

## **Aboriginal Consultation Framework for the Northern Gateway Pipeline Project**

This document sets out a framework for how the federal government will rely on the Joint Review Panel process to the extent possible to assist in fulfilling its legal duty to consult Aboriginal groups for the proposed Northern Gateway Pipeline project.

### **The Federal Government Approach to Aboriginal Consultation**

The Joint Review Panel (JRP) process will play a key role in the federal government's consultation with Aboriginal groups. The JRP will consider the potential adverse impacts that federal government actions regarding the Northern Gateway Pipeline project may have on potential or established Aboriginal and treaty rights.

The federal government is committed to taking a whole-of-government approach to consulting with Aboriginal groups regarding the Northern Gateway Pipeline project. Through this approach federal departments and agencies will fulfill their obligations for consulting Aboriginal groups in a coordinated manner that is integrated with the environmental assessment and regulatory review processes for the project.

The JRP process will be the primary mechanism for Aboriginal groups to learn about the project and present their views to the federal government about:

- their traditional knowledge with respect to the environmental effects of the project;
- the effects any change in the environment resulting from the project may have on their current use of lands and resources for traditional purposes; and
- The nature and scope of their potential or established Aboriginal and treaty rights, the impacts the Crown conduct in respect of the project may have on those rights, and appropriate measures to avoid or mitigate such impacts.

### **The Joint Review Panel Process**

The federal government is required by law to ensure the review of the proposed project under both the *Canadian Environmental Assessment Act (CEAA)* and the *National Energy Board Act (NEBA)*.

The JRP process provides the most thorough type of review available under these Acts. It requires that the proponent describe in detail the nature of its proposed project and provide a detailed statement of the anticipated project's environmental effects. The environmental assessment of the proposed project is

conducted by a panel of experts, appointed by the Minister of the Environment and by the NEB. The JRP process provides all interested parties with an opportunity to understand the nature of the project and its impact on the environment, and provides opportunities for individuals and groups to provide their own views and perspectives on these issues. The JRP process also provides all interested parties the opportunity to hear the views and perspectives of the other parties participating in the process.

The joint review panel process has proven over time to be an effective means for the review of the environmental impacts of proposed projects and the consideration of broad societal concerns, including those of Aboriginal groups

The federal government believes that many of the issues that will be considered by the JRP in satisfying its mandate (as set out in the JRP agreement) may be directly and indirectly related to potential or established Aboriginal and treaty rights. For example, the project may have the potential to adversely affect a fish-bearing stream or lake and have the potential for consequential impacts on a related right to fish in an Aboriginal group's claimed territory. The JRP process provides an effective and reasonable means of ensuring that Aboriginal groups have access to the JRP and can bring to the JRP's attention the best available information with respect to the project and its potential impacts.

The federal government will rely on the JRP process, to the extent possible, to fulfill its duty to consult with Aboriginal groups. In the event that project-related issues requiring consultation fall outside the mandate of the JRP, the federal government will consult directly with the potentially affected Aboriginal groups on these matters at any time.

### **Federal Environmental Assessment and Related Regulatory Responsibilities**

#### **Crown Consultation Co-ordination:**

The federal government will provide oversight of the consultation approach in order to ensure that the federal government fulfills its consultation obligations. The Canadian Environmental Assessment Agency (Agency) is responsible for coordinating Aboriginal consultation with Aboriginal groups during the federal environmental assessment of the Northern Gateway Pipeline project. The Agency has appointed a Crown Consultation Coordinator who will ensure that consultation activities described in this document are carried out, and Aboriginal groups are well informed.

Throughout the JRP process the Crown Consultation Coordinator will:

- ensure Aboriginal groups are provided with information, where necessary, on *CEAA*, *NEB* and the JRP processes and mandates, and the mandates of other federal departments and their involvement in the project review;
- answer any questions from Aboriginal groups about the integration of the consultation and JRP processes;
- discuss the importance of being involved in the JRP process and how Aboriginal groups can participate in it. This includes the importance of providing environmental assessment related information, including the traditional use of lands and resources for traditional purposes and information related to the nature and scope of potential or established Aboriginal and treaty rights that may potentially be affected by the project and the impacts that the project may have on these rights;
- encourage Aboriginal groups to introduce all project specific issues that are within the mandate of the JRP to the JRP process;
- monitor or participate in all public information sessions conducted by the JRP or its secretariat;
- monitor Aboriginal engagement activities conducted by the proponent to supplement the Crown record;
- liaise with the proponent to gain information on their Aboriginal engagement activities;
- attend oral hearings at key sessions depending on the schedule of intervenors and/or topics to hear and understand rights issues raised by Aboriginal groups in order to prepare for Phase IV consultations;
- discuss how Aboriginal groups may participate in consultation on the JRP environmental assessment report;
- coordinate, in collaboration with federal departments, the consultation on the environmental assessment report;
- initiate discussions on the participation of Aboriginal groups in any remaining consultation that may be required during the regulatory phase after the filing of the JRP environmental assessment report;
- describe funding available to assist Aboriginal groups to prepare for and participate in the JRP process and consultation activities as well as assist Aboriginal groups with the application for funding process; and
- prepare a report to the federal Cabinet, in consultation with federal departments, on the adequacy of consultation. This report on adequacy of consultation will be considered at the same time as federal departments seek federal Cabinet approval for the government response to the JRP environmental assessment report.

#### Federal Departments (Responsible Authorities)

Under section 5 of the *CEAA*, an environmental assessment is required for this project because the *NEB* may issue a certificate under section 52 of the *NEBA*; Transport Canada may grant leave under subsection 108(4) of the *NEBA*

and may issue a permit under paragraph 5(2) and 5(3) of the *Navigable Waters Protection Act*; Fisheries and Oceans Canada may issue an authorization under subsection 35(2) of the *Fisheries Act*; Indian and Northern Affairs Canada may provide an authorization under subsection 28(2) of the *Indian Act*; Canadian Transportation Agency may issue a permit under the *Transportation Safety Act*; and Environment Canada may issue a permit under the *Canadian Environmental Protection Act*. These federal departments cannot make these regulatory decisions until the environmental assessment has been completed.

Federal departments will be active participants in the JRP process to ensure the environmental assessment and the consultation record, is as accurate and complete as possible. Any issues or concerns related to aboriginal consultation will be brought to the attention of the Crown Consultation Coordinator.

Federal departments will refer any requests made by Aboriginal on project-related issues to the Crown Consultation Coordinator.

Other federal departments (federal authorities) may be asked to provide specialist or expert information or knowledge with respect to the project to the JRP.

### **Aboriginal Consultation Activities in the JRP Process**

There are five distinct phases which offer opportunities for consultation between the federal government and Aboriginal groups during the JRP process:

- Phase I: Initial engagement and consultation on the draft JRP agreement
- Phase II: JRP process leading to oral hearings
- Phase III: Oral hearing and preparation of the JRP reports
- Phase IV: Consultation on the JRP Environmental Assessment Report
- Phase V: Regulatory permitting

Each phase of the JRP process is undertaken to achieve a specific objective, is comprised of different activities and may involve different parties. However, the overall goal is to ensure that the requirements for environmental assessment and regulatory review under the *CEAA* and the *NEBA* are met. It also seeks to address the Crown's obligation to consult with Aboriginal groups about potential adverse impacts Crown conduct related to the project may have on potential or established Aboriginal and treaty rights. The federal government strongly encourages Aboriginal groups to participate in all phases of the JRP process to express their views about the project to federal decision makers. Information about the JRP process will be available to all interested parties as the review proceeds.

### ***Phase I: Initial engagement and consultation on the draft JRP Agreement***

Beginning in the fall of 2008, Agency officials began contacting Aboriginal groups identified as being potentially impacted by the proposed Northern Gateway Pipeline project. The objective was to describe the manner in which consultations with Aboriginal groups will be integrated into the environmental assessment process and provide details about the JRP process itself. This approach to consultation was previously outlined in the document "Approach to Crown Consultation for the Northern Gateway Pipeline Project" issued 9 February 2009 and is in accordance with the "Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult"<sup>1</sup>.

This preliminary phase will conclude when the JRP agreement is approved by the Minister of the Environment and the Chair of the NEB.

### **JRP Agreement**

The current final draft JRP agreement has been developed following consultation with Aboriginal groups. Each proposal put forward by Aboriginal groups was carefully considered and the final draft JRP agreement balances the interests and needs of all interested and potentially affected parties.

The mandate of the JRP with respect to Aboriginal rights and treaty is set out in sections 6.5, 8.1 and 8.2 of the JRP agreement. The JRP will be directed through the JRP agreement to collect information related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project and the impacts that the project may have on these rights. In this way, the JRP process will provide a detailed record of Aboriginal groups' concerns about potential adverse impacts that the project may have on their potential or established Aboriginal and treaty rights. The JRP may recommend appropriate measures to avoid or mitigate potential adverse impacts on such rights and interests.

### ***Phase II: JRP process leading to oral hearings***

The JRP process is an open and transparent venue for Aboriginal groups to bring concerns, comments and/or evidence forward to the federal decision makers. During Phases II and III, Aboriginal groups are strongly encouraged to provide the JRP with information related to the nature and scope of potential or established Aboriginal and treaty rights and the potential adverse impacts that the project may have on these rights. Aboriginal groups are invited to propose appropriate measures to avoid or mitigate such impacts on potential or established Aboriginal and treaty rights.

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<sup>1</sup> INAC/Department of Justice; February, 2008, <http://www.ainc-inac.gc.ca/ai/mr/ls/acp/intgui-eng.asp>

The JRP will also require the proponent to provide evidence regarding the concerns of Aboriginal groups and how these concerns have been taken into consideration in the project design and planning.

During Phase II, Aboriginal groups should prepare their information for submission to the JRP. There are three ways for Aboriginal groups to provide their information and participate in the hearing process:

- **Filing a letter of comment:** this is a written statement of the Aboriginal group's views on the project and any relevant information that will explain or support their comments.
- **Providing an oral statement:** this is similar to a letter of comment except that the statement is delivered orally at a prescribed time during the oral hearings (Phase III). A party wishing to provide an oral statement must advise the JRP of their intention to do so in advance.
- **Intervention:** Intervenors have the ability to do the following: file written evidence, ask questions regarding the evidence of others, be questioned on their evidence, participate in cross examination and make a final argument at the oral hearings (Phase III).

More information on these methods for involvement is available in the NEB's document 'The Public Hearing Process – Your Guide to Understanding the NEB Hearing Process'.<sup>2</sup>

Details of the panel process will be set by the JRP through a Hearing Order which sets out the procedures that will be followed for the joint review of the project. The Hearing Order will include:

- A description of the methods by which Aboriginal groups can participate in the review of the project;
- The draft list of issues (i.e. the project-related issues) that will be considered in the joint review;
- How and when intervenors can issue information requests to the proponent or other parties in order to clarify evidence or obtain further information regarding the project;
- The distribution of, and access to, all evidence, correspondence and other documents which will be used in the JRP process and which will form the public registry;
- The timetable of events for the JRP process, including the deadlines for filing evidence and information requests as well as the date when the oral hearings will commence; and
- How motions or questions of procedure or substance can be raised with the JRP.

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<sup>2</sup> NEB document, <http://www.neb-one.gc.ca/clf-nsi/rthnb/nvlvngthpbic/pblchrng/pblchrngpmphlt-eng.html>

The secretariat to the JRP will conduct information sessions with Aboriginal groups to assist them in understanding the JRP process and the ways in which Aboriginal groups can participate. The location and timing of the sessions will be determined by the JRP in response to demand from interested parties.

The JRP will conduct sessions with Aboriginal groups for the purpose of seeking comments on:

- the draft list of issues (included in the Hearing Order);
- whether the proponent be required to file any additional information in view of the proposed changes to the list of issues, the NEB Filing Manual and the Agency's document entitled "Scope of the Factors - Northern Gateway Pipeline Project, August, 2009"; and
- the location of the oral hearings.

The Crown Consultation Coordinator will be available to discuss and meet directly with Aboriginal groups during Phases II and III on the following subjects:

- Matters that fall outside of the JRP's mandate, although these are expected to be the exception given the broad mandate of the JRP;
- Provision of information on available funding and preparation of applications; and
- Continued assistance in understanding the integration of the consultation and JRP processes and how to participate.

### ***Phase III - Oral Hearings and Preparation of JRP Environmental Assessment Report***

Prior to the scheduled start of the oral hearings (as will be set out in the Hearing Order), the JRP will announce the location and timing of the oral hearings. When determining the location and timing of the oral hearings, the JRP will take into consideration the location of Aboriginal groups most impacted by the project and any special needs of Aboriginal groups. Although it is anticipated that the time available will be significantly longer, Aboriginal groups will have a minimum of 90 days prior to the commencement of the oral hearings to review the proponent's application. The oral hearings will be accessible via the Internet so Aboriginal groups not attending the oral hearings can listen to the proceedings. Transcripts of the oral hearings will be prepared and be available through the public registry on the Agency's website ([www.ceaa-acee.gc.ca](http://www.ceaa-acee.gc.ca)).

The Crown Consultation Coordinator will be available to continue to discuss and meet directly with Aboriginal groups during Phase III on all of the subjects in Phase II and to provide further information, including information about available capacity and participation funding, related to Phase IV - consultation on the environmental assessment report.

At the conclusion of the oral hearings, expected in early 2011, the JRP will prepare its environmental assessment report. The JRP will include in its report information provided by Aboriginal groups regarding the manner in which the project may affect potential or established Aboriginal and treaty rights. In the case of potential Aboriginal rights, the JRP will also include the information provided by the Aboriginal groups regarding the Aboriginal groups' strength of claim respecting Aboriginal rights. The JRP may include in its environmental assessment report recommendations for appropriate measures to avoid or mitigate potential adverse impacts on potential or established Aboriginal and treaty rights and interests.

The JRP will not be mandated, however, to make final determinations about the strength of an Aboriginal group's claim respecting Aboriginal rights. The federal government will make this final determination, and will ensure that it meets its legal duty to consult and, where appropriate, accommodate.

#### ***Phase IV – Consultation on the JRP Environmental Assessment Report***

After the JRP has issued its environmental assessment report, the Crown Consultation Coordinator, in collaboration with federal departments, and on behalf of the federal government, will consult with Aboriginal groups, to which it has a legal duty to consult, about the report and its recommendations. This consultation will seek to establish whether all concerns about potential project impacts on potential or established Aboriginal and treaty rights have been characterized accurately. It will also consult on the manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and whether there remain any outstanding issues.

The JRP's environmental assessment report and the record established through the JRP process will be the primary source of information to support the federal government's assessment of the project's potential impacts on potential or established Aboriginal and treaty rights. It is therefore essential that Aboriginal groups provide all relevant information to the JRP in Phases II and III. New or additional information about the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project or about the impacts of the project on these rights may not be considered during consultation on the JRP's environmental assessment report.

This consultation will form the basis for a report to the federal Cabinet by the Crown Consultation Coordinator, in consultation with federal departments, on the adequacy of consultation with Aboriginal groups. This report on adequacy of consultation will be considered at the same time as federal departments seek federal Cabinet approval for the government response to the JRP environmental assessment report. It is important to note that the federal departments, not including the NEB, must take a course of action that is in conformance with the federal Cabinet approval of the government response. The federal Cabinet could



decide that further consultation with Aboriginal groups is required. The approved government response will be sent to all Aboriginal groups and made public.

The JRP will then issue its “Reasons for Decision” pursuant to the NEB Act. The JRP will determine whether or not the project is in the public interest. If the JRP decides it is, federal Cabinet approval also will be required for the NEB to issue a Certificate of Public Convenience and Necessity.

Following the separate federal Cabinet approvals for the government response to the JRP environmental assessment report and the NEB Certificate, federal departments and the NEB may proceed to take decisions on regulatory permitting.

### ***Phase V – Regulatory Permitting***

In deliberating decisions on regulatory permitting, federal departments may need to further consult with Aboriginal groups on specific regulatory issues. The decision to undertake additional consultation will take into consideration:

- The consultation record;
- Mitigation, compensation, accommodation measures to address outstanding concerns not addressed through the environmental assessment;
- The report to the federal Cabinet by the Crown Consultation Coordinator on the adequacy of consultation;
- The government response to the JRP environmental assessment report; and
- Any direction that may be provided by federal Cabinet.

Responsibility for Aboriginal consultation throughout this phase, which could include specific details on project construction, operation and eventual decommissioning, will be transferred from the Crown Consultation Coordinator to another federal authority. Federal departments or their representatives will continue to be available to discuss regulatory matters directly with Aboriginal groups.

### **Participant Funding Program – Funding for Aboriginal groups**

The Aboriginal Funding Envelope under the Participant Funding Program supports Aboriginal groups engaged in Aboriginal consultation activities and public participation activities on projects that are undergoing a federal environmental assessment under the *CEAA*. The program is administered by the Agency and can cover eligible expenses, such as travel costs and fees for experts, to support participation in the environmental assessment process.

In this case, funding under the Aboriginal Funding Envelope was made available for Phase I. This funding was intended only for consultation related to the draft JRP agreement and process.

On July 24, 2009 notification was sent to Aboriginal groups of the availability of funding for participation in the following:

- all aspects of the JRP process (Phase II and III); and
- consultations on matters outside the JRP mandate (Phase II and III).

This funding will be awarded following the finalization of the JRP agreement and appointment of JRP members. The deadline to receive applications is two weeks after the release of the final JRP agreement.

Funding for Aboriginal participation in consultation on the JRP environmental assessment report (Phase IV) will be made available at a later date.

### **Provincial Environmental Assessment and Permitting Considerations**

At this time no provincial environmental assessment is required for the project by Alberta or British Columbia since the project, as proposed, crosses the provincial boundary between them. By crossing a provincial boundary, the project becomes a federally regulated project under the *NEBA*. However, Alberta and British Columbia will participate in the JRP process and do have permitting responsibilities that must be fulfilled to allow the project to proceed.