a duty to consult may be triggered when the Crown contemplates conduct that could have an adverse impact on the exercise of Treaty rights. The *Guidelines* are intended to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts.

The Crown's duty to consult is rooted in the honour of the Crown and the protection afforded to Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*. Consultation is a process intended to help parties understand and consider the potential adverse impacts of anticipated Crown

decisions on the exercise of Treaty rights and traditional uses. Through consultation, the GoA seeks to reconcile First Nations Treaty rights with the interests of all Albertans. Consultation may reveal a Crown duty to accommodate First Nations.

As stated in the *2013 Policy*, Alberta recognizes that a duty to consult exists when the following three factors are all present:

1. Alberta has real or constructive knowledge of a right;
2. Alberta's decision relating to land and natural resource management is contemplated; and
3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right.

Furthermore, the *2013 Policy* states that the GoA will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

## 2. Roles and Responsibilities in the Consultation Process

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The GoA, Alberta Energy Regulator (AER), project proponents, and First Nations all have roles and responsibilities within the GoA's consultation process. These roles and responsibilities are outlined in this section.

Whether GoA consults directly or delegates procedural aspects to proponents, the expectation is that all parties will participate in the process in good faith.

### A. The GoA

The duty to consult rests with the GoA. The GoA is responsible for overseeing and managing all substantive aspects of consultation, including determining if the duty to consult is triggered; assessing which First Nations to consult and at what depth; ensuring that First Nations are provided with sufficient information to describe the proposed decision or activity; considering information on First Nation concerns specific to the project or initiative; and assessing what, if any, accommodation is required. Although the GoA may delegate some procedural aspects of consultation to proponents, the Crown retains the sole responsibility for overseeing the overall consultation process and ensuring that the proponent's consultation activities comply with the *2013 Policy and Guidelines*. The process for managing delegated procedural aspects of consultation is described in section 3.

GoA assessment of consultation adequacy will generally occur prior to or within statutory and regulatory timelines. Depending on the potential adverse impact on the exercise of Treaty rights and traditional uses, the scope of the First Nations concerns raised, and the specifics of the proposed project or initiative, consultation timelines may vary.

Crown-led consultation may be carried out by the GoA on decisions regarding land and natural resource management that have the potential for adverse impacts on the exercise of Treaty rights and traditional uses that could include, but are not limited to, the following:

- Regulatory change;
- Infrastructure and facility development;
- Policy development; and
- Planning initiatives.

Ministries with statutory and regulatory responsibilities related to Crown land and natural resource management in Alberta are responsible for ensuring that First Nations are consulted if there is potential for adverse impact on the exercise of Treaty rights and traditional uses. Depending on the case, any or all of the following may apply: ministries may work with the Aboriginal Consultation Office to ensure that consultation obligations are met; they may carry out the procedural aspects of consultation activity; they may act as a project proponent; or they may delegate the procedural aspects of consultation.

### **i. Alberta Aboriginal Relations, Aboriginal Consultation Office**

To strengthen the GoA's role in the First Nations consultation process, the GoA created the Aboriginal Consultation Office (ACO). The ACO, administered by the Ministry of Aboriginal Relations, was established to provide consultation management services to meet the needs of GoA ministries, First Nations, the AER, and project proponents in a way that is efficient, coordinated, and consistent. The ACO has the following objectives:

- Uphold the honour of the Crown with respect to First Nations consultation for land and natural resource management matters in alignment with GoA priorities;
- Clearly discharge the legal duty of the Crown and ensure that the GoA works towards reconciling First Nations Treaty rights and traditional uses and the interests of all Albertans;
- Ensure consistency, certainty, and predictability with clear roles and a standardized process that First Nations, proponents, and the Crown can follow; and
- Enhance relationships with the federal and provincial governments, leading to a coordinated approach to First Nations consultation.

The ACO will direct, monitor, and support the consultation activities of GoA departments as well as proponents and First Nations, as required. In addition, the ACO will support consistent application of policy, process, and best practices. ACO support includes the following:

- Providing pre-consultation assessment advice or direction;
- Providing advice or direction during the consultation process;
- Providing advice or direction to First Nations and proponents if disputes arise during the consultation process;
- Providing staff to participate in consultation meetings with proponents and First Nations, as required;
- Evaluating consultation records; and
- Providing an assessment of consultation adequacy.

For activities requiring GoA decisions, the ACO will manage the consultation for the Crown and provide support as described above, which may be outlined under the terms of a cross-ministry agreement.

For activities requiring AER approval, the ACO will manage the consultation process for the Crown and provide support as described above. The ACO will decide whether or not consultation was adequate and provide that decision to the AER.

## **ii. Alberta Environment and Sustainable Resource Development**

Alberta Environment and Sustainable Resource Development (ESRD), as stewards of air, land, water, and biodiversity, will lead the achievement of desired environmental outcomes and sustainable development of natural resources for Albertans. ESRD takes a cumulative effects management approach that establishes outcomes for an area by balancing environmental, economic, and social considerations and implementing appropriate plans and tools to ensure those outcomes are met.

ESRD's Stewardship Branch is a shared service function that provides Aboriginal policy advice, strategic and operational Aboriginal engagement, and consultation support to the ministries of Alberta Energy and ESRD.

Examples of initiatives potentially requiring Crown-led consultation led by the Stewardship Branch include:

- ESRD provincial/regional policy development and implementation;
- ESRD management frameworks, sub-regional plans, and other planning initiatives (e.g., caribou range planning and similar species-at-risk plans); and
- Implementation of regional plans.

Examples of decisions potentially requiring proponent-led consultation pursuant to the *2013 Policy* include those under the following legislation:

- *Environmental Protection and Enhancement Act*;
- *Forests Act*;
- *Public Lands Act*; and
- *Water Act*.

## **iii. Alberta Culture, Historic Resource Management Branch**

Alberta Culture's Historic Resources Management Branch (HRMB) is mandated to protect and preserve Alberta's historic resources under the legislative authority of the *Historical Resources Act (HRA)*, which applies to all lands within provincial jurisdiction, both publicly and privately owned. The *HRA* protects historic resources such as designated historic places, archaeological and paleontological sites, and historic buildings, while regulating development to preserve these significant historical resources. Traditional use sites that are considered historic resources include, but are not limited to, burial grounds, ceremonial sites, gathering sites, and historic sites or ceremonial locations.

As part of the *HRA* regulatory process, when a known traditional use site of an historic resources nature has the potential to be adversely affected by a development project, either consultation with the respective First Nations or avoidance of the site may be required. First Nation traditional use sites of an historic resource nature that are known to Alberta Culture appear on the *Listing of Historic Resources (Listing)* as a generalized legal land description. The *Listing* informs developers of potential impacts their

proposed project may have on a traditional use site of an historic resource nature, without revealing the specific location and information of the traditional use site.

Additionally, section 31 of the *HRA* states that a person who discovers an historic resource in the course of making an excavation for a purpose other than for seeking historic resources shall notify the minister of the discovery. This section applies to newly discovered traditional use sites of an historic resource nature that are encountered during the development activities. If such historic resources are encountered and may be impacted by the proposed development, the proponent is required to notify Alberta Culture immediately.

#### **iv. Alberta Tourism, Parks and Recreation**

Alberta Tourism, Parks and Recreation (TPR), Parks Division, is responsible for regulatory and land management activities of Alberta's Parks system, including Wilderness Areas, Ecological Reserves, Natural Areas, Heritage Rangelands, Wildland Provincial Parks, Provincial Parks, and Provincial Recreation Areas and Willmore Wilderness Park.

Consultation may be required when TPR, Parks Division, is considering a decision that has the potential to adversely impact the exercise of Treaty rights and traditional uses. In specific circumstances, the following statutory and regulatory decisions made by TPR under Parks-related legislation may require consultation:

- Regulatory and policy changes related to resource protection, resource management, land use, or activities in the Alberta Parks system;
- Establishment of new parks or expansion of existing areas;
- Development of new facilities within parks;
- Re-designation of a park to a different classification;
- Development or revision of park management plans;
- Issuance of dispositions within the Alberta Parks system; and
- Issuance of research or collection permits within the Alberta Parks system.

#### **v. Alberta Municipal Affairs**

Alberta Municipal Affairs is responsible under the *Special Areas Act* for administering approximately 2.6 million acres of public land within southeast Alberta, which is administered by the Special Areas Board. The Special Areas Board is directly responsible to the Minister of Municipal Affairs.

Municipal Affairs is also responsible, through part 15 of the *Municipal Government Act*, for all functions of local government in improvement districts (IDs).

Consultation may be required when Municipal Affairs makes decisions associated with lands in the "Special Areas" or IDs that have the potential to adversely impact the exercise of Treaty rights and traditional uses.

Municipal Affairs, under the purview of the *Municipal Government Act*, also provides support and advice to assist municipalities in providing Albertans with strong and effective local government. While First Nations consultation is the responsibility of the GoA, municipalities could be delegated some procedural

aspects of First Nations consultation as a project proponent when applying to the GoA for regulatory decisions.

#### **vi. Alberta Transportation**

Alberta Transportation is responsible for road authorizations, planning, and other aspects of highway and bridge design. Consultation may be required in some cases, and Alberta Transportation may be a proponent for such projects.

#### **vii. Alberta Infrastructure**

Alberta Infrastructure is responsible for infrastructure planning and for building and managing government-owned infrastructure. Consultation may be required in some cases, and Alberta Infrastructure may be a proponent for such projects.

### **B. Proponents**

When considering proposals regarding land and natural resource management, Alberta may delegate procedural aspects of consultation to another party, such as the project proponent. Proponents may include industry, municipal governments, or any other organization or individual requiring a provincial approval. Procedural aspects of consultation to be delegated may include notifying and engaging with First Nations to discuss project-specific issues and possible mitigation. Fulfillment of these delegated procedural aspects should comply with the *2013 Policy* and be carried out as directed within the *Guidelines*.

Section 3 of these *Guidelines* provides more specific information regarding procedural aspects of consultation. Appendix A provides sector-specific consultation matrices to assist proponents in understanding the potential adverse impacts of activities and how they influence consultation requirements.

Proponents are encouraged to notify and consult with First Nations as early as possible in the pre-application stage. Proponents must document their consultation activities, share their consultation record with First Nations and provincial staff, and advise the GoA of any issues that arise. Depending on the responses received from First Nations and the specific activities involved, a proponent may be required to repeat certain steps under these *Guidelines* or to take additional steps to ensure meaningful consultation has taken place. A proponent's guide to consultation (to be released subsequent to the *Guidelines*) will provide additional details on the administrative steps, submission standards, and requirements for the consultation process.

The GoA recognizes that many First Nations and proponents have long-standing and established relationships. The GoA encourages strong relationships and clear communication between proponents and First Nations.

## C. First Nations

Where a proponent or the Crown is required to provide written notification to First Nations of a proposed land and resource management decision or activity, First Nations will have the opportunity to state whether their exercise of Treaty rights or traditional uses may be adversely impacted.

When responding to written notification, the First Nation should respond in writing, name the specific project and any applicable GoA First Nations consultation number, identify the location of the potential adverse impacts, and clearly identify the potential adverse impacts on the exercise of their Treaty rights and traditional uses that require further consultation.

During the consultation process, First Nations are expected to work with the GoA and project proponents on avoiding, minimizing, or mitigating impacts. First Nations should engage in consultation as outlined in section 3 of the *Guidelines* or in accordance with any applicable consultation process agreements with the GoA.

## D. Alberta Energy Regulator

Pursuant to the *Responsible Energy Development Act (REDA)*, the AER has jurisdiction for upstream oil, gas, oil sands, and coal activities. The AER has regulatory responsibility for the entire life cycle of upstream energy resource development in the province. To accomplish this, the AER delivers and is accountable for regulatory functions previously provided by the AER's predecessor, the Energy Resources Conservation Board, and by ESRD under the "specified enactments" (*Public Lands Act, Mines and Minerals (Part 8) Act, Water Act, and the Environmental Protection and Enhancement Act*) in respect of energy resource development.

Under section 21 of *REDA*, the AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*. The ACO works closely with the AER to ensure that consultation required for applications made to the AER under the specified enactments occurs prior to the AER's regulatory decision. The ACO, when appropriate, will provide the AER with advice relating to the mitigation of potential impacts to Treaty rights and traditional uses. Statements of concern received by the AER from First Nations or other Aboriginal groups or individuals will be provided to the ACO.

Direction on ACO and AER interaction is described in *Ministerial Order 141/2013, the Aboriginal Consultation Direction* put in place by Alberta Energy on November 26, 2013, and may be amended or replaced from time to time. In addition, the ACO and AER are cooperatively developing joint operating procedures for administration and coordination of ACO and AER operations. Once released, these procedures will be updated and amended as required.

# 3. Process for Consultation

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The ACO may manage consultation on behalf of applicable GoA ministries under the terms of a cross-ministry agreement.

The ACO or the applicable GoA ministry may delegate procedural aspects of consultation, including:

- Contacting First Nations by mail, telephone, or other means;
- Presenting and describing project plans and descriptions; and
- Modifying project plans in response to concerns raised during consultation.

The ACO or applicable GoA ministry must directly carry out substantive aspects of consultation, including:

- Assessing if the duty to consult is triggered;
- Assessing which First Nations should be consulted;
- Assessing the level and scope of consultation;
- Providing proponents with advice and appropriate information regarding potential adverse impacts to the exercise of Treaty rights and traditional uses;
- Advising First Nations and proponents of consultation requirements;
- Reviewing and approving consultation plans as appropriate;
- Directing proponents to provide First Nations with early and adequate notification;
- Monitoring proponent activities;
- Evaluating consultation records;
- Providing adequacy decisions for AER approvals and providing adequacy assessments with recommendations for all others; and
- Notifying First Nations and proponents about ACO adequacy decisions for AER approvals.

## A. Consultation Triggers

Consultation with First Nations is triggered when the GoA is contemplating a decision and has knowledge of the potential for that decision to have an adverse impact on the exercise of Treaty rights or traditional uses. While this list is not exhaustive, the following types of decisions may produce such triggers:

- Regulation, policy, and strategic initiatives or changes to public access;
- Fish and wildlife management – A decision that may limit or alter the quality and quantity of fish and wildlife;
- Natural resource development – A decision about surface land activity related to petroleum, forestry, mines and minerals, and other forms of natural resource development; and
- Land use planning that provides a long-term framework for Crown decisions.

## **B. Stages of the Consultation Process**

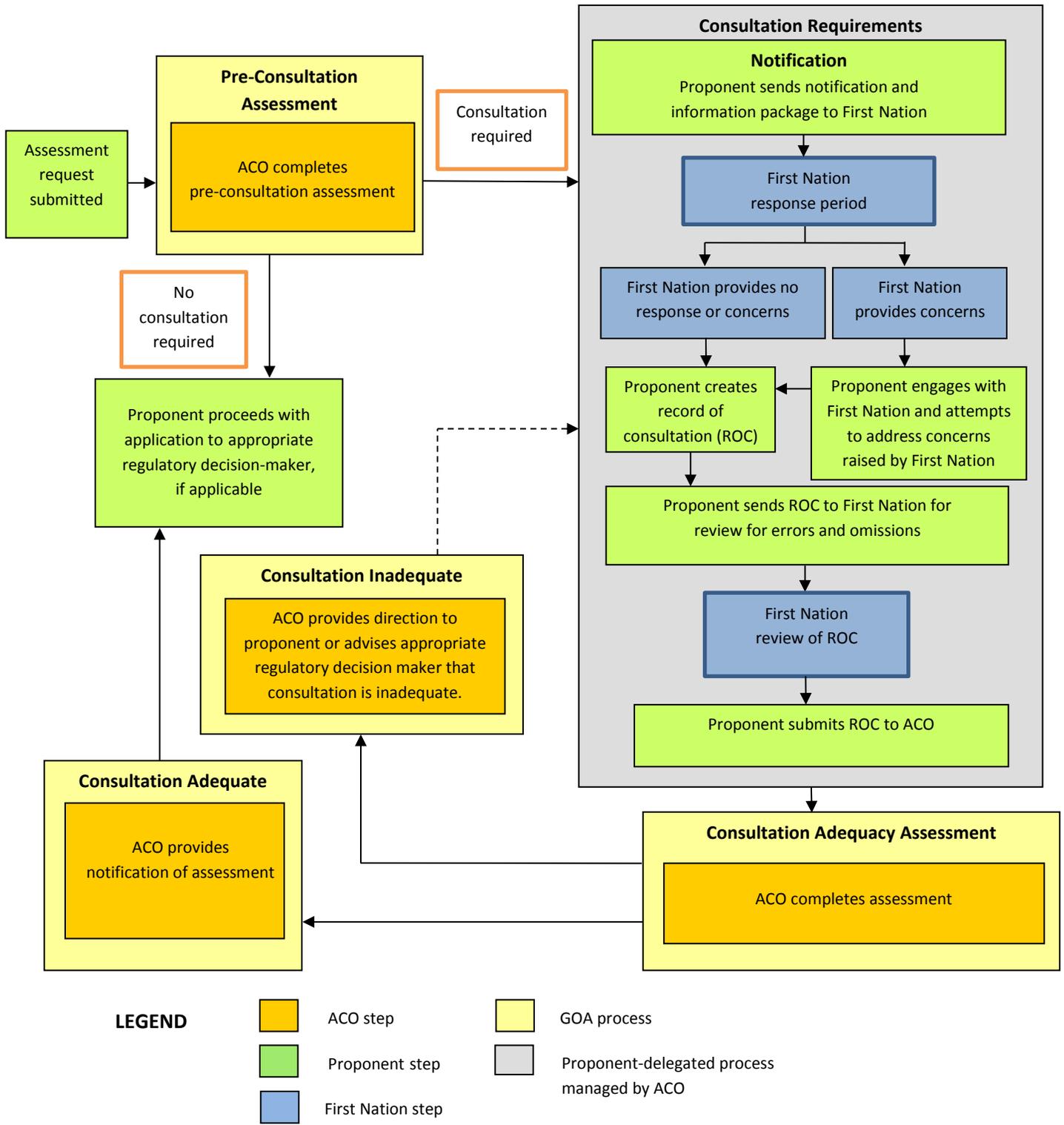
The following outlines the stages of the consultation process. Each step is described in more detail in subsequent sections.

1. Pre-consultation assessment;
2. Information sharing;
3. Determining the level of consultation;
4. Exploring concerns;
5. Verifying the record of consultation; and
6. Determining consultation adequacy.

## **C. Consultation Process Flowchart**

The following flowchart provides a general overview of the consultation process.

# Consultation Process Flowchart



## D. Processing Timelines

The ACO strives to process all assessments quickly and thoroughly. Within those general limits, and recognizing that timelines may change depending on how consultations proceed, the ACO will be expected to act within the timelines below. Timelines start the GoA working day following receipt of an assessment request.

To the extent applicable, the timelines should provide guidance to other GoA ministries for their consultation; however, in consultation with the ACO, these timelines may be altered, as required, for example, when the other GoA ministry, as the proponent, carries out procedural aspects of consultation or makes the assessment.

- Pre-consultation assessment:
  - Level 1 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 4 GoA working days for streamlined consultation.
  - Level 2 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 4 GoA working days for standard consultation.
  - Level 3 – If assessment request documentation is complete, the ACO will complete pre-consultation assessments within 10 GoA working days for extensive consultation.

When a traditional use site of an historic resource nature with an HRV 4c designation on the *Listing of Historic Resources* may be impacted by the proposed development, the ACO will provide Alberta Culture with a copy of the ACO pre-consultation assessment notice that is sent to the proponent.

- Adequacy assessment will proceed after First Nations have had the opportunity to review the record of consultation (also known as “consultation record”):
  - Level 1 – If the consultation summary documentation is complete, up to 10 GoA working days are required for adequacy assessment for streamlined consultation.
  - Level 2 – If the consultation summary documentation is complete, up to 10 GoA working days are required for adequacy assessment for standard consultation.
  - Level 3 – If the consultation summary documentation is complete, up to 20 GoA working days are required for adequacy assessment for extensive consultation.

These timelines may be revised for appropriate reasons in certain cases. For example:

- Timelines may be increased or decreased if information from First Nations, the Crown, or proponents demonstrates that potential adverse impacts require either more or less discussion;
- Timelines may be increased if the proponent amends the project and additional consultation is required; and
- Timelines may be increased if the proponent provided incomplete project information or consultation records to the ACO.

## E. Consultation Process Timelines

The following timelines apply to the consultation process. All timelines noted in these Guidelines start the GoA working day following the date of verified document delivery to the destination. The ACO recognizes that specific timelines may need to be revised in certain circumstances, depending, for example, on the complexity of the project. Other relevant factors may include circumstances that make a timely response difficult for a First Nation community, such as an emergency situation in the community.

The ACO expects that proponents will devote adequate time to address First Nations issues and concerns that arise during consultation.

- Level 1: Streamlined consultation
  - Notified First Nations have up to 15 GoA working days to respond to project notification.
  - Where First Nations respond to notification, consultation should be complete within 15 GoA working days of response to notification.
  - If the 15-day notification period has expired and the First Nation has not responded to the project notification within that time, the proponent, after providing First Nations with 5 GoA working days to review the consultation record, may ask the ACO to review the consultation record.
  
- Level 2: Standard consultation
  - Notified First Nations have up to 15 GoA working days to respond to project notification.
  - If no response is received within approximately 5 GoA working days, the proponent will follow up with the First Nation.
  - If no response is received within approximately 10 GoA working days of the initial notification, the proponent will follow up a second time with the First Nation.
  - Where First Nations respond to notification, consultation should be completed within 20 GoA working days of response to notification.
  - If the 15-day notification period has expired and the First Nation has not responded, the proponent, after giving First Nations 5 GoA working days to review the consultation record, may ask the ACO to review the consultation record.
  
- Level 3: Extensive consultation
  - Once the proponent's consultation plan is approved by the ACO following the pre-consultation assessment:
    - Notified First Nations have up to 20 GoA working days to respond to project notification.
    - If no response is received after approximately 10 GoA working days, the proponent will follow up with the First Nation.
    - If no response is received after approximately 15 GoA working days of the initial notification, the proponent will follow up a second time with the First Nation.

- Where First Nations respond to notification, consultation should be substantially underway or completed within 60 GoA working days of response to notification.
  - If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving the First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.
- Level 3: Extensive consultation for projects with EIAs
  - Once the proponent's consultation plan is approved by the ACO following the pre-consultation assessment:
    - Notified First Nations have up to 20 GoA working days to respond to project notification.
    - If no response is received within approximately 10 GoA working days, the proponent will follow up with the First Nation.
    - If no response is received within approximately 15 GoA working days, the proponent will follow up a second time with the First Nation.
    - Where First Nations respond to the notification, consultation is expected to be completed within the applicable regulatory timelines.
    - If the 20-day notification period has expired and there is no response to the second follow-up letter, the proponent, after giving First Nations 10 days to review the consultation record, may ask the ACO to review the consultation record.

## **F. Stages of Consultation**

### **i. Pre-consultation Assessment**

The pre-consultation assessment is intended to assess whether consultation is required. The ACO will:

- Assess whether or not consultation is required;
- If consultation is required, identify which First Nations are to be consulted;
- Assess the potential adverse impacts of a proposed decision or activity;
- Assess the scope of the duty to consult based on available information about the potential adverse impacts to Treaty rights and traditional uses; and
- Assign a level of consultation in order to provide direction on the depth of the consultation.

The scope of consultation is related to 1) the nature of the project and 2) its potential impacts on Treaty rights and traditional uses at that location. The pre-consultation assessment identifies three potential levels of consultation, which correspond with the scope of the potential impacts. The level of consultation identifies how deep the consultation should be and what process steps are required.

- Level 1: Streamlined – Notification with opportunity for First Nation to respond

- Level 2: Standard – Notification with opportunity for First Nation to respond and required follow-up by proponent
- Level 3: Extensive – Preparation of a consultation plan, notification with opportunity for First Nation to respond, and required follow-up by proponent.

Figure 1 below illustrates a framework for determining the level of consultation.

This framework will be enhanced over time with geographically referenced information that captures areas of known use and areas of significance identified by First Nations.

Factors that may determine the sensitivity of a location include history of use and level of contemporary use, the presence of ceremonial sites, or other values to indicate the importance of the site for Treaty rights and traditional uses.

**Figure 1: Framework for assessing scope of impacts and determining depth of consultation**

Sensitivity of the location (based on Treaty rights and traditional uses)	<b>High</b>	Level 2 – standard	Level 3 – extensive	Level 3 – extensive
	<b>Moderate</b>	Level 2 – standard	Level 2 – standard	Level 3 – extensive
	<b>Low</b>	Level 1 – streamlined	Level 1 – streamlined	Level 2 – standard
<b>Nature of the project</b>		<b>Low impact</b>	<b>Moderate impact</b>	<b>High impact</b>

Sector-specific matrices describing typical project activities are located in Appendix A. The matrices provide an initial assessment of the impacts of the activity on Treaty rights and traditional uses based on the nature of the project and identify the depth of consultation required.

## ii. Information Sharing

### a. Information review

After receiving a request for a pre-consultation assessment from a proponent, or for consultation advice from another ministry, the ACO will consider:

- Information about the proposed project and the relevant decisions and activities;
- Available information regarding the exercise of Treaty rights and traditional uses, including:
  - Information from Alberta Culture and
  - Existing agreements or protocols between First Nations and the GoA;
- Whether the proposed activity can be regarded as having, been adequately covered by a previous consultation and has had either minor or no subsequent changes and therefore is not subject to further consultation on potential adverse impacts on Treaty rights and traditional uses; and
- Maps depicting the geographic areas where the GoA consults a First Nation.

In the pre-consultation assessment notice the ACO will strive to advise proponents of Alberta Culture requirements if applicable, and will copy Alberta Culture on the same. Consultation overseen by the ACO and consultation overseen by Alberta Culture will proceed concurrently.

#### **b. Determining the level of consultation**

The ACO will provide proponents with direction on which First Nations must be consulted and on the level of consultation required. The ACO may use information from past consultation and other information about First Nations to assess the depth of consultation required.

The level of the consultation required and associated timelines may be revised during the consultation process if information from First Nations, proponents, or the Crown demonstrate that potential adverse impacts require either more or less discussion.

#### **c. Information package to First Nations**

The proponent will provide a comprehensive information package to the identified First Nations as early as possible, including:

- Notice that the proponent has been advised to consult with the First Nation and share information about the proposed activity;
- The level of consultation;
- A description of the consultation process , where applicable;
- A GoA First Nations consultation number, if applicable;
- A plain language information package describing the proposed activity, location, and potential impacts;
- Any information provided by the GoA about potential First Nations concerns in the area;
- A description of the GoA or regulatory authorization being sought; and
- A request that the First Nation send feedback to the proponent within the prescribed time period about how the project may impact their First Nations Treaty rights and traditional uses.

#### **d. Follow-up with First Nation**

A First Nation response to a notification package should include a written submission to the proponent with a copy to the ACO staff member identified on the file, quoting a First Nation consultation number, if applicable. The submission from First Nations should:

- Describe specific Treaty rights and traditional uses that may be impacted by the project at that location, and
- Identify if and why the impacts described may require a deeper level of consultation.

In response to any feedback received, the ACO will expect the proponent to follow up with the First Nation. For level 2 or level 3 consultations, if a response has not been received from the First Nation, the proponent must follow up and again request feedback about how the project may impact their Treaty rights and traditional uses.

#### **e. Consultation monitoring**

The ACO may make staff available to participate in consultation meetings with proponents and First Nations upon request for any level 3 consultation, or in situations where delegating procedural aspects of consultation is not appropriate.

The ACO will monitor activity on all consultation files. The responsible ACO staff will also be available to assist with any issues that arise during the consultation process. Requests for assistance will be accepted from First Nations or from proponents and the objective of the ACO's participation is to assist all parties in effectively proceeding with the consultation process with the intention of addressing concerns regarding Treaty rights and traditional uses.

At any time during the consultation process the ACO may redirect proponents to repeat steps that have not been completed adequately.

#### **iii. Exploring Concerns**

Proponents are encouraged to consider options to avoid, minimize, or mitigate impacts respecting Treaty rights and traditional uses brought forward during consultation with the First Nation. Exploration of these concerns should be documented thoroughly in the consultation record. The adequacy assessment process will take into account the efforts of proponents to address First Nation concerns.

Efforts to accommodate concerns may include:

- Modifying project design;
- Modifying project location or footprint;
- Modifying project timing;
- Seeking opportunities to mitigate impacts to traditional uses; and
- Exploring options to address concerns regarding access.

The ACO may also review the project-specific concerns raised by First Nations and if further clarification is required, through discussion with First Nations and project proponents, seek to identify what mitigation measures may be appropriate.

#### **iv. Verifying the Consultation Record**

The proponent must send a copy of the consultation record to the appropriate First Nation for their review. The First Nation has the opportunity to review the consultation record for accuracy and comment back to the proponent, the ACO, or both. If the proponent's consultation record appears inaccurate to the First Nation or the ACO, the ACO will work with the proponent and provide direction to address gaps. If components of consultation remain outstanding, the ACO will consider whether it is appropriate to continue to involve the proponent or whether the GoA will complete the outstanding components.

- First Nations review of the consultation record:
  - Level 1 – First Nations will have 5 GoA working days to review the consultation record for streamlined consultation.

- Level 2 – First Nations will have 5 GoA working days to review the consultation record for standard consultation.
- Level 3 – First Nations will have 10 GoA working days to review the consultation record for extensive consultation.

The time period provided for the verification of the consultation record is for review and assessment of accuracy, it is not intended to be an extension to the consultation timelines.

## **v. Determining Consultation Adequacy**

The ACO is responsible for deciding the adequacy of consultation for activities requiring AER approvals. In other cases, ACO shall provide a recommendation to a Crown decision-maker as to whether consultation is adequate. Although the optimal outcome of consultation is that all consulting parties reconcile interests, agreement of all parties is not required for consultation to be adequate.

In assessing adequacy, the ACO will review information gathered during the pre-consultation assessment information review, the proponent’s consultation record and any information provided by the First Nation. The ACO will consider, at a minimum, if the following factors have been addressed:

- Were all identified First Nations provided project information and given an opportunity to participate in the consultation process?
- Did the proponent provide project-specific information within a reasonable time before approvals were required or before the project was scheduled to start?
- If the First Nation provided site-specific concerns about how the proposed project may adversely impact their Treaty rights and traditional uses, did the proponent make reasonable attempts to avoid and/or mitigate those potential impacts?
- Did the proponent indicate how they intend to mitigate any potential adverse impacts to the exercise of Treaty rights and traditional uses?

The ACO will provide advice to GoA ministries and to the AER as to what mitigation was identified in the consultation process.

The ACO will strive to advise the appropriate ministry if concerns that are not project- and location-specific are presented in the consultation record. That ministry may follow up with First Nations as appropriate to clarify what process may be followed to discuss those concerns.

## **G. Review**

As per the commitment made by the GoA to review the *2013 Policy* annually, these *Guidelines* may also be updated annually. Feedback and comments from other ministries, First Nations, and proponents will be considered and incorporated as appropriate.

## **H. Contact Information**

For an up-to-date list of consultation contacts at the ACO, please refer to our website at <http://www.aboriginal.alberta.ca/575.cfm>.

# Appendix A: Sector-Specific Consultation Matrices

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The *Sector-Specific Consultation Matrices (Matrices)* are presented as a planning tool for proponents and in order to support transparency with First Nations. The *Matrices* provide an initial assessment based upon knowledge of the physical impacts of an activity but they are not a definitive categorization of the potential adverse impact on Treaty rights or traditional uses. The *Matrices* identify the nature of the activity and the potential biophysical impact, and propose the depth of consultation that may be required in the absence of other factors.

The Crown usually assesses consultation on a case-by-case basis in order to determine if there is a duty to consult and, if so, at what level. The level of consultation identified at the pre-consultation stage may change as consultation progresses and new information is provided. Potential adverse impacts to traditional use sites may also alter the consideration and rationale for consultation requirements.

Aboriginal traditional use sites, such as burial sites, ceremonial sites, historic structures, etc., may be considered historic resources under the *Historical Resources Act (HRA)*. Alberta Culture identifies Aboriginal traditional use sites as an HRV 4c in the *Listing of Historic Resources (the Listing)*. The *Listing* is a primary tool for regulating land-based development and is used exclusively to direct a proponent to apply to Alberta Culture for approval of a development under these circumstances. First Nation consultation may be required by Alberta Culture for HRV 4c sites that may be impacted by a proposed development. The presence of HRV 4c lands within a proposed project footprint may change the level of consultation required. It is important to note that the *Listing* is only one tool that Alberta Culture uses to determine if an application for *HRA* approval is required for all other types of historic resources (i.e., archaeological, paleontological, and historic).

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Sector-Specific Consultation Matrices

Sector <sup>1</sup>	<b>Low Impact STREAMLINED CONSULTATION</b> <i>These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.</i>	<b>Moderate Impact STANDARD CONSULTATION</b> <i>These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.</i>	<b>High Impact EXTENSIVE CONSULTATION</b> <i>These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities.</i>
<i>Forestry and fire management</i>	FireSmart plans (vegetation management component only) Herbicide plans where there was no previous consultation Temporary roads that are new routes with no previous consultation	Forest management agreement (FMA) renewal New quota New FMA Forest management plan (FMP) amendment (e.g., mountain pine beetle amendment) General development plan (GDP), Community Timber Permit Program (CTPP), FMA, and quota-holders Prescribed burn <sup>2</sup> (Types 1 and 2) All weather roads (mainlines)	Forest management plans
<i>Transmission line and utility corridor</i>	Power lines easements, rural electrification association easements (EZE, REAs) and vegetative control easements (VCEs) that overlap existing surface dispositions, with > 5 m of new cut Power line EZE, REA, and VCE easements that do not overlap existing surface dispositions and are < 1 km long	Power line EZE, REA, and VCE easements that do not overlap existing surface dispositions and are > 1 km long	Large-scale regional transmission line projects
<i>Geophysical</i>	Intermediate intensive 3D seismic (> 130 m ≤300 m source line spacing)	Intense 3D seismic (≤130 m source line spacing); 4D seismic Access roads	n/a

<sup>1</sup> These matrices are intended to apply to 1) land administered by ESRD under the *Public Lands Act* and 2) all AER decisions under the specified enactments relevant to such activities. They are not intended to apply to land administered by other ministries where there is no AER decision.

<sup>2</sup> For the purposes of these matrices the following definitions apply: Type 1 prescribed burn is the most complex and has the greatest potential for impact. It involves standing timber, and it requires a detailed plan and proposal. Type 2 prescribed burn is complex and has some potential for impact. It generally involves standing timber, and it requires a detailed plan and proposal.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

Sector <sup>1</sup>	<b>Low Impact STREAMLINED CONSULTATION</b> <i>These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.</i>	<b>Moderate Impact STANDARD CONSULTATION</b> <i>These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.</i>	<b>High Impact EXTENSIVE CONSULTATION</b> <i>These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities.</i>
<i>Coal, minerals, and quarries</i>	Coal exploration programs (CEPs) Other mines and minerals exploration (MME)	All-weather roads and railways, (haul roads, access roads) and other associated dispositions New underground mining activity on existing sites	New mine approvals Mine extensions
<i>Pipelines</i>	Small power lines and pipelines (< 1 km long) or pipelines bundled with single well site with associated facilities, access, pipelines (< 5 ha total size)	Gathering pipelines (> 1 km long) or pipelines bundled with larger sites or projects (e.g., multiple well sites) with associated facilities, access, etc. (> 5 ha total size)	Large-scale pipeline projects
<i>Sand and gravel</i>	Sand and gravel sites and/or projects with associated infrastructure <sup>3</sup> (< 5 ha total size) subject to the requirements for temporary field authorizations (TFAs), dispositional operational approvals (DOA) and surface material licences (SMCs) and require a <i>Water Act</i> authorization	Sand and gravel sites and/or projects with associated infrastructure (> 5 ha total size) subject to the requirements for surface materials leases (SMLs) and are subject to an <i>Environmental Protection and Enhancement Act (EPEA)</i> and a <i>Water Act</i> authorization for reclamation	Large-scale exploration programs
<i>Petroleum, natural gas, and oil sands</i>	Single well site <sup>4</sup> with associated facilities, access, pipelines (≤ 5 ha total size)	Medium-sized sites or projects (e.g., multiple well sites <sup>4</sup> ) with associated facilities and access (> 5 ha total size) Oilsands exploration (OSE) programs All weather roads – licences of occupation (LOCs)	Large multiple well site <sup>4</sup> In-situ projects with associated facilities and access (e.g., steam-assisted gravity drainage (SAGD)) Seasonal drilling programs – large-scale or complex Oilsands mines – pit development

<sup>3</sup> For the purposes of these matrices, “infrastructure” is defined as any works, buildings, structures, facilities, equipment, apparatus, mechanism, instrument, or machinery belonging to or used in connection with a pit, and includes any storage site or facility, disposal site, or facility.

<sup>4</sup> A single well site can include more than one bore hole. Multiple well sites refer to multiple well pads and can include multiple bores drilled on a single pad.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

# Appendix B: Sector-Specific Activities That May Not Require Consultation

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## General

- If consultation was deemed adequate within the past two years and there have been no adjustments to the scope or footprint of the project, consultation may not be required.
- Consultation on reclamation plans may not be required if the site was previously disturbed or previous consultation occurred within the footprint.
- Approval amendments and renewals: As long as the amendments/renewals are within the scope of the original approval and no new impacts are contemplated (new lands or novel impacts to existing lands), consultation may not be required.

## Forestry and Fire Management

### Activities that may not require consultation

Type 3 prescribed burns: Least complex with little or no chance of impact. Generally consists of annual hazard reduction involving burning off grass meadows, lesser vegetation, etc. There is no detailed planning and approval process.

Annual operating plans and operational plan amendments: Where changes to block location, harvest scheduling, and road design are consistent with the overall strategies of the FMP or the GDP; do not conflict with mitigation strategies to address concerns raised by a First Nation in previous consultation; or where there was previous consultation.

Temporary roads: Where there was previous consultation at the GDP level.

Herbicide plans: Where there was previous consultation at the GDP level.

Compartment assessment: When previously identified and consulted on in the GDP process.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Transmission Lines and Utility Corridors

### Activities that may not require consultation

Power lines and vegetative control easements that overlap existing surface dispositions, with < 5 m of new cut.

## Geophysical

### Activities that may not require consultation

Non-intensive 3D and 2D (>300 m source line spacing) Activity is of a very low intensity (e.g., narrow meandering lines or utilizing existing lines); little or no disturbance to the ground-level vegetation or soils; no mechanical ground access; short duration (usually a few weeks); drill holes are plugged/reclaimed within one season; negative impacts to land are mitigated through approval conditions and exploration directives and directions within the *Policy and Procedures for Submitting the Geophysical Field Report*.

## Coal, Minerals, and Quarries

### Activities that may not require consultation

Program on existing linear disturbance, (e.g. roads, power lines) or disturbed areas or previously approved programs/dispositions.

## Pipelines

### Activities that may not require consultation

Pipeline installation or replacement on lease (PIL); and located on existing dispositions.

Bored pipelines

## Petroleum, Natural Gas, and Oil Sands

### Activities that may not require consultation

Program on existing linear disturbance, (e.g. roads, power lines) or disturbed areas or previously approved programs/dispositions.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Sand and Gravel

### Activities that may not require consultation

Activities that are temporary, usually under 90 days, with land use ≤ 640 acres with a requirement for a temporary field authorization (TFA) or disposition operating approval (DOA) such as:

1. Surface materials<sup>1</sup> exploration activities subject to a surface material exploration approval (SME); or
2. Pits<sup>2</sup> that are subject to requirements under the *Code of Practice for Pits* and/or the *Environmental Protection and Enhancement Act* and/or the *Conservation and Reclamation Regulation*, and/or require a *Water Act* authorization.

### Acronyms

AER – Alberta Energy Regulator

CEP – Coal exploration programs

CTPP – Community timber permit

DOA – Dispositional operational approval

EIA – Environmental impact assessment

*EPEA – Environmental Protection and Enhancement Act*

ESRD – Environment and Sustainable Resource Development

EZE – Easement

FMA – Forest management agreement

FMP – Forest management plan

GDP – General development plan

LOC – Licence of occupation

MME – Mines and minerals exploration

OSE – Oilsands exploration programs

PIL – Pipeline installation on lease

REA – Rural electrification association

SAGD – Steam-assisted gravity drainage

SME – Surface materials exploration

SMC – Surface material licence

SML – Surface material lease

TEP – Transportation exploration program

TFA – Temporary field authorization

VCE – Vegetative control easement

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<sup>1</sup> For the purpose of these matrices, surface materials include: marl, clay, silt, sand, gravel, having a depositional history that is not associated with the bedrock formation.

<sup>2</sup> For the purpose of these matrices, pits are defined as openings or excavations in or working off the surface or subsurface for the purpose of removing any sand, gravel, clay, or marl, of any size, but does not include:

(i) A borrow excavation,

(ii) A pit on public land, meaning land administered under the *Public Lands Act*,

(iii) A pit, or a portion of a pit, where the surface or subsurface of the land has not been disturbed by pit operations since August 15, 1978, or

(iv) A pit, or a portion of a pit, on which a waste management facility is operating or operated pursuant to a valid approval or registration under the *Environmental Protection and Enhancement Act*.

In all cases the GoA retains discretion to modify the level of consultation. There may be modifications to the level of consultation required, based on characteristics of the project, including location, scale, duration, and intensity. For examples, if a project is sited proximate to a known First Nation traditional use site, consultation may be assessed at a higher level, or if the expected duration is significantly shorter than average, then consultation may occur at a lower level.

## Appendix C: Non Sector-Specific Activities That Do Not Require Consultation

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Activity or Application
The activity is regulated by a code of practice under the <i>Water Act</i> and <i>Environmental Protection and Enhancement Act</i> .
The activity requires a short-term diversion and use of water authorized by a temporary diversion licence under the <i>Water Act</i> .
The activity requires temporary, short-term access to public land and is identified as “not requiring consultation” in the <a href="#">Temporary Field Authorization Guidelines</a> (see tables C and D).
The activity consists of: <ul style="list-style-type: none"><li>• Adjustments, repairs, replacements, or maintenance made in the normal course of operations.</li><li>• Short-term testing or temporary modifications to machinery, equipment, or processes that do not result in a new surface disturbance beyond the normal course of operations.</li></ul>
The application is for renewals and amendments to existing authorizations, including: <ul style="list-style-type: none"><li>• Correcting clerical errors;</li><li>• Changing monitoring, reporting, or inspection requirements;</li><li>• Effecting a change in ownership;</li><li>• Addressing matters related to temporary discontinuance of an activity;</li><li>• A single short-term extension (up to 1 year) of the expiry date for an authorization or a term or condition of the authorization;</li><li>• Amend a term of condition if there is no new surface disturbance beyond the normal course of operations;</li><li>• Amalgamate authorizations;</li><li>• Filing as-built (final survey submissions) if the lands applied for have not changed from the original application; and</li><li>• Amendment for the purpose of deleting lands from an application (deletion of lands)</li></ul>

# Appendix D: Glossary

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## **Approval**

Includes authorizations or dispositions or licences or registrations or permits as defined under the appropriate statutes or regulations.

## **Crown**

In Canada, the Crown may refer to the federal government and each of the provincial governments. Within this document, the Crown refers to the Government of Alberta (GoA or Alberta).

## **Decision**

Includes any administrative, legislative, statutory, regulatory, policy, and operational decision of the GoA.

## **Land and natural resource management**

Activities (on or off Crown land) potentially affecting the use of provincial Crown land where such activities arise from decisions involving land, water, air, forestry, or fish and wildlife.

## **Proponent**

An entity or person who is either seeking a Crown decision related to land and natural resource management or seeking an approval from the AER under the specified enactments.

## **Surface disturbance**

Any disruption of an area that disturbs the Earth's surface or waters during activity or after an activity has ceased.

## **Treaty rights**

Rights held by a First Nation in accordance with the terms of a Treaty agreement with the Crown. Treaties may also identify obligations to be met by a First Nation and the Crown. As they exist today, the Treaty rights to hunt, fish and trap for food may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

## **Strategic initiatives**

An embracing or overarching policy addressing an objective of the GoA that may set a context in which project-specific consultation can occur.

## **Traditional uses**

Customs or practices that First Nations may engage in on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations. These may include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.