

Indigenous¹ Consultation and Participation in Natural Resource Development Project Reviews under the *Natural Resources Conservation Board Act*

The Crown duty to consult and accommodate

Pursuant to s. 35(1) of the *Constitution Act, 1982*, the existing Aboriginal and treaty rights of Indigenous peoples are affirmed. Natural Resources Conservation Board (NRCB) decisions that may infringe on Aboriginal and treaty rights trigger the duty to consult and accommodate.

The Alberta Aboriginal Consultation Office (ACO) is responsible for leading consultations on behalf of the Government of Alberta (GoA). The ACO also oversees private sector proponent-led consultation conducted in accordance with a consultation plan.

Projects that require NRCB approval are also subject to other GoA approvals (e.g., *Environmental Protection and Enhancement Act* or *Water Act*) and may require federal approvals². The ACO will provide a consultation adequacy recommendation to GoA regulatory decision makers; however, the ACO does not provide advice to the NRCB. The GoA has stated that it may rely upon the NRCB's review process to partially or completely fulfil the GoA's duty to consult and accommodate. See [ACO's information on proponent-led Indigenous consultations](#).

The NRCB has aligned its pre-hearing, hearing, and decision-making procedures to ensure a robust process that contributes to the discharge of consultation duties that may be triggered.

The NRCB respects the following principles

- An NRCB review would trigger the GoA's duty to consult when the GoA has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by an NRCB public interest decision. The NRCB does not assess the adequacy of the GoA's direct Indigenous consultation³; rather, the NRCB satisfies itself that the GoA's consultation process is sufficiently advanced to allow the NRCB review process to proceed to a public hearing.

- The duty to consult and accommodate is meant to address adverse impacts on established or asserted Aboriginal or treaty rights in relation to the NRCB approval under consideration.
- The duty to consult and accommodate involves a procedural and substantive element.
- Procedurally, if infringement of constitutional rights might occur, Indigenous peoples must have the opportunity to have their views heard and considered in the NRCB review.
- Substantively, where adverse effects to constitutional rights might occur, Indigenous peoples must have their rights accommodated through mitigation of impacts, minimal impairment, and consideration of compensation or other negotiated solutions.
- A meaningful consultation process must be carried out in good faith.
- In its decisions, the NRCB will identify how it considered and addressed Indigenous concerns.
- The NRCB will determine whether consultation with Indigenous peoples has adequately identified a project's adverse effects on established or asserted Aboriginal or treaty rights, and whether impacts have been sufficiently accommodated or mitigated. Independent of the NRCB review process, GoA consultation may continue after the NRCB hearing.
- The GoA may rely on the NRCB to fulfil aspects of its duty to consult and accommodate. Should the NRCB determine that a project is in the public interest, it recognizes that the GoA may determine that additional conditions to accommodate adverse impacts to established or asserted rights may need to be imposed under the project as a result of the GoA's ongoing consultation obligation.

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The opportunity to participate in the NRCB review

Indigenous peoples who participate in the NRCB review process can expect:

- An inclusive review process consistent with the Honour of the Crown principle in order to ensure that Indigenous concerns are taken into account in the NRCB's review;
- An impartial review by the NRCB. The NRCB acts at arm's length from the GoA's direct Indigenous consultation;
- An opportunity for meaningful participation⁴ in the NRCB's review will include an accessible electronic written record and may include an oral hearing;
- Adequate notice of the pre-hearing and hearing process inviting formal participation;
- An oral or written hearing that will provide the opportunity to make formal submissions and to make information requests and receive responses;
- Sensitivity to Indigenous peoples and their procedural needs;
- An intervener funding process⁵ that facilitates participation in the hearing, including assistance to prepare and tender evidence (this may include an expertly prepared traditional land use study). The NRCB encourages Indigenous peoples to participate in the pre-hearing conference, which will address the hearing process and advance intervener funding;
- An ability to make closing (normally oral) submissions;
- An assessment of impacts to Aboriginal or treaty rights;
- A consideration of accommodation measures designed to minimize impacts and respond directly to the concerns raised by affected Indigenous peoples if the NRCB determines that a project is in the public interest; and
- A written decision that describes how the rights and interests of Indigenous peoples were considered and addressed.

Notes

¹ The NRCB uses the term "Indigenous" to refer to all First Nations, Métis, Inuit, and other Indigenous peoples, recognizing that not all people self-identify using the term "Indigenous". The NRCB uses the term "Aboriginal" when required for historical or legal reasons or when referencing programs, program area titles, and data sources that use "Aboriginal".

² The government of Canada is responsible for pursuing consultations with Indigenous peoples where a project requires a federal regulatory approval and Aboriginal and treaty rights may be infringed.

³ The NRCB is not a designated decision maker under Part 2 of the *Administrative Procedures and Jurisdiction Act* (RSA 2000 c. A-3) and has no statutory authority to determine questions of constitutional law.

⁴ The *Natural Resources Conservation Board Act* provides that persons who may be directly affected by the proposed project have standing to participate in the NRCB review. See the NRCB's guide document "[The Board Review Process under the NRCBA](#)".

⁵ Information related to intervener funding eligibility and process, including advance intervener funding, is available in the NRCB's "[Intervener Funding Process Guide](#)" and the "[Intervener Funding Fact Sheet](#)".

You are encouraged to contact the NRCB for further information.

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Fact sheets and other NRCB publications are available at www.nrcb.ca

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