



Community Engagement and Board Consultation Policy

DRAFT

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**Mackenzie Valley Land and Water Board
Gwich'in Land and Water Board
Sahtu Land and Water Board
Wek'èezhìi Land and Water Board**

Table of Contents

Definitions and Acronyms	i
1. Background.....	1
2. Purpose and Objectives.....	2
3. Authority.....	3
4. Policy Development.....	3
5. Application	4
6. Guiding Principles	4
7. Shared Responsibilities: Situating Community Engagement and Board Consultation Within the Broader Duty of the Crown to Consult	4
7.1.Consultation Mandate of the Land and Water Boards	7
8. Aboriginal Consultation Throughout the Regulatory Process.....	7
8.1. Assessing Adequacy of Proponent Community Engagement	8
8.2 Board Notification and Review Period	10
8.3. Is There Potential for Impacts to Established or Asserted Rights?	11
8.4 Ensuring Adequate Consultation Before Final Recommendations or Decisions.....	12
9. Policy Implementation	13
10. Monitoring and Performance Measurement.....	13
Appendix A: Reviewed Documents	1
Appendix B: Aboriginal Engagement and Consultation Roles and Responsibilities as They Pertain to Permitting and Licensing	1
Appendix C: Summary of Regulatory Guidance in Policy Directions and Interim Measures Agreements	1

Definitions and Acronyms

Term	Definition
AANDC	Aboriginal Affairs and Northern Development Canada
Aboriginal engagement and consultation	includes community engagement, Board consultation, and Crown consultation with potentially impacted persons, communities, Aboriginal organizations/governments.
Aboriginal organization/government	an organization representing the rights and interests of a First Nation (as defined in section 2 of the MVRMA), Métis or Inuit community or region, including the Tłı̨cho First Nation or the Tłı̨cho Government.
affected community	a community that is predicted to be affected, either adversely and/or beneficially, by a proposed project, or that is being affected by a project.
Boards	Land and Water Boards of the Mackenzie Valley, as established by the <i>Mackenzie Valley Resource Management Act</i> (MVRMA).
Board consultation (MVRMA)	<p>Wherever in the MVRMA reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised, as stated in section 3 of the MVRMA:</p> <p>(a) By providing, to the party to be consulted:</p> <ul style="list-style-type: none"> (i) notice of the matter, in sufficient form and detail to allow the party to prepare its views on the matter; (ii) a reasonable period for the party to prepare these views; (iii) an opportunity to present those views to the party having the power or duty to consult; <p>(b) By considering, fully and impartially, any views so presented.</p>
Crown conduct	The exercise of the Crown's jurisdiction and authority whether the Crown may be in charge of the activity or may be approving an activity through permits and authorizations.
duty to consult	Practically, the duty to consult is the process of ensuring that Aboriginal people's rights are fairly considered in government conduct that could potentially affect those rights, particularly in the approval of developments involving land and resources. The duty to consult is an obligation of the government as a whole. In <i>Haida</i> , <i>Taku River</i> , and <i>Mikisew Cree</i> , the Supreme Court of Canada held that provincial and federal governments have a legal

	obligation to consult when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty Rights.
engagement	the communication and outreach activities a proponent is required, by the Boards, to undertake with affected communities and Aboriginal organizations/governments prior to and during the operation of a project, including closure and reclamation phases.
Engagement Plan	a document that clearly describes how, when, and what engagement will occur with the affected community and Aboriginal organization/government at each stage during the life of the project.
Engagement Record	A record, including supporting documents, that details the engagement processes and outcomes between the proponent and the affected community and Aboriginal organization/government.
GLWB	Gwich'in Land and Water Board
Interim Measures Agreement (IMA)	an agreement that clarifies how the Government of Canada and the Government of the Northwest Territories will work with an Aboriginal group during land and resource negotiations on matters such as parks, forest management, land use permits, disposals of land, water licences, tourism, etc.
MVLWB	Mackenzie Valley Land and Water Board
MVRMA	<i>Mackenzie Valley Resource Management Act</i>
project	Any development that requires a land use permit or water licence.
proponent	Applicant for, or holder of, a land use permit(s) and/or water licence(s).
Public participation	a general term for any process that involves public input in decision making. It involves the process or activity of informing the public and inviting them to have input into the decisions that affect them. ¹
SLWB	Sahtu Land and Water Board
Treaty Rights	rights that are defined by the terms of a historic Treaty, rights set out in a modern land claims agreement, or certain aspects of some self-government agreements.
WLWB	Wek'èezhìi Land and Water Board

¹ Canadian Environmental Assessment Agency. *Public Participation Guide*.

1. Background

Under the direction of the *Mackenzie Valley Resource Management Act* (MVRMA), the Land and Water Boards (the Boards) of the Mackenzie Valley regulate the use of land and water, and the deposit of waste, through the issuance and management of land use permits and water licences. There are four Boards in the Mackenzie Valley Region that perform these functions, each in different management areas². The objective of the Boards is to provide for the conservation, development, and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of each respective management area and residents of the Mackenzie Valley (see section 101.1 of the MVRMA).

In exercising their authorities, which includes conducting preliminary screenings, as well as issuing authorizations, the Boards must ensure that, “the concerns of Aboriginal people have been taken into account” (paragraph 114(c) and consider, “the importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the *Constitution Act* applies and who use an area of the Mackenzie Valley”(section 60.1). In meeting these objectives, the Boards work with proponents, affected communities, Aboriginal organizations/governments, and other parties (e.g. other Boards and government agencies that issue associated authorizations) to ensure that potential impacts of proposed projects are understood and carefully considered before decisions are made.

Public participation is one of the cornerstones of good regulatory, environmental screening, and review processes, and this concept is well entrenched in the regulatory system, associated processes, and procedures established by the Boards under the MVRMA. The Boards operate under *Rules of Procedure* (2004) which facilitate open and transparent administrative processes and describe how the Boards will conduct their proceedings and hearings with the objectives of fairness and efficiency. The Boards also maintain and manage Public Registries that are available at each Board office, and also online to increase public access.

In the Mackenzie Valley, Dene and Métis First Nations have a special relationship to the lands and resources that they have traditionally occupied and used. This unique relationship to the land and its resources are recognized in treaties with the Crown and has been recognized in the *Constitution Act* (1982) under s.35. When Crown conduct is contemplated that could adversely impact Aboriginal or treaty rights, it is incumbent on the Crown to ensure that it consults, and where appropriate, accommodates the concerns of aboriginal communities. The federal and territorial Crown (the Government of the Northwest Territories) are ultimately responsible for upholding this relationship with Aboriginal organizations/governments in the Mackenzie Valley and, therefore, are responsible to ensure the duty to consult, when triggered, is met,

² The Gwich'in, Sahtu, and Tłı̨chǫ land claim agreements provide for the creation of Land and Water Boards. Part 3 of the MVRMA establishes the regional Land and Water Boards as Regional Panels of the Mackenzie Valley Land and Water Board which carry out responsibilities in the MVRMA in the Gwich'in, Sahtu, and Wek'èezhii management areas. Collectively, they are part of a larger integrated and coordinated system of land and water management in the Mackenzie Valley. Part 4 of the MVRMA creates the Mackenzie Valley Land and Water Board, which has authority to regulate land and water use in areas of the Mackenzie Valley that are not yet subject to settled land claim agreements and to establish, where required, consistent policies for the regulation of land and water in the Mackenzie Valley.

which may include ensuring that appropriate accommodations are provided. The Boards also have decision-making responsibilities for a large portion of Crown conduct. This adds some complexity to the issue of roles and responsibilities.

Over the last number of years, and since the enactment of the MVRMA in 1998, the courts in Canada have made decisions which detail how the Crown must consult, and the roles that tribunals and industry proponents can play in the process of consultation. The 2011 Federal Guidelines—*Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (the Federal Guidelines)—state:

In the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. The Court explained that the duty stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples....The court has also clarified, that depending on their mandate, entities such as boards and tribunals may also play a role in fulfilling the duty to consult.³

The courts have also said that while the duty itself cannot be delegated, the Crown can rely on its partners' (e.g. Aboriginal groups, provinces, territories, industry, and tribunals) processes to assist it in meeting its commitments and responsibilities. This is echoed in federal guidelines for consultation (DIAND 2011, Guiding Principle #6, p.15).

The Board has developed this Policy in order to ensure that obligations for meaningful consultation (as set out by the land claims and applicable legislation) are clearly articulated, and to situate how this fits with the Crown's duty to consult.

2. Purpose and Objectives

The *Community Engagement and Board Consultation Policy* (the Policy) describes the framework that the Boards will operate within to make decisions regarding: (1) submission requirements for applicants and holders of land use permits and water licences pertaining to pre-submission and life-of-project community engagement; and (2) the administration of Board responsibilities for statutory consultation with affected communities and Aboriginal organizations/governments under the MVRMA.

The Policy's framework is built upon, and takes direction from, the foundations established in the land claim agreements, the MVRMA and regulations, federal guidelines for Crown consultation, best consultation and engagement practices, and jurisprudence.

Specifically the Policy aims to:

³ March 2011, *Aboriginal Consultation and Accommodation, Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. Minister of the Department of Indian Affairs and Northern Development, Government of Canada.

- Provide clarity and certainty regarding the Boards' expectations of proponents in relation to community engagement with the public and, in particular, engagement requirements with affected communities and Aboriginal organizations/governments;
- Situate the Boards' roles and responsibilities for consultation within the broader context of the Crown's responsibilities to Aboriginal peoples; and
- Describe the Boards' framework for statutory consultation with Aboriginal people, including how it will rule, if required, on the adequacy of Crown consultation.

This Policy is supported by two guidance documents:

- *Community Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits* (the Guidelines) that includes specific requirements and suggested best practices for pre-submission engagement and engagement planning for the life of a project; and
- *Procedural Framework for Addressing the Adequacy of Consultation* (the Reference Bulletin) that outlines how a Board will assess, if required, the adequacy of Crown consultation.

3. Authority

The Boards may not issue a licence, permit, or authorization for the carrying out of a proposed development unless the requirements of Part 5 of the MVRMA have been met.⁴ As screeners, the Boards must ensure that the concerns of Aboriginal people and the general public are taken into account, have regard to the protection of the social, cultural, and economic well-being of residents of the Mackenzie Valley, and consider the importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada, to whom section 35 of the *Constitution Act*, 1982 applies, and who use an area of the Mackenzie Valley (see section 62, and paragraphs 114(c) and 115(b) and (c) of the MVRMA).

The Boards have been granted the authority to establish policies and guidelines which assist them in fulfilling their mandates and responsibilities as screeners under the MVRMA. As such, the Boards have created the Policy and associated documents under the authority of section 65 of the MVRMA which states that, "subject to the regulations, a board may establish guidelines and policies respecting licences, permits, and authorizations, including their issuance under this Part".

4. Policy Development

The Policy was developed by the Engagement and Consultation Working Group⁵, and influenced by the work of the Mackenzie Valley Land and Water Board (MVLWB) and the Mackenzie Valley Environmental Impact Review Board (MVEIRB) Joint Steering Committee on Consultation, formed in 2010. It is based on

⁴ Part 5 describes the objectives and general process of screening, environmental assessment, and environmental impact review. The Land and Water Boards are the primary screeners under the MVRMA.

⁵ This is one of six standard procedures and consistency working groups established by the Boards in 2008.

legal and policy research, including regulatory, community-based, and industry engagement best practices, as well as careful consideration of public comments received by the Board after the release of draft documents in February 2012 (See Appendix A for a list of reviewed documents).

5. Application

The Policy applies to all new applications made before the Boards after its effective date. It may also apply to existing permits and licences, depending on activities, submissions, or applications made in relation to those permits and licences.

6. Guiding Principles

The following principles will guide the Boards' decisions on any matter related to consultation with affected communities and Aboriginal organizations/governments, including proponent engagement activities, occurring prior to and throughout its process. The principles are not listed in order of priority, and they carry equal weight:

- **Shared responsibility:** meaningful consultation with Aboriginal people, which reflects the authorities and mandates of each responsible party, is essential in our co-management system.
- **Appropriate disclosure:** all information relevant to an application⁶ is made available in a timely and understandable manner and considers the particular culture(s), language(s), and traditions of the affected communities and Aboriginal organizations/governments.
- **Inclusiveness:** all sectors of affected communities, including youth, Elders, and women, are given the opportunity to be involved.
- **Reasonableness:** proponents, affected communities, Aboriginal organizations/governments, the Boards, and the Crown must be reasonable when setting expectations for engagement and consultation processes and be willing to enter into these processes in the spirit of cooperation. This includes the provision of reasonable financial resources for carrying out and participating in consultation and engagement processes.

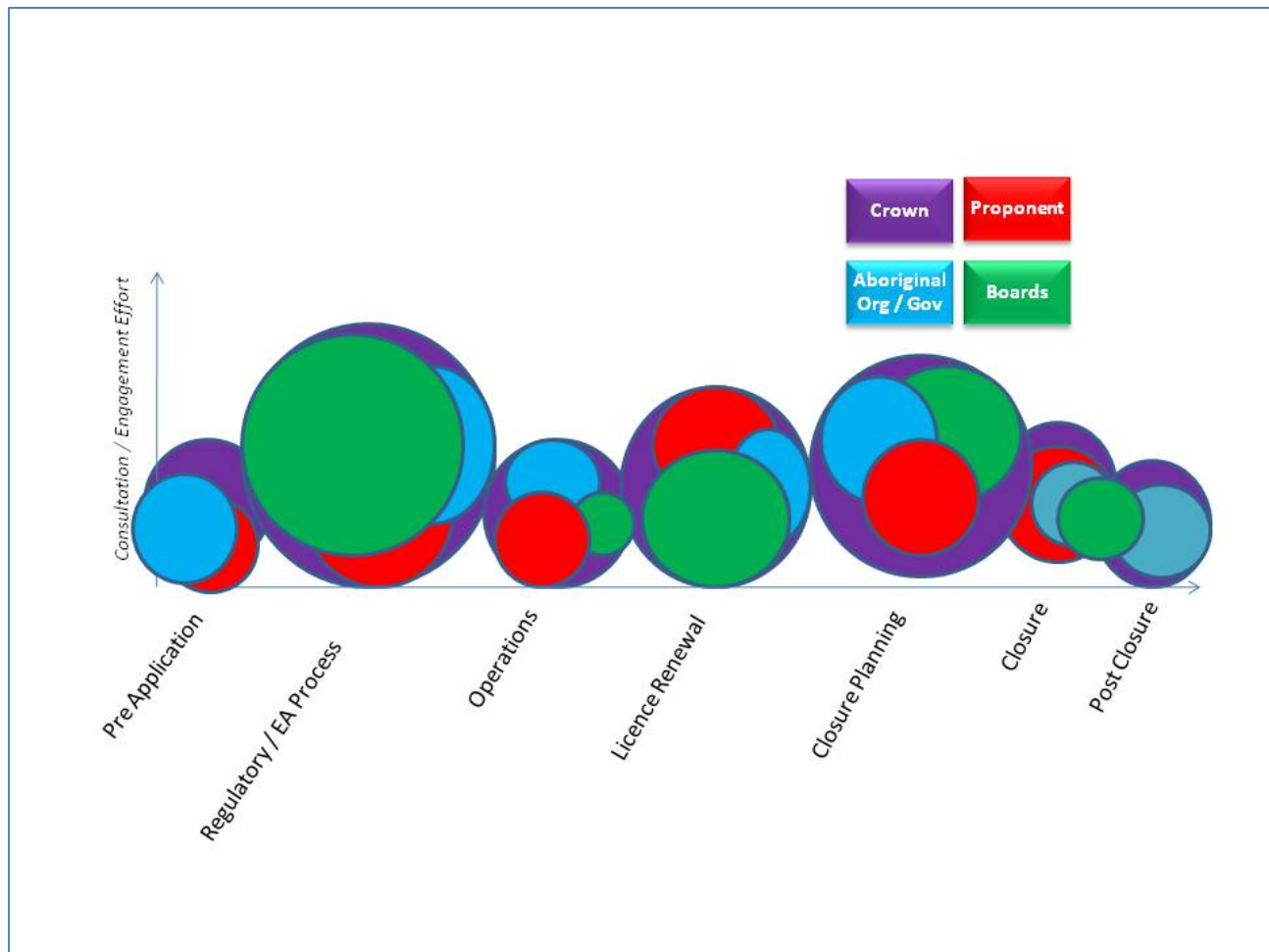
7. Shared Responsibilities: Situating Community Engagement and Board Consultation within the Broader Duty of the Crown to Consult

Consultation with Aboriginal people is motivated by a number of variables, including constitutional duty, legal obligations, ensuring good governance, and maintaining social licence in a region where Aboriginal

⁶This does not pertain to information that is protected by law, commercially confidential, or proprietary.

people live. Therefore, it is important to recognize, as these various types of consultation occur during the regulatory process, how they are different and how they interrelate with one another (see Figure 1).

Figure 1: Example of consultation and engagement throughout the stages of a development



If any activity that is subject to a permit or licence is being contemplated, the federal or territorial Crown is responsible for ensuring its obligations to consult communities and Aboriginal organizations/governments are satisfied. Depending on the nature of the proposed activity, the Crown may; (a) have a duty to consult and accommodate an Aboriginal group; (b) be required to consult under a land claim agreement or statute; or (c) chose to engage with an Aboriginal group to ensure good governance.

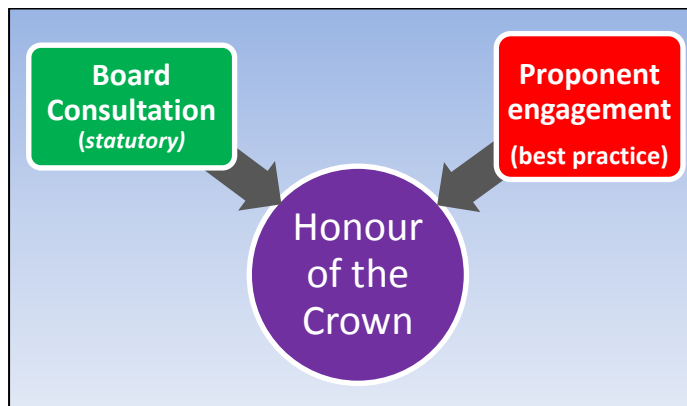
Community engagement, in the context of the Policy, refers to the communication and outreach activities a proponent is required, by the Boards, to undertake with affected communities prior to and during the operation of a project, including closure and reclamation phases. Community engagement is now a recognized industry best practice at the international and national level,⁷ and in most Canadian jurisdictions

⁷ See International Council on Mining and Metals (ICMM). 2010. Good Practices Guide: Indigenous Peoples and Mining, Mining Association of Canada. *Aboriginal and Community Outreach Program: Towards Sustainable Mining (TSM) Assessment Tool*. 2009. Prospectors and Developers Association of Canada (PDAC). *E3Plus: A Framework for Responsible Exploration: Principles and Guidance*.

there are regulatory requirements (although these requirements range in approach)⁸ to engage with impacted communities and to pay unique attention to the potential for impacts to First Nations.

In the Mackenzie Valley, the majority of affected communities are comprised largely of Aboriginal people, and therefore there is a steady reliance on the results of community engagement carried out by an applicant and statutory consultation occurring through Board processes, to assist decision makers in tracking potential issues which might impact asserted or established Treat or aboriginal rights (see Figure 2).

Figure 2: Crown’s reliance on other consultative processes



The Boards consultative processes, carried out under the MVRMA, play a key role in identifying issues of concern to Aboriginal people and the broader public. According to the federal guidelines, “Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessments and regulatory approval processes that allow it to gather information and address issues raised by Aboriginal groups”⁹. They further state that the “role to be played by any given board, commission or tribunal is determined by its statutory mandate or its terms of reference. More specifically, an ability to address questions of law and an ability to remedy or address consultation related issues will inform the role of such boards, tribunals, and commissions in Crown consultation processes”. (AANDC 2011, p.18).

For engagement and consultation to be effective, affected communities in the Mackenzie Valley and the Aboriginal organizations/governments who are tasked with representing the rights bearing community also need to engage and participate. However, limited capacity can often reduce the ability of all parties, particularly affected Aboriginal organizations, to effectively participate.

⁸ The National Energy Board (NEB) recommends, as a best practice, the development of consultation protocols with affected Aboriginal communities, and requires proponent reporting on any Crown consultation they are aware of that occurred where First Nations could be impacted. The British Columbia Utilities Commission (BCUC), whose applicants are often Crown corporations, outlines a mandatory and detailed First Nations consultation process, where applicants must summarize consultation undertaken, including information regarding asserted or established rights. In contrast, the Alberta Energy Resources Conservation Board (ERCB) has mandatory public engagement requirements for larger projects, within which any engagement with First Nations is discretionary.

⁹ Also see Guiding Principle #6 that directs federal officials to align consultation processes to existing regulatory or legislative processes, to the extent possible (p.15).

7.1. Consultation Mandate of the Land and Water Boards

The Boards have the ability to rule on questions of law and have specific remedies in the MVRMA that can be used to address issues raised during statutory consultation, but cannot engage directly in Crown consultation.

The Boards play a dual role in the context of contributing to the Crown's obligations to Aboriginal people in the Mackenzie Valley:

- (1) The Boards conduct consultation pursuant to specific objectives of the MVRMA that aim to ensure Aboriginal rights have been taken into account before decisions are made; and,
- (2) The Boards have the authority to assess the adequacy of Crown consultation before making a final decision or making a recommendation to the Minister of Aboriginal Affairs and Northern Development Canada and may use remedies available to them in addressing consultation issues.

In the regions of the Mackenzie Valley with finalized land claim agreements,¹⁰ consultation processes are clearly articulated. In the regions of the NWT where modern treaties have not yet been concluded and implemented, the requirements for Crown consultation and engagement are not finalized in any negotiated frameworks. As a result, consultation issues can arise more frequently in the course of a proceeding.

Appendix B lists a general summary of all parties' mandates/responsibilities for engagement and consultation.

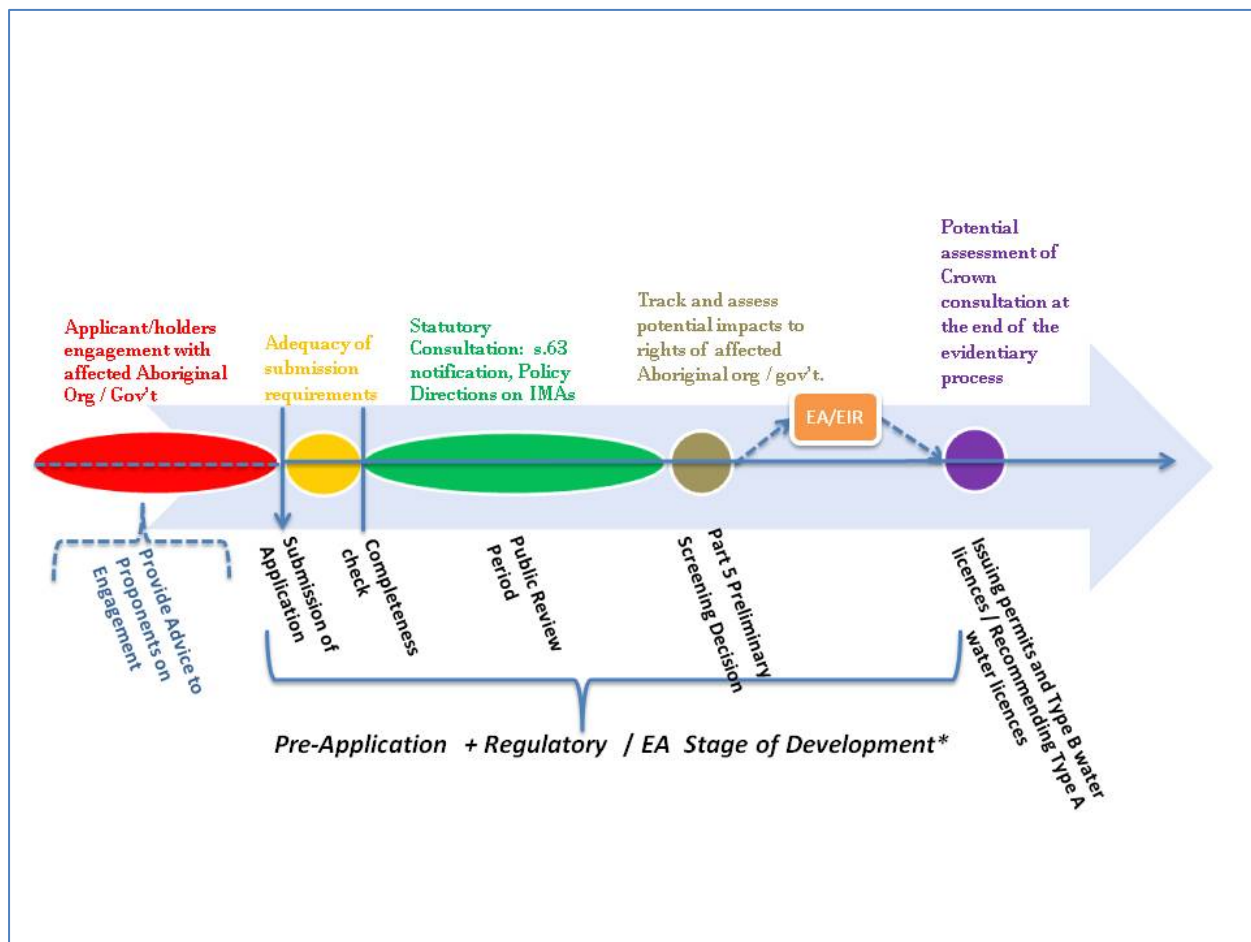
8. Aboriginal Consultation throughout the Regulatory Process

The following section outlines the Boards' policy for engagement requirements and Board consultation throughout the permitting and licensing process. The framework is addressed in four parts and illustrated in Figure 3. It includes:

1. **Completeness Check:** Has adequate engagement with affected communities taken place prior to the submission of the application?
2. **Notification and Public Review:** Who is an affected community and Aboriginal organization/government?
3. **Preliminary Screening:** Is there potential for impacts to established or asserted rights?
4. **Final Decisions:** Was Board and Crown consultation adequate?

¹⁰ Gwich'in Comprehensive Land Claim Agreement (1992), Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993), and Land Claim and Self-Government Agreement Among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada (2005).

Figure 3: Community engagement and Aboriginal consultation throughout the issuance process¹¹



8.1. Assessing Adequacy of Proponent Community Engagement

Community engagement carried out by a proponent in an affected community provides an important contribution to the overall consultation effort required to ensure that consultation requirements, expectations, and needs of Aboriginal people are addressed. As stated by the federal government in its updated Consultation Guidelines, “Industry proponents are often in the best position to accommodate an Aboriginal group for any adverse impacts on its potential or established Aboriginal or Treaty rights, for example, by modifying the design or routing of a project. Canada will seek to benefit from the outcomes of a third-party consultation process and any accommodation measures undertaken by third parties” (AANDC 2011, p.19).

The *Policy* is based on the expectation that a proponent, prior to submitting an application to the Board, makes an effort to seek and understand the full nature of concerns expressed by affected communities and to consider the feasibility of any proposed methods of mitigation. A proponent, prior to submitting an

¹¹ Refer to Figure 1 and Appendix B for consultation roles outside of this process. This diagram does not detail the environmental assessment or environmental impact assessment stages in relation to Aboriginal engagement or Board consultation.

application and over the life of the project, is expected to respond to concerns and work with affected communities to jointly resolve such issues. The *Policy* is further based on the expectation that the proponent and the affected communities will consider and mutually agree upon future engagement efforts that are reasonable in consideration of the scope, scale and context of the application.

The Boards' requirements for community engagement are outlined below and its guidance to proponents is provided in the document, "*Community Engagement Guidelines for Applicants and Holders of Land Use Permits and Water Licences*".

8.1.1. Submission Requirements

For an application to be deemed complete and advance through the regulatory process an **engagement record** and **engagement plan** must be submitted.

The **engagement plan** is a forward-looking document, detailing appropriate times and approaches to engagement with the appropriate communities and Aboriginal organization(s)/government(s) over the life of a project. It should reflect the scope, scale, and context of the project. Where community concern is likely to be high, a higher level of engagement should be reflected in the engagement plan. The *Guidelines* provide some suggestions on recommended levels of engagement planning based on the type and circumstances of a proposed project. Examples are also provided to guide proponents working on smaller scale projects that likely just require one permit, versus larger projects that will require multiple permits and licences over a longer period of time.

The **engagement record** must be comprehensive and provide the Board with evidence of what engagement and, if applicable, government consultation (that the proponent is aware of) took place prior to an application and any resulting changes to the proposed project.

8.1.2. Deeming an Application Complete

The Board will assess, upon receipt of an application, the engagement record and the engagement plan to determine whether they are complete.

If both the engagement record and the engagement plan are signed by the appropriate Aboriginal organization(s)/government(s), they will likely be considered adequate.

If submissions are not signed, the Board will apply its own **adequacy criteria** to determine whether an application is complete (see subsection 2.2 of the *Guidelines*). The criteria are based on the guiding principles in this *Policy* and consider: (a) which communities were engaged; (2) timing of engagement; and (3) achieved results.

The Boards will accept requests from parties for exemptions from, or for, additional engagement and retains discretion to make determinations on a case-by-case basis. The Boards maintain discretion to address proponent engagement with affected communities throughout the regulatory process (for example, by placing conditions in permits or licences that address ongoing community engagement).

Proponents should refer to the Guidelines for more details regarding engagement submission requirements, the Board's engagement criteria, and recommended engagement best practices. The Guidelines also provide suggested approaches and guidance to support the submission of engagement documents, including:

- Step-by-step guidance for identifying affected communities;
- Initiating dialogue and engagement planning; and,
- Recommended engagement activities and templates/guides for engagement documentation and planning.

8.2. Board Notification and Review Period

Pursuant to section 63 of the MVRMA, the Boards must provide a copy of all applications to land owners [subsection 63(1)] and provide notice to affected communities and First Nations [subsection 63(2)] and, in the case of the WLWB, the Tłjcho Government [63.(3)], to allow a reasonable period of time for them to make representations to the Boards with respect to the application. Wherever in the MVRMA reference is made, in relation to any matter, to a power or duty to consult,¹² that power or duty shall be exercised, as stated in section 3 of the MVRMA:

(a) By providing, to the party to be consulted:

- (i) notice of the matter, in sufficient form and detail to allow the party to prepare its views on the matter;
- (ii) a reasonable period for the party to prepare these views;
- (iii) an opportunity to present those views to the party having the power or duty to consult; and

(b) by considering, fully and impartially, any views so presented.

Timelines for land use permit notification and review periods are set by the Board to ensure compliance with the timelines established in the Mackenzie Valley Land Use Regulations.¹³ For water licence applications, there are no prescribed timelines.

The Boards use distribution lists to notify all potentially affected parties, including Aboriginal organizations/governments. As opposed to pre-submission community engagement carried out by the proponent, statutory consultation carried out by the Boards is much broader and more comprehensive in terms of geographic scope. With respect to Aboriginal organizations/governments, distribution lists are informed by direction provided in:

- modern treaties (Gwich'in, Sahtu, and Tłjcho agreements);
- interim measures agreements;
- framework agreements;

¹² While the term "consultation" is not directly referenced in section 63, the Boards interpret this provision of the MVRMA as a statutory consultation obligation to First Nations.

¹³ The Board must decide whether to issue, refer to environmental assessment, conduct further study, or deny a land use permit application within 42 days of receipt of the application.

- litigation settlement areas; and,
- overlap agreements.

Other considerations, including downstream impacts to water, are critical to answering the question, “Who may be potentially impacted?” The Boards will rely on different tools, including those provided by the Crown, such as the geo-pdf *NWT Land Information Related to Aboriginal Groups*.

8.2.1. Policy Directions and Interim Measures Agreements (IMAs)

In regions of the Mackenzie Valley where land claim negotiations are still underway, the MVLWB has been provided with policy direction from the Minister of Aboriginal Affairs and Northern Development Canada to implement interim measures agreement (IMA) processes and timelines. IMAs clarify how the Government of Canada and the Government of the Northwest Territories will work with an Aboriginal group during land and resource negotiations on matters such as parks, forest management, land use permits, disposals of land, water licences, tourism, etc. The MVLWB works within the context of the policy direction relating to the IMAs, the MVRMA, the *NWT Waters Act*, and the accompanying regulations during its notification and public review process.

See Appendix C for a summary of the IMAs and policy direction to the MVLWB.

8.3. Is there Potential for Impacts to Established or Asserted Rights?

Once notification and public review periods for an application are complete, all new project applications are subject to a preliminary screening, unless specifically exempted, to determine if they might have significant adverse environmental impacts or be a source of public concern.

If in the course of a public review, an affected community or Aboriginal organization/government raises concern regarding a potential impact to an asserted or established right, the Boards will, prior to making a screening decision, need to assess the potential impact of the application in this context, in addition to any concerns raised by other parties (e.g. government agencies, members of the non-Aboriginal public). The Boards track these issues as they arise and consider them during screening decisions.

Once potential impacts of the project have been identified (including those that may impact an established or asserted right), the Boards have a number of options (remedies), including:

- Ruling to stop the process and conduct a public hearing or further investigation under paragraph 22(2)(b) of the *Mackenzie Valley Land Use Regulations*;
- Issuing a permit or licence with conditions that can adequately address (mitigate) impacts to established or asserted rights;
- Referring the project to environmental assessment if the development is likely to have a significant adverse impact on the environment or might be a cause for public concern (which includes concerns raised regarding impacts to rights); or
- Refusing to issue the permit or type B water licence, or not recommending the issuance of a type A water licence until appropriate accommodations are considered.

As outlined in the Boards' Reference Bulletin: *Procedural Framework for Addressing the Adequacy of Crown Consultation*, if further investigation of impacts to asserted or established rights is required, the Boards may consider information provided by the Crown regarding its knowledge of a potential infringement and steps it has taken to ensure it is meeting its legal obligations.

8.3.1. Decisions Exempted from Part 5 Processes

Boards often receive applications for renewals of existing permits and licences, as well as for assignments and extensions. These applications have previously fulfilled the requirements of the environmental assessment process as described in Part 5 of the MVRMA (which may include a screening and environmental assessment or an environmental impact review) and therefore are normally exempt from any further screening.

Pursuant to section 62 of the MVRMA, a Land and Water Board may not issue a licence, permit, or authorization unless the requirements of Part 5 have been met, including paragraph (114)(c) which requires ensuring that the concerns of Aboriginal people and the general public are taken into account in that process. The Boards require, under its pre-submission engagement requirements (outlined in section 8.1 of the Policy and addressed in the Guidelines), that engagement occurs throughout the life of a project. This includes, in the instance of a previously permitted or renewed project, assignments and extensions. These engagement requirements, combined with the Board's notification, public review process, and its ability to set terms and conditions will, in most instances, be adequate to meet the objectives of section 62 of the MVRMA.

8.4. Ensuring Adequate Consultation Before Final Recommendations or Decisions

Before issuing a land use permit or a type B water licence or making recommendations to the Minister of Aboriginal Affairs and Northern Development Canada regarding the approval of a type A water licence, the Boards must be satisfied that adequate Crown consultation has occurred. The Boards will have been tracking consultation issues that arose during proponent engagement and throughout the regulatory process and, if required, will report on them specifically in the Reasons for Decision for a particular application.

In the case of a type A water licence, a Board will highlight, in the Reasons for Decision, any consultation issues that arose throughout its proceedings and how they were addressed in the Board's process. If consultation issues remain, they will be articulated to the Minister. It is the responsibility of the Minister to examine these issues and determine appropriate actions prior to approving a type A water licence.

As a final decision-maker on land use permits or type B water licences, the Board's authority extends to its role as a preliminary screener, as well as to its role as regulator. The Board may consider remedies available to it if the adequacy of Crown consultation has been raised in the course of a proceeding (through a request for ruling) and deemed inadequate.

The Board’s internal process for making adequacy determinations is outlined in the MVLWB’s Reference Bulletin: *Procedural Framework for Addressing the Adequacy of Crown Consultation*.

9. Policy Implementation

Section 106 of the MVRMA gives the MVLWB the responsibility to “Issue directions on general policy matters or on matters concerning the use of land or waters or the deposit of waste that, in the Board’s opinion, require consistent application throughout the Mackenzie Valley”. The Policy is issued under section 106 and, as such, the MVLWB will establish the procedures necessary to ensure that the Policy is appropriately implemented and periodically reviewed. The MVLWB may establish working groups to address specific policy matters related to consultation or engagement, including the revision of the Policy, the Guidelines or the Reference Bulletin.

10. Monitoring and Performance Measurement

Mechanisms will be required to monitor and measure performance and to evaluate the effectiveness in achieving the Policy’s objectives articulated above. In accordance with the principles of a management systems approach (i.e., plan-do-check-act), the MVLWB will develop a performance measurement framework that specifies reporting requirements against the Policy’s objectives including indicators, sources of information, and frequency of reporting. The Policy will be reviewed and amended as necessary within that framework. The framework will also describe how interested parties will be involved in the Policy review process.

Appendix A: Reviewed Documents

Statutory and Regulatory Guidance Documents related to Engagement and Consultation

- Government of Canada. 1992. *Gwich'in Comprehensive Land Claim Agreement*.
- Government of Canada. 1993. *Sahtu Dene and Métis Comprehensive Land Claim Agreement*.
- Government of Canada. 1998. *Mackenzie Valley Resource Management Act*.
- Government of Canada. 2001. *Akaiicho Territory Interim Measures Agreement*.
- Government of Canada. 2003. *NWT Métis Nation Interim Measures Agreement*.
- Government of Canada. 2003. *Policy Direction to the MVLWB Regarding Consultation with the Manitoba Denesuline*.
- Government of Canada. 2003. *Policy Direction to the MVLWB Regarding Consultation with the Saskatchewan Athabasca Denesuline*.
- Government of Canada. 2004. *Dehcho Interim Measures Agreement*.
- Government of Canada. 2004. *Policy Direction, section 43, Dehcho Interim Measures Agreement*.
- Government of Canada. 2004. *Policy Direction to the MVLWB regarding the Akaiicho Territory Dene First Nations*.
- Government of Canada. 2005. *Land Claim and Self-Government Agreement Among the Tłı̨cho and the Government of the Northwest Territories and the Government of Canada*.
- Mackenzie Valley Land and Water Board. 2003. *Draft Public Engagement Guidelines of the Mackenzie Valley Land and Water Board*.

Crown Consultation Guidelines/Agreements

- Aboriginal Affairs and Northern Development Canada (AANDC). 2011. *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, Government of Canada.
- Canadian Northern Economic Development Agency. 2012. *Memorandum of Understanding: Defining Terms and Scope of Cooperation between Federal Departments, Agencies and the Northern Projects Management Office (NPMO) for Coordination of Northern Projects*.
- Government of the Northwest Territories. 2012. *Aboriginal Engagement Strategy*.

Government of the Northwest Territories. 2007. *The GNWT's Approach to consultation with Aboriginal Governments and Organizations*.

Community-based Guidelines applicable to Engagement and Consultation

Akaiitcho Dene First Nations. *Mineral Exploration Guidelines in the Akaiitcho Territory*.

Akaiitcho Dene First Nations. 2008. *Akaiitcho Exploration Agreement*.

Gwich'in Tribal Council. 2010. *Land Management and Control Guidelines*.

Industry Guidance on Aboriginal and Public Engagement

Canadian Association of Petroleum Producers (CAPP). 2006. Industry Practices: *Developing Effective Working Relationships With Aboriginal Communities*.

Canadian Association of Petroleum Producers (CAPP). 2003. *Guide for Effective Public Involvement*.

International Council on Mining and Metals (ICMM). 2010. *Good Practices Guide: Indigenous Peoples and Mining*.

Mining Association of Canada. 2009. *Aboriginal and Community Outreach Program: Towards Sustainable Mining (TSM) Assessment Tool*.

Prospectors and Developers Association of Canada (PDAC). 2009. *E3Plus: A Framework for Responsible Exploration: Principles and Guidance*.

Appendix B: Aboriginal Engagement and Consultation Roles and Responsibilities as it Pertains to Permitting and Licensing

Party	Roles	Responsibilities	Examples of Existing Guidance on Mandate and Authorities
Land and Water Boards	Statutory Consultation (MVRMA)	<ul style="list-style-type: none"> Guiding proponents (industry) on community engagement and assessing adequacy Administering consultation processes under the MVRMA Assessing, as a final decision-maker, the adequacy of Crown consultation when requested and required. 	<ul style="list-style-type: none"> <i>Mackenzie Valley Resource Management Act, NWT Waters Act, and associated regulations</i> interim measures agreements (IMAs) <i>Community Engagement and Board Consultation Policy</i> <i>Community Engagement Guidelines</i> <i>Reference Bulletin: Procedural Framework for Addressing the Adequacy of Consultation.</i>
Crown (Federal Dept's and GNWT)	Ensuring that the duty to consult is met (under statute, section 35, etc)	<p>Federal (2011):</p> <ul style="list-style-type: none"> Pre-consultation analysis and planning. If required: <ul style="list-style-type: none"> Crown Consultation Process Accommodation Implementation, Monitoring and Follow-up <p>GNWT (2007):</p> <ul style="list-style-type: none"> Pre-consultation analysis. If required: <ul style="list-style-type: none"> Consultation Plan Formal consultation and potential accommodation Post consultation 	<ul style="list-style-type: none"> section 35 of <i>Constitution Act</i> <i>Mackenzie Valley Resource Management Act, NWT Waters Act, and associated regulations</i> land claim agreements interim measures agreements <i>Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011)</i> <i>The GNWT's Approach to Consultation with Aboriginal Governments and Organizations (2007)</i> Aboriginal Engagement Strategy, GNWT Interim Resource Management Assistance (IRMA) Program (AANDC/GNWT) project-specific participant funding mechanisms¹⁴

¹⁴ There is no participant fund under the MVRMA. This has been identified as a key capacity gap by many parties in the context of effective public participation, including Aboriginal capacity to engage in the regulatory process.

Party	Roles	Responsibilities	Examples of Guidance on Mandate, Authorities, and Policy
Mackenzie Valley Environmental Impact Review Board	Statutory consultation	<ul style="list-style-type: none"> Guiding developers (industry) on engagement in the EA / EIR process Administering consultation processes under the MVRMA Tracking and assessing, consultation and accommodation issues in the course of an EA or EIR 	<ul style="list-style-type: none"> <i>Mackenzie Valley Resource Management Act</i> EIA guidelines Traditional Knowledge guidelines socio-economic impact assessment guidelines
Proponents	Community engagement	<ul style="list-style-type: none"> To ensure best practices, as provided for in the Boards' guidelines, are carried out in the pre-submission phase and over the life of the project 	<ul style="list-style-type: none"> ICMM – <i>Good Practice Guide: Indigenous Peoples and Mining</i> PDAC: <i>E3 Plus Framework</i> CAPP: <i>Developing Effective Working Relationships with Aboriginal Communities</i>
Affected Aboriginal organizations/governments	Engaging with proponents Participating in the regulatory system	<ul style="list-style-type: none"> Engaging with proponents in the pre-submission phase Clearly articulating the nature and scope of any assertions and potential adverse impacts of a given project or initiative using MVRMA processes 	<ul style="list-style-type: none"> land claim agreements IMAs, administrative agreements regional and community-based consultation guidelines

Appendix C: Summary of Regulatory Guidance in Policy Directions and Interim Measures Agreements

Agreement, IMA, and Policy Direction	Date	Source	Sections Relevant to the MVLWB	Subject area	Specific Measures
Akaiitcho Interim Measures Agreement (IMA) and Schedules	2001		2.1 (a)(b) 3.1 (a)(b) Schedule C- Land Use Permits C.1 – Water Licences	Notification and review	<ul style="list-style-type: none"> Canada issues land use permits and water licences through the MVLWB Schedules C and C.1 set out how (the Board) will provide the Akaiitcho DFN with copies of the application or other information and timelines for response. For land use permits and water licences, the IMA states the Board will send applications to the Akaiitcho Pre-Screening Board (APSB), within five days of receipt and deeming the application complete. The APSB will consider an application and respond within 21 days for type A land use permits, and five days for type B land use permits. The APSB will consider an application and respond within 30 days for a water licence. For water licences, the MVLWB may extend the time for the APSB to respond, to the extent permitted by the MVRMA. Responses may include written submissions, oral submissions, audio-visual presentations, and/or Elders submissions (oral or written).
Ministerial Policy Direction regarding the Akaiitcho IMA	2004	Sections 82 and 109 of the MVRMA	1-10	<p>Further study re: potential impacts to rights</p> <p>Mitigation measures for land and water re: exercise of resource rights and impact on heritage</p>	<ul style="list-style-type: none"> Policy Direction further directs the MVLWB to consider, fully and impartially, a request by the APSB that the Board use paragraph 22(2)(b) of the Mackenzie Valley Land Use Regulations or section 16 of the <i>NWT Waters Act</i> so that a hearing can be held or that the applicant conduct further study or investigation respecting use by members of an ATDFN of land subject to the application or the use of water or the deposit of waste, and of adjacent land and water that may be affected by the application. When establishing terms and conditions for a permit or a water licence, the Board is to consider the impact of the permit or licence on traditional resource use activities engaged in by members of the ATDFN and on heritage resources. The Board is to consider fully and impartially any recommendations made by the APSB respecting the terms and conditions to be included in a permit for the use of water and whether to issue a licence for the use of water or deposit of waste and the terms and conditions to be included in a licence. <i>For greater certainty, the Direction does not change any time period set out in</i>

				resources	<i>the MVRMA or the NWT Waters Act or their regulations.</i>
Dehcho First Nations (DCFN) Interim Measures Agreement	2001		11 27/28	Land Use planning	<ul style="list-style-type: none"> Following consideration of a land use plan and after consultation with the MVLWB, the Minister of Aboriginal Affairs and Northern Development Canada may, under section 109 of the MVRMA, provide written policy directions, in relation to the plan, binding on the Board with respect to the exercise of its functions. No new land use permits or water licences will be issued within the Dehcho Territory except after written notice to the DCFN of an application made to the MVLWB for a permit or licence and after a reasonable period of time for the DCFN to make representations to the Board.
Ministerial Policy Direction regarding the DCFN IMA – withdrawn lands non-exclusive seismic	2004		Sections 82 and 109 of the MVRMA Section 43 of the IIMA	Exclusion of land from non-exclusive surveys (geophysical seismic)	<ul style="list-style-type: none"> In undertaking its (Canada's) function of identifying the location and area of lands that may be used in geophysical land-use operations involving seismic programs conducted as non-exclusive surveys, the Board is to exercise its authority consistent with Canada's commitment in section 43 of the IMA. Accordingly, the lands identified on maps attached to the policy direction which are within the area of lands withdrawn from disposal under the Order in Council dated August 13, 2003 shall not be available for such land-use operations for the period of time the withdrawal order, or an order replacing it under the Agreement, is in effect.
Northwest Territory Métis Nation Interim Measures Agreement	2002		5.0 Schedule 4.1 (a) - LUPs 4.1(b) - WLs	Notification and review	<ul style="list-style-type: none"> Canada shall, at its earliest opportunity, notify the NWTMN in writing when an application for a type A or type B land use permit or type A or type B water licence as provided for in the MVRMA or the <i>NWT Waters Act</i> is received, without prejudice to: (a) involvement of the NWTMN in the preliminary screening process provided for in the MVRMA; and, (b) involvement of the NWTMN in any other consultative process. Schedules 4.1(a) and 4.1(b) set out how the Board will provide the NWTMN with copies of the application or other information, and timelines for response. For land use permits and water licences, the IMA states the Board will deliver packages containing applications and related information to the NWTMN, within five days of receipt and deeming the application complete. The Board will release all new information to the NWTMN as soon as it becomes available, and the Board may, upon request by the NWTMN, provide any further information necessary for the NWTMN to inform itself, review, assess, and respond to the application being pre-screened. Where the Board holds public meetings relating to the proposal, any official records of such meetings will be released to the NWTMN as soon as they are

					<p>completed.</p> <ul style="list-style-type: none"> The NWTMN will consider an application and respond within 30 days (for all types of applications), or within such time as agreed upon between the Board and the NWTMN.
Transboundary IMAs					
Ministerial Policy Direction regarding Saskatchewan Athabasca Denesuline IMA	2003		Section 82 of the MVRMA	<p>Notification and review-paragraph (63)(2)</p> <p>Consider stated potential impacts to heritage resources paragraph (64)(1)</p>	<ul style="list-style-type: none"> Notify the Saskatchewan Athabasca Denesuline of an application made to the Board for a licence or permit in relation to the area identified in Annex B of this direction and allow a reasonable period of time for them to make representations to the board with respect to the application. Seek and consider the advice of the above respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application.
Ministerial Policy Direction regarding Manitoba Athabasca Denesuline IMA	2003		Section 82 of the MVRMA	<p>Notification and review-paragraph (63)(2)</p> <p>Consider stated potential impacts to heritage resources paragraph (64)(1)</p>	<ul style="list-style-type: none"> Notify the Manitoba Athabasca Denesuline of an application made to the Board for a licence or permit in relation to the area identified in Annex "A" of this direction and allow a reasonable period of time for them to make representations to the board with respect to the application. Seek and consider the advice of the above respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application.