

Supplemental to:
Environmental Assessment Office 2009 User Guide

**Application Information Requirements
and
Providing Required
Non-Treaty First Nations Information**

Purpose

This document provides guidance to proponents on meeting Section C of the Application Information Requirements (AIR) which relate to the potential impacts of the proposed project on aboriginal rights, including title. This document is not intended to be a comprehensive guide on how to consult with First Nations or to replicate materials covered in the *Environmental Assessment Office 2009 User Guide*. It is considered a supplemental document that provides specific guidelines to proponents on ways to obtain required First Nation information. A separate guide is being developed for Treaty First Nations Information.

Background

Pursuant to the section 11 order, a proponent is assigned certain responsibilities for undertaking procedural aspects of the Crown's duty to consult with potentially impacted First Nations. This includes responsibility to gather information about how First Nations' asserted aboriginal rights¹ including title may be impacted by the proposed project, and the consideration of ways in which First Nation concerns and interests can be accommodated.

The First Nations section of the AIR is designed to ensure that the Application contains the appropriate amount and type of information about the interests and perspectives of First Nations that may potentially be impacted by the proposed project.

Steps for Gathering First Nations Study Information

The following is a list of steps designed to assist proponents in meeting the requirements under the First Nations section of the AIR.

1. Conduct an initial information search on the First Nations potentially impacted by the proposed project:
 - a. Review First Nations' Website (where applicable);
 - b. Review other government decisions involving the First Nations;
 - c. Review pertinent court decisions; and
 - d. Review the Environmental Assessment Office's (EAO) electronic Project Information Center (e-Pic) for information that may be relevant.

¹ An aboriginal right is an activity which is an element of a custom, practice or tradition integral to the distinctive culture of the aboriginal group claiming the right. For an overview of the complex law applicable to the establishment of an aboriginal right, see *Lax Kw'aalams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, at para. 10.

2. Meet with EAO to discuss any existing reports or information available through EAO.
3. Research available ethno-historical, ethnographic or historical information relevant to the proposed project area, and First Nations' use.
4. Meet with First Nations to explain the proposed project and the identity of the proponent; which First Nations are or are likely to be involved; what information the proponent has regarding the First Nation, and requirements under the AIR.
5. If possible, establish an agreed upon consultation approach with First Nations for obtaining the necessary information from appropriate knowledge-holders
This may include:
 - i. gaining information directly from the First Nations through Chief(s), Council(s), Elders or Community Members;
 - ii. funding the production of the First Nations' information reports or studies, (although not required by EAO - see below); and/or
 - iii. obtaining existing information already in the possession of the First Nation.

Types of Information

Through written mechanisms, the proponent should seek to engage with First Nations as early as possible regarding how information should be obtained and what information would be included in the Application on First Nations. Any publicly available information that the proponent may have on the First Nation they are consulting with should be shared with the First Nation early in the process. Specifically, the following questions should be discussed with First Nations in relation to the proposed project area:

1. What specific activities related to aboriginal rights, including title, have been practiced by First Nations in the past in the vicinity of the proposed project?;
2. What specific activities related to aboriginal rights, including title, are currently practiced by First Nations in the vicinity of the proposed project?;
3. What specific activities related to aboriginal rights, including title, could be practiced in the future by First Nations in the vicinity of the proposed project?;
4. How does the proposed project potentially impact each of the aboriginal rights identified above?;
5. What measures could be used in the proposed project's design or operation to avoid or reduce potential impacts to the above-identified rights?; and
6. Within the First Nations asserted traditional territory, where else can the specific aboriginal right be exercised that lies outside of the proposed project area?

Where possible, proponents are also encouraged to identify how the proposed project may impact broader First Nation interests with respect to potential environmental, economic, health, social and heritage effects (that is, interests which are not

necessarily elements of traditional activities). Proponents are encouraged to incorporate relevant ecological knowledge in assessing these effects. This can be done through early involvement of First Nations in the establishment of baseline studies and study boundaries. In many cases, First Nations can identify this information by participating in working groups and open houses and by way of other direct consultation activities, such as early and on-going meetings with First Nations.

Although a proponent is not required by EAO to fund specific and separate studies commonly referred to as traditional use studies, aboriginal interest and use studies or traditional ecological knowledge studies, a proponent may decide that since such studies may contain the information required above, (as well as additional information of interest to First Nations) it may be mutually beneficial to undertake these studies. EAO encourages proponents to consider funding such studies where the proponent is able to reach agreement with the First Nations and where such studies are consistent with the AIR.

Should the proponent not be able to obtain information directly from First Nations, the proponent must report to EAO the steps that were taken and efforts made. Proponents must also include details as to the funding offered and/or provided to First Nations, or what the proponent was prepared to provide. Proponents must still include information obtained from other sources, such as ethno-historic research about the area or First Nation use of the area as described in other public documents.

The proponent is not responsible or required to:

- make statements related to the strength of First Nations' asserted aboriginal rights including aboriginal title;
- the legal status of treaty rights or negotiations; or
- consider the adequacy of the Crown's duty to consult with First Nations.

In summary, the proponent's consultation should be focused on developing a full understanding of First Nation activities and interests in the project area with the goal of avoiding, mitigating or accommodating impacts where practicable.

Other Types of Studies

First Nations are often interested in securing funding to inform strategic community development strategies, or other such studies to help identify the broader interests of the First Nation in relation to a proposed project, and relevant perspectives concerning the communities' economic development.

While EAO encourages the proponent and First Nations to discuss these matters where of mutual interest and benefit, such studies are not regarded as part of the EA process. In any case where the proponent proposes to include information from

additional studies that are not required in the AIR, the Application should clearly indicate that the information was not required in the AIR, and that the information is being provided for general information.

Confidentiality

EAO does not generally accept documents on a confidential basis, as doing so raises questions about fairness and transparency of process if the public and other interested parties are not made aware of, and do not have an opportunity to respond as necessary to, information that may potentially affect their interests. There can, however, be limited exceptions to this principle, such as an extraordinary and compelling reason why specific information must be kept confidential. This might, for example, include identification of a particularly sensitive cultural site for which public disclosure might be reasonably expected to have significant adverse impacts on the First Nation. It is important to recognize that these are limited circumstances, and the mere fact that information is of cultural importance to a First Nation is not enough to warrant departures from the normal principles of administrative fairness and transparency.

Typically, concerns about disclosure of information that First Nations might otherwise wish to be treated as “confidential” can be addressed by presenting the information in a manner that addresses the information requirements of the EA but does avoid the concerns First Nations may have regarding public disclosure. This may include describing the information in public documents in a manner that does not disclose specific locations. In the case where a proponent is having, or believes it will have difficulty in obtaining First Nations information as required under the AIR, unless a contract of confidentiality is signed, they should discuss this with the EAO project lead as soon as possible.

Economic Benefit Arrangements

The EAO encourages proponents to explore benefit-sharing agreements with First Nations where the parties consider them to be in their mutual interest. The EAO will consider any information it receives regarding such agreements when assessing the impacts of a proposed project. However, such agreements are not considered preconditions to the completion of the review process or the consultation process or to a decision by the Ministers. In any case where a proponent proposes to include in its Application information regarding economic benefits arrangements, the Application should clearly indicate that such information was not required in the AIR but is included for general information.