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YESAA Five-year Review

The Yukon Environmental and Socio-economic Assessment Act

Draft Review Report - INTERIM

March 31, 2012

This report is often referred to as the October 2012 report. The date was never changed and still says March 31, 2012

- Without Prejudice -



CYFN did not give permission for the use of the logo for this report.





YESAA Five-Year Review – Interim Review Report

Table of Contents

Executive Summary - Pending

Acknowledgements - Pending

1.0 Introduction

- 1.1 Purpose of Final Report
- 1.2 Report Structure

2.0 Purpose and Scope of the Review

- 2.1 Purpose of the Review
- 2.2 Scope of Review

3.0 How the Review was Conducted

- 3.1 Review Planning
- 3.2 Participation of First Nations
- 3.3 Phase 1: Issues Scoping
- 3.4 Phase 2: Analysis
- 3.5 Phase 3: Response
- 3.6 YESAB Review of *Rules for Evaluations Conducted by Designated Offices* (June 2010)

4.0 Designated Representatives' Response to the Final Observations and Conclusions Report:

- 4.1 YESAB Administration
- 4.2 Development Assessment Process
- 4.3 Traditional Knowledge in the Development Assessment Process
- 4.4 Role of First Nations Governments in the Development Assessment Process
- 4.5 Non-Process Issues

5.0 Recommended Implementation Actions

- 5.1 Forums
- 5.2 Workshops
- 5.3 Legislative and Regulatory Changes
- 5.4 Policy and Administrative

Appendices

- Appendix A: Terms of Reference – YESAA Five-Year Review
- Appendix B: Final Issues Scoping Report – Phase I
- Appendix C: Final Observations and Conclusions Report – Phase II
- Appendix D: Recommendations (list)
- Appendix E: Table – YESAA Activities listed in Schedule 1, 2 and 3 of the YESAA *Assessable Activities, Exceptions & Executive Committee Projects Regulation* recommended for further review and/ or amendment



List of Acronyms and Definitions

AANDC	Aboriginal Affairs and Northern Development Canada
CEAA	Canadian Environmental Assessment Act
CYFN	Council of Yukon First Nations
Parties	When capitalized, Parties refers to the Government of Canada, Yukon government, and Council of Yukon First Nations (CYFN)
Consultant	Independent Consultant
TK	Traditional Knowledge
UFA	Umbrella Final Agreement
YESAA	Yukon Environmental and Socio-economic Assessment Act
YESAB	Yukon Environmental and Socio-economic Assessment Board
YOR	YESAB On-line Registry

Definitions

Designated Representative:

The Parties shall each appoint a representative who shall, with the representatives by the other two Parties, be responsible for coordinating and completing a comprehensive legislative review of the Yukon Environmental and Socio-economic Assessment Process.



Executive Summary

Pending

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Section 1.0: Introduction

1.1 Purpose of Interim Review Report

The Interim YESAA Five-year Review Report captures the work undertaken as of March, 2012 and recognizes that some outstanding items remain that have not been captured in this report. The purpose of the Interim Report remains to provide the findings of the review, and propose actions for improvements to the YESAA regime to the principals of each Party.

The Interim report fulfills the obligations established under section 12.19.3 of the Umbrella Final Agreement (UFA) whereby the Parties to the Agreement (the Government of Canada, the Government of the Yukon and the Council of Yukon First Nations) are required to complete a comprehensive review of the development assessment process. In accordance with the 2005 Yukon Development Assessment Process Implementation Plan, each party appointed a Designated Representative to lead the YESAA Five-year Review ('the Review') with the direct and meaningful participation of First Nations. Representatives from the Yukon Environmental and Socio-economic Assessment Board (YESAB) also participated

The Interim report does NOT fulfill the obligations. Outstanding issues should still be addressed.

As required in the YESAA 5 Year Review Terms of Reference, this report is the Designated Representatives' joint response to the Final Observations and Conclusions Report and recommendations for the consideration by the principals of the Parties (Minister of Aboriginal Affairs and Northern Development for Government of Canada, the Grand Chief for the Council of Yukon First Nations, and the Premier for the Government of the Yukon). The Interim Report includes descriptions of proposed outcomes, findings and results from the Review, suggested implementation actions. Each of the Parties to the YESAA Five-year Review is responsible for, within their areas of jurisdiction, implementing the outcomes of the Review once they are agreed to by the principal of each Party.

1.2 Report Structure

The Interim Review Report is the joint response to 63 recommendations made in the Final Observations and Conclusions Report (October 2009). The Parties agreed to move forward with the Interim Draft Review report on February 9 and 10, 2012.

The remainder of the report is divided into the following sections:

Sections 2 and 3 provide the report context, the purpose and scope of the YESAA Five-year Review, and the methods used for the Review's three major phases.

Section 4 provides the Designated Representatives' response to the recommendations contained in the Final Observations and Conclusions Report. Each recommendation is presented beginning with a summary of the issues as presented in the Observations and Conclusions Report. The recommendation response indicates whether it is accepted, varied or rejected; the rationale for the joint decision; and a summary of the actions to implement the recommendation. Several additional recommendations were added based on joint discussions by the Designated Representatives and First Nations and are noted in the report.

Section 5 provides a general overview of implementation actions required to implement the recommendations and the organizations responsible for implementation.



Section 2.0: Purpose and Scope of YESAA Five-year Review

2.1 Purpose of the Review

The primary purpose of the YESAA Five-year Review is “to examine the Yukon’s development assessment process in its entirety in the context of the objectives of the UFA”.¹

The development assessment process arises from commitments negotiated in First Nation land claim agreements and is described in Chapter 12 of the Umbrella Final Agreement and individual First Nation Final Agreements. Chapter 12 requires the establishment of an environmental and socio-economic assessment regime for all development projects and activities in the Yukon. Chapter 12 outlines objectives for a neutrally conducted assessment process to be established in the Yukon which guarantees opportunities for the participation of First Nations people. “As described in the Chapter 12 Objectives, among other things, this new regime is to recognize and enhance, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness environment; and to protect and promote the well-being of Yukon Indian People and their communities”. The land claim commitments to establish the development assessment process by legislation were addressed through the enactment and implementation of the *Yukon Environmental and Socio-economic Assessment Act*. The objectives outlined under Chapter 12 of the UFA are generally mirrored in Section 5 of the YESAA.

YESAA is federal legislation that applies to all Yukon land. YESAA received Royal Assent in Parliament on May 13, 2003 and assessments began in November 2005 once the regulations had been completed and an administrative structure to support assessments was established. Under YESAA, YESAB, the executive committee and six Designated Offices maintained by YESAB, are responsible for independently conducting environmental and socio-economic assessment of development activities. The six Designated Offices operate in each of the six assessment districts in the Yukon. YESAB, the executive committee and Designated Offices conclude their assessments by making recommendations to government Decision Bodies.

Section 12.19.3 of the UFA requires completion of a comprehensive review of the assessment process by the Parties to the UFA. The YESAA Implementation Plan (2005) provides a framework for completion of the Five-year Review (the Review). The Plan prescribes the appointment of Designated Representatives by the Parties to coordinate and complete the Review and obliges the Designated Representatives to provide opportunities for First Nations to participate in the Review and for public input during the Review.

Terms of Reference were developed by the Designated Representatives for the YESAA Five-year Review. They set out the Review’s purpose, principles, scope, the process for the Review, roles and responsibilities and outcomes. See Appendix [A]

2.2 Scope of Review

The YESAA Five-year Review Terms of Reference describe the scope of the Review:

“This Review will examine all aspects of the Yukon development assessment process including the following:

- 1. YESAA and its regulations;*

¹ YESAA Terms of Reference (Appendix [x])



2. *the implementation, assessment and decision-making processes: the implementation plan, funding, opportunities for public participation in the process, phases and timelines, process performance expectations and process documents such as rules, guides, forms; and*
3. *YESAB, Decision Bodies and other participants: responsibilities, duties, functions, timelines and documentation”*

Section 3.0: How the Review Was Conducted

3.1 Review Planning

The Designated Representatives convened a Review Steering Committee in 2007 made up of the Designated Representatives as well as supporting experts from Canada, Government of Yukon, the Council of Yukon First Nations (CYFN), and the YESAB. The Steering Committee helped draft the Review Terms of Reference with public input and administered the Review.

As stated in the Terms of Reference, the Designated Representatives agreed to carry out the Review in accordance with the following principles:

- Decisions about the conduct of the review will be made by consensus.
- All proceedings and discussions are without prejudice.
- Conclusions and findings are not necessarily a reflection of any one party's position.
- The Review will be as comprehensive as possible.
- The Review will be conducted in a fair, balanced and transparent manner.
- The Review will give equitable, full and fair consideration to input received.

The Review process included three phases:

- Phase One – Information Gathering and Issue Scoping
- Phase Two – Issues Analysis
- Phase Three – Response

Some components of the Review were carried out by an independent contractor while other components were the responsibility of the Parties. The Steering Committee selected a independent consultant, using the Government of Canada procurement process, to perform the first two phases of the Review.

3.2 Participation of First Nations in the YESAA Five-year Review

The foundations of the Yukon's development assessment process and the need for a comprehensive review once in place are established in the UFA and individual First Nation Final Agreements. As a result, the Parties undertook special efforts to ensure the effective participation of First Nation governments (with or without Final Agreements) and citizens in all phases of the Review.

The independent contractor was required to engage directly with First Nation governments and citizens to understand their views, interests, concerns and comments about the development assessment process. To foster effective engagement, the Designated Representatives provided, through the Council of Yukon First Nations, a First Nation Liaison who worked directly with the independent contractor to help support First Nations participation and input in the Review.



Yukon First Nations find this description offensive to the review approach that was taken from the outset, and agreed to by the Parties - that First Nations would participate directly in the review because only they could represent their individual interests.

Throughout the Review, CYFN coordinated and relied upon a First Nation caucus that provided a forum for First Nations to guide and direct CYFN's team in relation to management of the YESAA 5-Year Review. From the outset and despite the fact that 12.19.3 of the Umbrella Final Agreement refers to the Parties, which includes the CYFN, First Nations maintained that neither CYFN nor the caucus represented them in the Review and that their input must be sought and considered directly. This is consistent with the *Yukon Development Assessment Process Implementation Plan* (2005) and the Terms of Reference for the Review which envisioned the direct participation of First Nations. Despite not having a mandate to represent First Nations, the caucus was an effective forum for First Nations to collectively discuss their concerns and issues related to YESAA and coordinate their input for the Review.

First Nations participated directly in the final phase of the Review as members of the Multi-party Review Team. The Multi-party Review Team contributed in the joint development of the responses in the Interim Draft Review Report. The First Nation Liaison role continued through the final phase to promote the effective participation of First Nations.

3.3 Phase 1: Issues Scoping

Phase 1 of the Review involved seeking and compiling input about the development assessment process and identifying issues that would require further research and consideration. The independent consultant initiated this phase of the Review in November 2008 and completed it in May 2009 with the submission of *Final Issues Scoping Report* (see Appendix B).

The independent consultant team compiled and assessed views on the development assessment process from a broad range of groups and individuals, including members of the public, advisory boards and organizations, First Nations, Yukon government, Canada, municipal governments, YESAB, renewable resource councils, and individuals from industry and non-governmental organizations throughout the Yukon, as well as the Gwich'in Tribal Council in the Northwest Territories. The consultant collected information using a variety of mechanisms that included community visits, meetings (January to March of 2009), written submissions and telephone interviews. During Phase 1, the consultant initially contacted 143 groups/ organization representatives, conducted 78 meetings, and received 71 written submissions. Complete details of the Phase 1 engagement process can be found in the *Final Issues Scoping Report* (Appendix B).

Before finalizing its Issues Scoping Report, the consultant conducted workshops with First Nations and the Review Steering Committee to discuss and confirm the accuracy of the issues identified during the information collection period, and to identify any gaps.

3.4 Phase 2: Issues Analysis

Phase 2 of the Review involved additional research and analysis to address the issues identified during Phase 1. The independent consultant convened a multi-party workshop in May 2009 to better understand the range of perspectives on key issues identified during Phase 1 and to identify concepts and options that may be appropriate for resolving these issues. The consultant summarized the results of the review in a Draft Observations and Conclusions Report, describing proposed observations, conclusions and recommendations. After considering and addressing input received during a public review of the draft Observations and Conclusions Report, the consultant delivered its *Final Observations and Conclusions Report* in October 2009 (Appendix C).



The independent consultant made general observations that the YESAA process is still new and it viewed the YESAA regime as a dynamic, adaptive process. Further noted that continual adjustments have been made by all YESAA participants to make the process function more effectively and concluded that awareness and understanding of the new process is expanding, but that ongoing communication between the parties is necessary to support continued improvement.

The *Final Observations and Conclusions Report* represents the consultants' efforts to assess and characterize the status of YESAA implementation at the time of their report, identify strengths and weaknesses of the development assessment process in meeting its objectives, and identify areas for improvement to the regime. The *Final Observations and Conclusions Report* lists 63 recommendations, and formed the basis of discussions by the Parties, First Nations and YESAB in the last phase of the Review (Phase 3).

3.5 Phase 3: Response

Phase 3 of the Review involved the development of a response by the Parties to the findings of the consultant in the *Final Observations and Conclusions Report*. The YESAA 5Year Review Terms of Reference require the Designated Representatives, First Nations and YESAB to consider the findings and jointly develop a response that describes the outcome of the review in a draft and Final Review Report. The response is to include rationales for accepting, rejecting or varying the consultant's recommendations. The responsibility for finalizing the Review Report rests with the Designated Representatives.

A Multi-party Review Team of representatives from Canada, CYFN, Yukon government, First Nations and YESAB held numerous meetings to discuss the findings of the Review and the process for developing the joint responses to the recommendations (including implementation actions). During 2010 and 2011, the Review Team convened six multi-day workshops, where they defined and completed a process for systematically discussing the issues and recommendations and formulating responses to the recommendations. The Team also added several recommendations during the course of its discussions and decision making. These are noted in the Report and include a description of the issue and the rationale for including a recommendation as part of the joint response.

Late in Phase 3, the Multi-party Review Team established a series of sub-groups to facilitate more substantive discussions of key issues and recommendations. These sub-groups provided input back to the Multi-party Review Team on some recommendations related to the following topics: (1) Heritage and Traditional Knowledge, (2) Scoping, (3) Socio-economic Effects and Sustainability, (4) Amendment of the YESAA Activity List Regulations, and (5) Role of First Nations in the YESAA Decision Phase. The processes undertaken and led by the Multi-party Review Team helped to address the requirement for direct and meaningful participation by First Nations in Phase 3 of the Review.

this section is missing the important description of the outstanding issues which should have been included in detail, with a good description why CYFN has asserted the report cannot be signed off until the outstanding issues are fully and fairly considered.

3.6 YESAB Review of Rules for Evaluations Conducted by Designated Offices (June 2010)

It is important to note that the YESAB initiated a review of their Rules for Designated Office Evaluations during the YESAA Five-year Review.



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YESAB released its new *Rules for Evaluations Conducted by Designated Offices* on June 1, 2010 and they came into effect in August 2010. This allowed the YESAA Five-year Review participants to evaluate the extent to which the revised YESAB Rules have addressed some of the issues and recommendations from the Review. The Interim Draft Review Report indicates where the consultants' recommendations for improvements to the YESAA process have and/ or are being addressed by YESAB's new Designated Office Rules.

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Section 4.0: Joint Response to Recommendations

Introduction

This section of the Report outlines the Parties' Designated Representatives joint response to the recommendations and describes the proposed outcomes of the Five-year Review. As stated in the YESAA 5Year Review Terms of Reference, the joint response includes whether the recommendation is **accepted** (no changes), **accepted with intent** (minor changes only), **varied** (changes made) **or rejected** (in full).

The structure of this section is consistent with the *Final Observations and Conclusions Report* that groups the Review issues and recommendations under the following major headings:

- 4.1 YESAB Administration
- 4.2 Development Assessment Process
 - 4.2.1 Project Discussion
 - 4.2.2 Assessment Phase
 - 4.2.3 Decision Phase
 - 4.2.4 Regulatory Phase
- 4.3 Traditional Knowledge in the Development Assessment Process
- 4.4 Role of First Nations Governments in the Development Assessment Process
- 4.5 Non-Process Issues

The response begins with the issue summary as stated in the *Final Observations and Conclusions Report* followed by the recommendation, the Parties' Designated Representatives joint response and implementation action. Implementation actions are categorized into five areas: Forums, Workshops, Legislative, External Process and Regulatory Changes, and Administrative. These are discussed in detail in subsequent sections of this report.

The *Final Observations and Conclusions Report* identified 63 recommendations. The **Multi-party Review Team** added thirteen recommendations during the course of its consideration and decision making. These are noted with the addition of 'b', 'c' or 'd' to the recommendation as appropriate, e.g. 14(b). The response for those additional recommendations includes the Review Team's description of the issue and rationale for including a recommendation as part of the Designated Representatives (DR) joint response. For the majority of recommendations the Multi-party review Team was able to reach agreement on the recommendations. For the few recommendations where the Multi-party Review Team members were unable to reach agreement and provide a joint response, each Designated Representative's response to the recommendation is stated.

Multi-party Review Team:
 representatives from:
 Canada-Aboriginal Affairs
 Northern Development Canada
 (AANDC), Council of Yukon
 First Nations (CYFN), First
 Nations, Gwich'in Tribal
 Council, Yukon government
 and YESAB

Recommendations

4.1 YESAB Administration

4.1 A) Community Engagement and Outreach



Final Observations & Conclusions Report - Summary of Issue:

"Based on input received by the consultant's Review Team from the Yukon and First Nation governments, some industry and non-governmental organization representatives, some UFA councils, and the general public, this issue stems from concerns about the following:

- *lack of awareness of the process/need for ongoing information exchange*
- *inadequate notification of assessments*
- *lack of face to face interaction with assessors"*

O&C Report Link:
 Pages 12-15

"Not enough public outreach is being done by YESAB to educate people about YESAA and the Yukon development assessment process"

Five recommendations were identified to address YESAB community engagement and outreach.

Recommendation 1 - YESAB should devote additional resources to public outreach activities such as process information meetings in all communities and preparing a regular newsletter. These activities should be conducted on a regular basis.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that there should be additional public outreach activities. During discussions, the Review Team noted that responsibility for public outreach activities related to the development assessment process and YESAA is not limited to YESAB but all parties. Decision bodies, First Nations and government regulators all have a role in keeping the public well informed.

Implementation Action: Implementation activities are already underway. YESAB has developed a newsletter titled "*The Voice*" (www.yesab.ca/news_events/newsletters) that is issued quarterly (Issue '01 was released in July, 2010). YESAB also engages in various public outreach activities annually - for example, information booths at the annual Mineral Round-Up in Vancouver, the Dawson City Gold Show, the Geoscience Forum, and at specific conferences (for example the 2011 Aboriginal Resource Opportunities Conference). YESAB has adopted a Strategic Communications Plan, which contains a Strategic Outreach Plan. It includes provisions for creating detailed outreach plans for various parts of YESAB (Board, Executive Committee, and Designated Offices). Yukon government also engages in YESAA outreach internally and externally with proponents and non-government organizations by providing periodic "YESAA 101" sessions, which provide a basic overview of YESAA processes within Yukon government. Canada will continue to provide information to proponents about the YESAA process as part of regular business practices. A permanent YESAA Forum being recommended as part of the Five-year Review may also be a useful vehicle for discussing outreach methods and tools. See Section 5 on Implementation for more specific information on the proposed forum. (Implementation Category: ADMINISTRATIVE)

Recommendation 2 - YESAB should establish an open forum for discussing a variety of environmental and socio-economic assessment topics, and organize workshops for stakeholder information exchange.



Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that mechanisms for discussing environmental and socio-economic assessment topics should be established. The Team notes that this role is not limited to YESAB but also other governments and organizations. The Multi-party Review Team supports the development of a YESAA forum as a main implementation tool to address a number of recommendations from the Five-year review. During discussions, YESAB noted that a number of mechanisms may be used for stakeholder information exchange, not just forums. For example, topic specific workshops could be convened at the discretion of the YESAA forum.

Implementation Action: Implementation is underway. Section 5 of this report (Implementation) provides a framework for the recommended YESAA Forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. YESAB has prepared a communications strategy which includes conducting workshops on specific topics as appropriate and as required. The determination of specific topics, priority, resources and timing will be discussed with YESAB staff. Subsequent recommendations in this report identify issues where workshop/ forum discussions are proposed. (Implementation Category: FORUM)

Recommendation 3: Map Packages and Public Notices prepared by assessors should include boundaries and labels of First Nation traditional territories and settlement lands, as well as traditional place names.

Joint Response of Designated Representatives: ACCEPT. During Multi-party Review Team discussions, First Nations representatives noted the importance of having settlement land indicated on YESAB's maps in addition to traditional territories. First Nations also expressed the need for notification procedures to be modified to fulfill YESAA requirements that assessors notify and seek the view of First Nations about any proposed project that may have effects on their traditional territory, whether or not the project is located in the traditional territory (e.g. potential impacts to Yukon River salmon in traditional territories that are downstream from a proposed project area).

Implementation Action: Implementation activities are already underway. YESAB Designated Offices are currently implementing new procedures to improve the quality of mapping information collected and published, including First Nations traditional territory and settlement lands boundaries and labels. YESAB assessors will also include traditional names when a First Nation provides the information to the assessor. In 2010, YESAB revised and strengthened its assessor notification procedures on projects that may have significant effects in the traditional territories of First Nations outside of the immediate project location. (Implementation Category: ADMINISTRATIVE)

Recommendation 4: Designated Offices should encourage proponents to do more to contact affected parties in the area of their proposed project. Compilation by each Designated Office of a database of organizations and individuals (e.g., trappers) potentially affected by projects for use by applicants could assist in this consultation process.

Joint Response of Designated Representatives: VARY recommendation to: **Designated Offices should encourage proponents to contact affected parties in the area of their proposed project. Government departments should facilitate such notification by developing processes to enable contact information to be provided to the assessor or proponent. First Nations should also encourage their citizens to provide their contact information to YESAB assessors.**



The Multi-party Review Team agrees that further steps are needed to improve notification processes with local residents and affected individuals and organizations. YESAB noted that assessors regularly work with proponents to encourage and assist them in notifying individuals that may be affected by their proposed project. The solution proposed by the consultant is not viewed as workable given the information privacy requirements that both YESAB and government departments must follow. For instance, a government department cannot release an individual's personal information (e.g. their address) to a third party (e.g. the project proponent) without that person's permission.

Implementation Action: Implementation activities are already underway. YESAB has a database of potential "interested persons" on the YESAB On-line Registry (YOR) that, based on the profile of that individual or organization sets up, will notify them on projects they may be interested in. YESAB will continue to provide support as needed to clients groups (e.g. wilderness tourism operators, outfitters, trappers, etc.), organizations or individuals to register on the YOR and establish notification profiles for projects they may have an interest in. Environment Yukon is developing a letter and consent form to seek trapper permission to release contact information when requested. Other affected Yukon government departments will undertake similar changes with their clients (e.g. wilderness tourism operators, outfitters, etc.) First Nations will encourage citizens who may be affected by projects (e.g. trappers) to contact the applicable YESAB Designated Office so contact information can be provided. (Implementation Category: ADMINISTRATIVE)

Recommendation 5: YESAB should develop guidelines regarding when public or technical meetings should be held during a project assessment

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees with the need for YESAB to develop guidance on when it holds public or technical meetings. The Review Team recognizes that the new *Rules for Evaluations Conducted by Designated Offices* (June 2010) establish clear provisions for technical meetings during Designated Office Evaluations. Guidance for assessors about when to convene such meeting would bring greater certainty and clarity to the assessment process. The Review Team notes however, that any guidance for convening public or technical meeting should be flexible and remain at the assessors' discretion.

Implementation Action: YESAB representatives have provided their general support for the recommendation but have indicated that they do not have any plans to develop these guidelines in the immediate future. (Implementation Category: ADMINISTRATIVE).

4.1 B) YESAB Rules, Guidance Documents

Final Observations & Conclusions Report - Summary of Issue:

"Sections 30 to 38 of YESAA require or permit the Board to make rules relating to a variety of subject matters. The consultants' Review Team heard a number of criticisms directed at the Board concerning the adequacy of its rules and procedures. This section of

O&C Report Link:
 Pages 15-21

"In the few years since its creation, the YESAB has made significant efforts to fulfill the requirements of the Act relating to the development of rules for assessments. For the most part, the Board seems to have adequately complied with the YESAA's "non-discretionary" requirements to develop various sets of rules".

"A number of YESAB Rules and Guides are still in draft form, and their status is unclear."



the consultants' Report seeks to confirm whether and to what extent YESAB has complied with the "rule-making" provisions of the Act and whether established rules are consistent with "good practice". It also addresses the discretionary rules and guidance documents currently developed. Finally, concerns about consistency among Designated Offices are also addressed."

Four recommendations were identified to address YESAB rules and guidance documents. The Multi-party Review Team added one recommendation (8b).

Recommendation 6: The Board should develop rules relating to project evaluations by Designated Offices that provide for "different types of evaluations for different categories of projects".

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team believes YESAB has met this requirement through new *Rules for Evaluations Conducted by Designated Offices* implemented in June 2010. YESAB noted during discussions that the new Rules provide greater flexibility to accommodate more complex projects yet maintain a streamlined process for straightforward, routine projects. This approach combined with other actions being undertaken by YESAB, such as developing sector-specific application forms will address the issue raised during the Review. Note: this issue is also addressed in Recommendation 29.

Implementation Action: Implementation activities are already underway. The new *Rules for Evaluations Conducted by Designated Offices* have been implemented and a project to develop sector-specific application forms is underway beginning with placer mining, quartz mining and land applications. YESAB is involving industry, First Nations and other governments in the development of the application forms. (Implementation Category: ADMINISTRATIVE)

Recommendation 7: The Board should make best efforts to finalize and make public any rules and guidelines that are still currently in draft form.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees with the need for YESAB to finalize and publish its rules and guidelines. YESAB committed during discussions to make best efforts to finalize their outstanding draft guidelines and provide all guidelines on their website. YESAB indicated that certain guidelines will take more time to complete given the complexity of the topic (e.g. traditional knowledge, socio-economic impacts) and the need to work with affected agencies and governments.

Implementation Action: Implementation activities are already underway. All finalized guidelines are now available from YESAB and on their website (www.yesab.ca). Actions are underway or planned to develop and finalize other guidelines. For example, heritage resource information requirements for proposals that include land disposition and proponent guidance on information required for the assessment of project effects on water. (Implementation Category: ADMINISTRATIVE)

Recommendation 8: The Board should consider drafting by-laws in fulfillment of sections 35(a) and 36(1) of the Act.



Draft Review Report - INTERIM

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that such YESAB by-laws should be established. YESAB indicated during discussions that since the release of the *Final Observations and Conclusions Report*, the Board has prepared bylaws and administrative procedures on its internal affairs pursuant to the YESAA, sections 35 and 36.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation Category: ADMINISTRATIVE)

Additional Recommendation 8(b): The Board should consider developing additional public information on the administration of the assessment process.

Rationale: Several issues regarding the administration of the assessment process were identified in the *Issues Scoping Report*. The Multi-party Review Team concluded that these were not adequately addressed by the recommendations in the *Final Observations and Conclusions Report*. Identified issues focused on the lack of written and publicly available policies and/or procedures governing the administration of the assessment process (for example, reporting structures between the Board and Designated Offices, complaints processes) and consistency of assessment practices between Designated Offices.

Joint Response of Designated Representatives: ACCEPT. During discussions, YESAB indicated that many of the concerns raised are communications issues. Information was provided to the Multi-party Review Team to describe YESAB's internal procedures and clarify its reporting and accountability structures. Mechanisms to ensure consistency between Designated Offices were discussed, such as – weekly meetings, peer reviews of assessments, and senior staff support for assessors. Review Team members noted that such information should be publicly accessible via their website. YESAB indicated they are reviewing their communications materials to address issues raised.

Implementation Action: Implementation activities are already underway. YESAB is revising its web-based communications materials to include the roles and responsibilities of the Board, Designated Offices and improvements to YESAB's Staff Organization Chart (www.yesab.ca). YESAB has initiated a framework for internal policy development and will be working on various projects to establish policies, procedures and supporting guidelines. This information will be made available on the YESAB website. (Implementation Category: ADMINISTRATIVE)

Recommendation 9: The Board should prepare a comprehensive list of all YESAB documents, including all rules and guidelines and documents that are presently not readily available to the public. This list, along with the documents, should be posted to the website and updated as necessary.

Joint Response: ACCEPT. YESAB has agreed to develop this list and post it along with the applicable documents on their website (www.yesab.ca).

Implementation Action: Implementation activities are already underway. YESAB has prepared a comprehensive list and posted it on the website. (Implementation Category: ADMINISTRATIVE)



4.1 C) YESAB Capacity

Final Observations & Conclusions Report - Summary of Issue:

"During the course of the Review several business representatives, First Nation and Yukon government representatives, and members of some UFA boards and councils and non-governmental organizations expressed concerns about the capacity of Board members and YESAB staff to fully carry out their responsibilities. They commented on both the adequacy of the current nominations and appointment process(es) for Board members, and the suitability of staff and Board member training and experience with respect to the requirements for their respective roles. Additionally, YESAB raised specific concerns about the term of Board appointments and the potential of the current process to impact institutional continuity and the functioning of possible panel reviews."

O&C Report Link:
 Pages 21-24

"YESAB appears to encourage and provide training opportunities for staff and Board members; however, given issues discussed elsewhere in this Report, additional training opportunities exist."

Two recommendations were identified to address YESAB capacity. The Multi-party Review Team added 2 recommendations (11b, 11c).

Recommendation 10: The Parties to the UFA should implement recommendations made by YESAB and by the Implementation Review Group with respect to Board appointments, and in particular, the recommendation that the Parties [should] seek information from Boards about the attributes and skills that would be most beneficial to the Board, before identifying their nominees.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that the Parties should seek input from YESAB about YESAB member attributes and skills that would be most beneficial. This should be done whenever a Party is nominating or appointing a new YESAB member. To support this, YESAB should prepare and keep up-to-date, documentation describing attributes and skills of YESAB members.

The 2005 Yukon Development Assessment Process Implementation Plan agreed to by Canada, Yukon and CYFN provides 'Guidelines for the Selection of Nominations for the Board'. However, the identification of this issue during the Review indicates that renewed attention to the 2005 Guideline is needed and that additional measures are needed to ensure nomination of qualified individuals. During Multi-party Review Team discussions, AANDC representatives referenced activities being undertaken at a national level seeking input on roles and responsibilities of Government of Canada appointed Board members. AANDC has prepared two job descriptions for YESAB members, one for Executive Committee members and one for regular board members. AANDC consulted both Yukon government and CYFN on the documents which outline Board positions, duties and workload. CYFN sought input from YESAB about what attributes are needed for Board appointments and prepared a description of qualifications that guides its selection of nominees. Yukon, Canada and CYFN have standard procedures which are used for its appointments to board and committees.



Draft Review Report - INTERIM

Implementation Action: Some approaches are already in place. Prior to future nominations and appointments, each of the Parties should seek input from YESAB about the attributes and skills that would be most beneficial for YESAB members. (Implementation Category: ADMINISTRATIVE)

Recommendation 11: YESAB should review and revise, as appropriate, competencies, qualifications, training needs and professional development for its Board members and staff in light of the findings and recommendations of this Review.

Joint Response of Designated Representatives: ACCEPT. During Multi-party Review Team discussions, YESAB indicated that the Board continually reviews and revises its training and professional development plans for board members and staff to ensure they have the appropriate qualifications and competencies. The Review findings and recommendations are being considered in current Board planning and will continue to be considered throughout Review implementation. Additional training and development needs arising from other recommendations in the consultants' report are being reviewed and will be implemented as set out in the Implementation Schedule.

no schedule was ever developed

Implementation Action: Implementation activities are already underway. (Implementation Category: ADMINISTRATIVE)

Additional Recommendation 11(b): The Parties should investigate whether to amend the YESAA legislation to allow Board appointments to be staggered so that the terms do not expire all on the same date.

Rationale: When YESAB was first established in 2004, six of seven members were appointed on the same date for a three-year term. When the terms expired, these six positions had to be appointed. This created a period of uncertainty, concerns over loss of continuity and knowledge, and the time and resources required to orient potentially six new Board members. Discussions at the Multi-party Review Team focused on how to avoid a similar situation for future appointments.

Joint Response of Designated Representatives: ACCEPT. YESAB noted that recent appointments to the Board are starting to create staggered terms naturally. At present most of the seven positions will expire on different dates. As a result, a legislative amendment is not required at this time.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation Category: ADMINISTRATIVE)

Additional Recommendation 11(c): The Parties should amend the legislation to allow the terms of Board members who are participating in a panel review of a project to be extended until the conclusion of the panel review.

Rationale: During Multi-party Review Team discussions, YESAB noted that the current provisions of the YESAA do not allow a Board member's term to be extended if they are participating on a panel review of a project. This is important in order for the in-depth project knowledge gained by the individual over the length of the panel assessment to be continued until its completion.



Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that the Act should be amended. Provisions for the extension of Board member terms during panel reviews exist in other jurisdictions assessment legislation.

Implementation Action: Implementing this recommendation will require an amendment of YESAA by revising sections 8 or 65. Canada will investigate administrative options for extending terms of board members in cases where panel reviews are still underway. (Implementation Category: LEGISLATIVE or ADMINISTRATIVE)

see page 70

4.2 Development Assessment Process

4.2.1 PROJECT DISCUSSION

4.2.1. A) What Gets Assessed

Final Observations & Conclusions Report - Summary of Issue:

"What activities get captured for assessment under YESAA was a common issue for many of the groups the consultant's Review Team met with. There are divergent views on the subject with some government departments, business organizations and industry identifying various assessment triggers as being too low, while several First Nation governments, non-governmental organizations, and members of the public identified triggers that they felt were too high. We also heard comments that the list of assessable activities was not appropriate and included many activities that should not be included in the assessment process. We heard the following general concerns related to project triggers and thresholds:

- thresholds for a number of routine projects that are currently subject to assessment are too low;*
- rationale for the setting of the thresholds as they currently exist in the Regulations should be provided;*
- more certainty around project triggers and what warrants an Executive Committee review is required; and,*
- renewals and amendments to existing water uses licences should be exempt."*

O&C Report Link:
Pages 25-27

"The general concerns raised to the [SENEC] Review Team about triggers for project assessments are valid."

The linkage of YESAA and the Canadian Environmental Assessment Act creates inflexibility in the YESAA process and Regulations."

Two recommendations were identified to address what gets assessed under YESAA.



Recommendation 12: The Parties and YESAB should work with regulators, proponents and other organizations to review the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* so that specific recommendations for amendments can be made.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that specific amendments to the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* should be made. However, the work to review the regulations and identify appropriate amendments should be undertaken by the Parties and First Nations. The federal process to amend the regulations will include opportunities for input by proponents, the public and other organizations. This recommendation is linked with #13 because the legislative amendment proposed in recommendations #13 would alleviate constraints related to how the *Canadian Environmental Assessment Act* (CEAA) and the YESAA interconnect. This recommendation is also linked to rec. #30 on Executive Committee Screening thresholds.

Implementation Action: The Multi-party Review Team has developed a preliminary compilation of problem areas and specific issues in the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* that should be addressed in amendments (see Appendix E for the listing). The Parties should establish a working group to finalize the review of the regulations and recommend specific amendments. (Implementation Category: LEGISLATIVE)

Recommendation 13: Amendments should be made to revise the relationship with the *Canadian Environmental Assessment Act*.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that YESAA should be amended to revise its relationship with the *Canadian Environmental Assessment Act* (CEAA). The YESAA states that CEAA does not apply in Yukon except under specific circumstances², for example, if a project does not require a YESAA assessment but triggers a CEAA assessment. In order to minimize the continued application of CEAA in Yukon the YESAA regulations were initially developed to reduce the potential for “CEAA pop-ups” by attempting to mirror thresholds in CEAA’s regulations to ensure consistency. As a result, the legislative link to CEAA hampered the ability to make a “made in Yukon” activity list for YESAA and created challenges in creating practical and straightforward listings of assessable and exempted activities. An additional complication is that the CEAA regulations have been amended twice since YESAA was enacted in 2005 and both regulations are no longer consistent. It was noted during Multi-party Review Team discussions that other Northern assessment legislative instruments do not contain similar linkages to CEAA, e.g. the Nunavut Planning and Project Assessment Act (NUPPA).

Implementation Action: This change could require a legislative amendment to the YESAA.

The process will include detailed legal analysis to consider overall implications of proposed changes. The process will include a detailed legal analysis to consider the overall implications of any proposed changes. As an outcome, Canada may wish to propose legislative amendments. (Implementation Category: LEGISLATIVE).

Does not include a commitment to work with Yukon First Nations in this process, which is inconsistent with the development of the Act and the 5 year review process

4.2.1 B) Project Proposals

Final Observations & Conclusions Report - Summary of Issue:

² YESAA Section 6(1).



"During the review we heard from First Nations, Yukon and federal governments, business organizations, industry, and non-governmental organizations, a variety of concerns related to project proposals. Specifically, two main issues were identified: (i) adequacy of project proposals and (ii) YESAB information requests and requirements for project proposals."

One recommendation was identified to address the content of project proposals. The Multi-party Review Team added three recommendations (14 b, c, d).

Recommendation 14: Given the diversity of projects assessed at the Designated Office level, YESAB should develop proponent guidance for sector-specific projects, as well as for different types of projects based on size and complexity (i.e., more detail for larger projects and less detail for the more routine assessments). In completing these guidance documents, a review and alignment of proponent submission requirements under section 50(2) of YESAA and matters to be considered under s. 42(1) of the Act should be undertaken, with due consideration of the size, complexity and potential benefits and impacts of different types of projects

Joint Response of Designated Representatives: VARY recommendation to: Given the diversity of projects assessed at the Designated Office level, YESAB should develop proponent guidance for sector-specific projects, as well as for different types of projects based on size and complexity (i.e., more detail for larger projects and less detail for the more routine assessments).

The Multi-party Review Team agrees with first portion of the recommendation, that YESAB should develop sector-specific proponent guidance. YESAB noted that since the *Final Observations and Conclusions Report* was released, the new *Rules for Evaluations Conducted by Designated Offices* (June 2010) are in place which allow for greater flexibility in assessing larger, more complex projects as well as maintaining a streamlined process for straightforward, routine projects.

The Review Team does not agree with the second portion of the recommendation which suggests realigning sections 50(2) and 42(1) of YESAA. These sections set out the specific requirements for proponents when submitting their applications (section 50(2) and the matters to be considered by assessors (section 42(1)). These sections are distinct and are not meant to mutually apply to both assessor and proponent. The development of YESAA established this distinction and the Multi-party Review Team agrees that the distinctions are still valid. Some matters to be considered, for example identifying cumulative effects and treaty rights should not be the responsibility of the proponent because proponents do not necessarily have the expertise and capacity to address such issues in their project proposals.

Implementation Action: Implementation activities are already underway. YESAB has begun the development of sector-specific applications forms beginning with placer mining, quartz mining and land applications and is working with government regulators, First Nations and industry groups. (Implementation Category: ADMINISTRATIVE)



Additional Recommendation 14(b): YESAB should work with the affected First Nation(s) when evaluating the adequacy of proponent consultations with First Nations as required for Executive Committee Screening-level projects.

Rationale: For Executive Committee Screening-level projects, the project proponent is required to consult with First Nation(s) prior to submitting their proposal³. During discussions, several First Nations raised an issue with YESAB's process for evaluating the adequacy of such consultations with the affected First Nation(s). First Nations representatives voiced the importance of obtaining the perspective of First Nations on the consultation activities undertaken by the proponent and for YESAB assessors to not rely solely on the proponent's project proposal and input.

Joint Response of Designated Representatives: ACCEPT. YESAB representatives communicated that it has revised its practice for Executive Committee Screenings and now routinely seeks the views of the affected First Nation(s) during the adequacy review stage in establishing whether the project proponent has conducted the required consultation and its quality. First Nations representatives have confirmed that this practice has occurred on recent Executive Committee screenings.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation Category: ADMINISTRATIVE)

Additional Recommendation 14(c): YESAB should develop a process for providing access to documents developed during discussions on the adequacy and completeness of a project proposal prior to the project being deemed complete. For example, any meeting notes, letters, and technical committee discussions (if a committee is established).

Rationale: During Multi-party Review Team discussions, the issue of transparency during the preliminary stages of a project about to undergo a YESAB assessment was raised. The concern focuses on the 'adequacy' or 'completeness review' stage prior to a project proposal being deemed complete to begin the assessment process (Designated Office Evaluation or Executive Committee Screening). In the past there was no public access to any information shared, decisions made or documents prepared during this phase. The documents provided on the YESAB On-line Registry (YOR) were limited to those that were part of a project proposal or were submitted after the project was 'deemed complete'.

Joint Response of Designated Representatives: ACCEPT. YESAB has changed its procedures so that documents are made available through the YESAB On-line Registry (YOR) during the adequacy review stage of a proposed project.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation Category: ADMINISTRATIVE)

Additional Recommendation 14(d): YESAB and Decision Bodies should develop a process to prevent the un-necessary assessment of projects that will not be approved by a Decision Body due to government policy.

³ YESAA, section 50(3)



Rationale: During Multi-party Review Team discussions, First Nations identified an issue with applications being accepted for assessment by YESAB even though the application's likelihood of being approved by the applicable Decision Body is minimal due to an existing government policy. For example, the assessment of a land application in an area not available for application as per Yukon government land policy. This situation has arisen several times since the Act was enacted and results in unnecessary assessments, increased workloads, raised expectations and in some instances controversy.

Joint Response of Designated Representatives: ACCEPT. YESAB and Yukon government have clarified their respective processes to address this issue, specifically for land applications. As standard practice, assessors inquire whether a proponent has contacted the applicable regulator(s) in relation to their proposed project. For example, if a proponent applies for land in an area not available under government land policy, coordination between Energy, Mines and Resources-Land Management Branch regulators and the YESAB assessor is intended to prevent projects from unnecessarily entering the assessment process.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation Category: ADMINISTRATIVE)

4.2.1 C) Project Scoping

Final Observations & Conclusions Report - Summary of Issue:

"The consultant's Review Team heard from many of the groups that project scoping is a significant issue; the principal concern being that YESAB scopes projects too narrowly, which can result in activities being excluded from assessment. This can result in the Designated Office being unable to make recommendations for mitigation of adverse effects resulting from those activities that are not "scoped in". We heard that some common examples of projects where this has occurred include residential and commercial subdivision projects where only road construction and lot clearing are scoped in, and timber harvest plans. An associated issue is YESAB's narrow interpretation of what a "proponent" is. The scoping issue also relates to cumulative effects, discussed in Section 3.2.2 of this Report."

O&C Report Link:
Pages 30-32

"Narrow interpretation of the Act with respect to who is a proponent and what constitutes an activity has resulted in some projects being scoped inappropriately."

Two recommendations were identified to address project scoping. The Multi-party Review Team added two recommendations (15 b, c)

Recommendation 15: YESAB should improve its scoping guidance to allow for more inclusive project scoping

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that YESAB should improve not just its guidance but also its practices for project scoping. During discussions the Review Team concluded that YESAA provides assessors with the authority to establish the scope of projects for assessments and that there



Draft Review Report - INTERIM

appears to be no need to change YESAA's project scoping provisions. The development of project scoping guidelines by YESAB should be a process that involves assessors, decision bodies, key reviewers and other participants as required.

Implementation Action: YESAB has agreed to convene one or more project scoping workshop(s) to provide a forum for assessors, decision bodies, project reviewers and other participants to discuss current project scoping approaches, issues and concerns about project scoping, and to identify possible solutions. The workshop should be designed to achieve a number of outcomes, which are: (1) a common understanding of current project scoping approaches and practices, (2) a thorough understanding of various parties' perspectives on project scoping, and (3) recommendations for scoping guidance that will best address the range of perspectives within the legal framework of YESAA. Based on the outcomes of the workshop, YESAB should refine its scoping guidance. (Implementation category: WORKSHOP)

Additional Recommendation 15(b): YESAB should revise its project scoping guidance to provide a more thorough description of policies and practices related to temporal scoping of projects.

Rationale: During Phase 1 and 2 of the Five-year Review, Yukon government raised an issue with YESAB assessors' temporal scoping practices for projects. Specifically, the practice of tying the temporal scope of a project to the duration of a regulatory authorization associated with the project.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team believes that temporal scoping practices need to provide flexibility for assessors. For some projects, temporal scopes that are consistent with regulatory authorizations may be appropriate (e.g. for projects with environmental and socio-economic effects that are difficult to predict, or projects with changing adjacent land use conditions). In other cases, it may be appropriate to consider project scopes that exceed the duration of specific authorizations (e.g. activities and projects that require a series of short duration authorizations, activities and projects with well understood effects that are unlikely to change). YESAB scoping guidance, practices and policies should provide flexibility for assessors and identify appropriate conditions for applying different approaches to the temporal scoping of projects.

Implementation Action: Temporal scoping should be a topic of discussion for the project scoping workshop discussed in relation to recommendation 15(a). Future discussions should include a joint examination of YESAB's policies and/ or practices on temporal scoping with a specific goal of developing a policy or practice that allows an assessor to apply appropriate temporal scopes to projects regardless of the length of the associated authorization. (Implementation category: ADMINISTRATIVE and WORKSHOP)

Additional Recommendation 15(c): YESAA should be revised so that the activities of third-party resource users can be included in the scope of a project when a government is a proponent of forest resource management planning and allocation initiatives.

Rationale: During Phases 1 and 2 of the Five-year Review, Yukon government raised an issue with YESAB assessors' scoping practices when a government is a project proponent. The Multi-party Review Team agreed that the issue warranted a specific recommendation.

Joint Response of Designated Representatives: ACCEPT. Since the YESAA came into effect, YESAB assessors have frequently been challenged in their review of projects that include



subdivision development plans and timber harvest plans. In these cases, governments (in particular Yukon government) are the proponents of these planning activities. However, the interpretation and inter-relationship between YESAA's definition of 'proponent' and project scoping provisions has sometimes constrained assessors' interpretations about whether to include building construction in subdivision assessments or timber cutting in timber harvest plan assessments, because government does not "propose to undertake" these activities as per YESAA's definition of 'project'. Outside of the constraints contained in the definition of proponent, Section 51 of YESAA appears to provide flexibility for including such activities provided they are likely to occur and 'sufficiently related.'

The Multi-party Review Team recognizes the benefits of assessing these types of activities as part of project assessments in a more holistic way. YESAB has tried incorporating the activities of third-party users in a cumulative effects assessment, but that approach proved ineffective because assessors could not apply mitigations on future activities. Utilizing the YESAA provisions for assessment of plans also provides an opportunity for addressing some of the issues, but the mechanism does not provide the level of certainty and specificity that can be addressed in subsequent project assessments. The Multi-party Review Team has considered these solutions but concluded that they would not be adequate for addressing the issues. YESAB's recent approach to scoping of subdivision projects illustrates a more inclusive approach that allows consideration of effects of the future activities that subdivision has planned. This approach appears to resolve the issue for subdivision projects and has recently been tested on several timber harvest projects in 2010.

The Multi-party Review Team discussed the types of projects where a broader project assessment approach could be applied and agreed that the ability to conduct realistic assessments relies on having sufficient detail available on the subsequent activities that will be undertaken (e.g. timber harvest plans including cut block locations and prescriptions). The Team agreed such an assessment approach is appropriate when government is undertaking management and disbursement of known resources under an overall legislated planning mandate as in the case of forest resource management planning and allocation under the Yukon *Forest Resource Management Act* (2011).

Implementation Action: Providing greater certainty on this recommendation will require amendment of the YESAA legislation. One option is to revise the definition of 'proponent' to provide for a broader inclusion of third-party activities. The overall implications of changing the definition of proponent will have to be considered. This and other options can be discussed in more detail as part of the process of preparing legislative amendments.

Recognizing the recent approaches of assessors to project scoping for subdivision and forestry projects, an administrative solution may be possible. In this case, inclusion of third-party activities on a project-by-project basis would require that those activities be described in sufficient detail to allow a thorough assessment of potential environmental and socio-economic effects. (Implementation category: LEGISLATIVE or ADMINISTRATIVE)

[See Page 70 comments](#)

Recommendation 16: YESAB should develop project scoping as part of the initial training program for assessors and the Board.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that training on project scoping should be included as a component of YESAB training for assessment staff and Board members. YESAB noted during Team discussions that project scoping is already a significant component of assessor training.



Implementation Action: YESAB will continue to evaluate training needs for board members and staff including needs for further or continued training on project scoping. (Implementation Category: ADMINISTRATIVE)

4.2.1 D) Heritage Assessments

Final Observations & Conclusions Report - Summary of Issue

"A stated purpose of YESAA, and objective of Chapter 12 of the UFA, is to protect and maintain heritage resources. Effects on heritage resources are also captured in the definition of "socio-economic effects" in YESAA and, as such, should be considered in an assessment. Heritage assessments are a primary source of information that YESAB uses to determine a project's potential effects on heritage resources in the Yukon. During the issues scoping period, several First Nation governments questioned the adequacy of the approach used to assess and mitigate effects on heritage as part of project assessments.

Concerns raised mostly related to the approach used for heritage resources on non-settlement lands. Specific issues of concern included:

- *differing understandings and definitions of heritage resources and appropriate management approaches;*
- *challenges of collecting heritage information and doing site assessments in the context of project specific timelines for assessments, particularly during seasons with snow and frost;*
- *capacity to do assessments and field work in a timely manner;*
- *who is being requested to do heritage impact assessments for non-Settlement Land and how they are done;*
- *inconsistencies in how different Designated Offices deal with heritage resource assessments and mitigations; and*
- *YESAB's different weighting of heritage-related input from First Nations and the Yukon Government. All but the last of these topics have also, to some degree, been raised by the Yukon Government."*

O&C Report Link:
 Pages 33-37

"The different expectations and opinions of what "heritage resources" means, and what heritage assessments should therefore include, and who should conduct them on non-settlement land are creating inconsistencies in application and difficulties for all parties involved. "

Four recommendations were identified to address the issue of heritage assessments. The Multi-party Review Team added 1 recommendation (17B).



Recommendation 17: Structured dialogues/forums involving YESAB, the Government of Yukon and First Nation governments should occur to:

- a) resolve issues of difference relating to the definition of “heritage resources” and its application under YESAA, including the jurisdiction and responsibilities of each party in conducting and evaluating heritage resource assessments.
- b) develop protocols and guidelines on the appropriate scope of heritage resource assessments and steps for their implementation including, but not limited to:
 - i. early inter-governmental notification of proposed projects requiring heritage resource assessments;
 - ii. appropriate approaches to encouraging proponents to engage, where appropriate, with First Nations and the Government of Yukon Heritage Unit, prior to entering the YESAB system.
 - iii. the appropriate qualifications of people conducting heritage resource assessments.
- c) identify socio-economic effects related to heritage resources that may not be captured by the definition of “heritage resources” and identify options for how YESAB may address these effects.

Joint Response of Designated Representatives: VARY recommendation to: **The Parties to the YESAA 5-Year Review should work with the UFA Implementation Working Group’s – “Chapter 13 Heritage Manual Drafting Committee” to achieve the following:**

- a) Reconcile definitions related to heritage resources and their application under YESAA, including jurisdiction and responsibilities in conducting and evaluating heritage resource assessments;
- b) Develop protocols and guidelines on the appropriate scope of heritage resource assessments and steps for their implementation including, but not limited to:
 - I. early inter-governmental notification of proposed projects requiring heritage resource assessments;
 - II. appropriate approaches to encouraging proponents to engage, where appropriate, with First Nations and the Yukon government Heritage Unit, prior to entering the YESAB process; and,
 - III. the appropriate qualifications of people conducting heritage resource assessments.
- c) Identify socio-economic effects related to heritage resources that may not be captured by the definitions related to heritage resources management and identify options for how YESAB may address these effects.

The Multi-party Review Team agrees with the overall intent of the recommendation to ensure that the Parties work together to resolve uncertainty and differences about definitions related to heritage resources and resolve roles and responsibilities of the Parties for conducting heritage assessment work in the YESAA regime. The Team also agrees with the overall intent to improve heritage assessment work and to improve communications so proponents and/ or governments provide early notification to the affected First Nations, and when practicable, prior to entering the YESAA review process. The varied recommendation clarifies that an existing forum is likely the most appropriate mechanism for completing the recommended actions.

The Multi-party Review Team recognized the importance of concerns related to qualifications of people conducting heritage assessments but did not reach a conclusion about the level of



detail required in defining qualifications for those conducting heritage assessments. First Nations participants noted that the required qualifications vary depending upon the scope of values considered under the definition of heritage resources. For instance, some First Nations have expressed concern that a qualified archaeologist who is able to conduct historic resources assessments and archaeological overview assessments and impact studies may not necessarily be qualified for assessing the social and cultural dimensions tied to First Nations heritage values. The Review Team agrees that the issue warrants further discussion by appropriate experts and this should be done within the framework of resolving the heritage resource related definitions.

Implementation Action: As suggested in the consultant's recommendation, a formal process for discussion about heritage resources related definitions and issues will be required. This process needs to involve participants who are familiar with heritage resource assessment issues and the relationship with the YESAA process.

During discussions, the Multi-party Review Team, supported by more detailed working-group discussions, concluded that the UFA "*Chapter 13 Heritage Manual Drafting Committee*" comprised of representatives from First Nations with Final Agreements and Yukon government would likely provide an appropriate forum for addressing the issues raised in the Review. The UFA Implementation Working Group (IWG) has provided a mandate to the "*Chapter 13 Heritage Manual Drafting Committee*" to work on a variety of heritage resources issues, including various definitions pertaining to "heritage resources management." If and when this group concludes a definition of Heritage Resources, it will become the definition used and required to be applied within Chapter 13, and the YESAA regime and could be applied under the Yukon *Historic Resources Act*. Addressing the specific issues of this Review would require some minor additions and clarifications to the mandate of the *Chapter 13 Heritage Manual Drafting Committee*, but both First Nations and Yukon representatives concluded that a request for this group to expand the scope of matters to be addressed would be a reasonable and suitable request. The Parties should make a request for an expanded mandate and support allocation of resources to allow the *Chapter 13 Heritage Manual Drafting Committee* at the conclusion of its definitions work, to further address the development of protocols and guidelines. A change to the mandate of the Committee would require additional resources but the YESAA Five-year Review does not have scope to direct resourcing priorities that fall within the purview of each government.

The Multi-party Review Team notes that utilizing the *Chapter 13 Heritage Manual Drafting Committee* would exclude First Nations that do not have Final Agreements. As such, alternate mechanisms are needed to provide for participation of these First Nations. The Team recognizes that some improvements have already been made; early notification is often happening, and the new YESAB *Rules for Evaluations Conducted by Designated Offices* provide additional time if required for proposal adequacy to address heritage resource assessment needs. (Implementation category: ADMINISTRATIVE and OTHER EXTERNAL PROCESSES)

Additional Recommendation 17(b): YESAB should develop an information management approach for sensitive information that fails to meet the confidentiality requirements established in YESAA. The approach should make the information available to all parties to the assessment without allowing broad public availability/distribution through the YESAB On-Line Registry.

Rationale: First Nations often share sensitive cultural or environmental information to support their evaluation, recommendations and input during YESAA assessment processes. Posting this information in a readily accessible on-line format provides broad public access to the



information even for people who have no interest in the specific assessment. While such information may not always meet the stringent confidentiality requirements established under YESAA, the inappropriate sharing and use of this information can still be damaging to a First Nation government's or citizen's interests or values. First Nations are seeking mechanisms that will allow the information to be readily shared within the assessment process but not provide broad public access to the information for unrelated purposes.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees with the concern raised by First Nations and recognizes the need for different information management approaches for sensitive but non-confidential information. Mechanisms are needed to maintain transparency in the assessment process, ensuring that all assessment participants have access to non-confidential information that is part of the assessment process, while avoiding widespread availability of sensitive information.

Implementation Action: For sensitive but non-confidential information, YESAB will enable the On-line Registry to contain notations about the information. The notation will describe the nature of the information and identify how assessment participants can access the information. Criteria for managing information in this way may be discussed at the proposed YESAA Forum. (Implementation Category: ADMINISTRATIVE and FORUM)

Recommendation 18: Options for integrating requirements for heritage resource assessments within authorizations should be explored by regulators and YESAB, in consultation with the Government of Yukon Heritage Unit and First Nations.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The recommendation is based on its observation that "*in cases where heritage assessment cannot be completed as the basis for Designated Office evaluations due to timelines or seasonal restrictions, there is no standard approach to recommending proponent actions to identify and mitigate potential heritage impacts as a condition of project approval.*"⁴ The Multi-Party Review Team recognizes the importance of the issue and the intent of the recommendation to find appropriate mechanisms for ensuring completion of adequate heritage resource assessments. While the recommendation offered one possible solution for this important issue, the Team has concluded that the issue and intent of the recommendation can be addressed with other approaches, including: (1) recent changes to YESAB's *Rules for Evaluations Conducted by Designated Offices* (June 2010) and (2) discussions and implementation actions related to Recommendation No. 17(a).

The new *Rules for Evaluations Conducted by Designated Offices* (June 2010) address the concern about completion of heritage resource assessments within the timelines of an assessment. Under the previous rules, when a YESAA assessment was initiated, time lines did not provide adequate time for proponents to complete a heritage resource assessment if it was needed. The new rules provide greater flexibility whereby the YESAA assessment process is stopped if a Designated Office concludes that heritage resource assessment information is required for concluding a YESAA assessment.

Despite the additional flexibility provided by the new *Rules for Evaluations Conducted by Designated Offices*, First Nations remain concerned about the adequacy of heritage resource assessments that may be conducted before or during assessment processes. The scope of these heritage resource assessments and inter-related socio-economic effects assessments are sometimes too narrow to address First Nation concerns about cultural, traditional and lifestyle effects, and First Nations sometimes need to undertake additional heritage assessment work as

⁴ SENES Observations and Conclusions Report, pg. 37



part of their participation in YESAA assessments. The new *Rules for Evaluations Conducted by Designated Offices* do not provide flexibility to accommodate such additional heritage assessment work by a First Nation.

Recommendation No. 17(a) proposes further discussion among parties to: (1) clarify the scope of heritage resource assessments, (2) clarify expectations for notification and participation of First Nations in heritage resource assessments, and (3) identify effective methods for YESAA assessments to address socio-economic effects on culture, traditions and lifestyles arising from impacts on heritage resources. The effective resolution of these issues as proposed in rec. #17 will clarify the requirements for heritage resource assessments that are conducted before or during YESAA assessment processes, providing greater likelihood that the resource assessments will address First Nations' needs and expectations.

Implementation Actions: There are three components of implementation actions for addressing the recommendation. First, YESAB has developed new *Rules for Evaluations Conducted by Designated Offices* that incorporate more flexible time lines. Designated Offices can identify the need for assessment of heritage resource values and request that proponents provide relevant information. Second, YESAB has also developed a new policy "*Heritage Resource Information Requirements for Land Applications Proposals Policy*". Third, discussions should be undertaken in relation to rec. #17 to provide greater clarity and certainty about the scope and methods and responsibilities for heritage resource assessments and inter-related effects on First Nation culture, traditions and lifestyles. (Implementation Category: ADMINISTRATIVE, FORUM)

Recommendation 19: Particularly when projects involve the "permanent alienation" of public lands for agricultural purposes, YESAB should review options available to allow for effective heritage resources assessments to be conducted. These might include encouragement of pre-notification by proponents to both Yukon Government and First Nations as a trigger for pre-assessments, extension of timelines for Designated Office assessment level projects, and inclusion of a pre-project heritage assessment and mitigation requirement as a condition of authorization.

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team agrees about the need to allow for effective heritage resource assessments for projects that involve the permanent alienation of land. As such, relevant parties have reviewed options to provide for such assessments and have implemented changes intended to ensure completion of heritage resource assessments prior to or during YESAA assessments.

Implementation Action: YESAB has revised its *Rules for Evaluations Conducted by Designated Offices* to incorporate more flexible time lines such that Designated Offices can identify the need for assessment of heritage resources and request that proponents provide relevant information. YESAB has developed a "*Heritage Resource Information Requirements for Land Applications Proposals Policy*" to describe heritage resource information required as part of a project proposal that includes land dispositions. Yukon's Land Management Branch (EMR) has issued an information sheet called "*Land Applications and Heritage Resources*." This lays out Yukon government's policy of forwarding all land applications to the Yukon government Archaeology Program for review. The information sheet further identifies the potential need for Yukon government to conduct an archaeological assessment, noting that this may delay applications because such assessments can only be conducted in thawed, snow-free conditions. No further actions are anticipated to address this recommendation. (Implementation Category: ADMINISTRATIVE)



Recommendation 20: Efforts should be made to increase the knowledge-base and documentation of heritage resources and sites in the Yukon. This will require increased resourcing of appropriate agencies in the Government of Yukon and First Nations.

Joint Response of Designated Representatives: VARY recommendation to: Efforts should be made to increase the knowledge-base and documentation of heritage resources and sites in the Yukon. This will have an impact on resourcing of appropriate agencies in the Yukon government and First Nations.

The Multi-Party Review Team accepted the first portion of the consultants' recommendation, agreeing that YESAA assessments would benefit from increased knowledge and documentation of heritage resources and sites in the Yukon. The Team also agreed that implementing the recommendation will have an impact on resourcing for relevant agencies within Yukon and First Nation governments. However, resourcing priorities fall within the jurisdiction and discretion of each government.

Implementation Action: Yukon and First Nation governments will consider the YESAA related benefits of increased knowledge and documentation of heritage resources when evaluating funding needs for heritage-related agencies and programs. (Implementation Category: ADMINISTRATIVE)

4.2.2 ASSESSMENT PHASE

4.2.2 A) Cumulative Effects

Final Observations & Conclusions Report - Summary of Issue

"Concern about inadequate cumulative effects assessment (environmental and socio-economic) was probably one of the issues raised most often. Cumulative effects was identified as a concern by all levels of governments, non-governmental organizations, UFA and other boards and councils, the general public and a few business organizations. Directly linked to the cumulative effects issue is the lack of land use plans (LUPs) which would provide guidance from regional or other plans upon which to base cumulative effects assessments (CEA). The key issues included:

- Lack of clarity and consistency in the scope and approach to CEA;*
- Lack of mechanism for regional or cumulative effects monitoring and baseline data; and,*
- Lack of regional land use plans and clarity regarding the ongoing role of land use planning commissions."*

O&C Report Link:
Pages 37-44

"Assessors and regulatory decision-makers lack the tools and data/information necessary to make informed planning and approval decisions based on regional/territorial cumulative effects of projects."

Five recommendations were identified to address cumulative effects.



Recommendation 21: YESAB should organize research and participatory forums related to cumulative effects assessment for the purpose of educating assessment practitioners (YESAB, governments, proponents, non-government organizations, etc.) in best practices.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that participatory forum(s) for discussion and refinement of cumulative effects assessment under YESAA is important. As noted by the consultant, the forums/ workshops should be planned by a variety of assessment practitioners and decision-makers. During discussions, YESAB noted that they prepared a cumulative effects research study for the White Gold area of Yukon in 2010 (www.yesab.ca).

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA Forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. The Forum should include discussion of cumulative effects assessment workshop. YESAB notes that this recommendation is not limited just to YESAB but other participants such as First Nations, government agencies, regulators and decision bodies as well. (Implementation category: FORUM and WORKSHOP)

Recommendation 22: The Act should be amended to adopt “best practice” in terms of application of the approach to “future projects” to bring YESAA practice in line with other jurisdictions.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The recommendation is modified slightly to apply to cumulative effects assessment, specifically, “The Act should be amended to adopt ‘best practices’ in the approach to “future projects” to bring YESAA cumulative effects assessment scoping practice in line with other jurisdictions.”

The recommendation to amend the cumulative effects provisions of YESAA is based on its observation that “*the Act sets out cumulative effects in a narrow way that is not consistent with current ‘best practices.’ As a result, YESAB does not include activities that are reasonably likely to occur, and future projects known to technical experts.*”⁵ The Multi-party Review Team agrees with the intent of the recommendation and supports the need to amend the YESAA legislation. While the Review Team supports the application of best practices, it recognizes that ‘best practices’ in the field of cumulative effects assessment are continually evolving. Overall, the Review Team concluded that amendments should be undertaken to provide greater flexibility for assessors to include ‘reasonably foreseeable’⁶ projects in cumulative effects assessments. YESAA should provide flexibility for assessors to continue to develop and implement the best ways to address the combined effects of multiple projects, learning from experience gained under YESAA and other assessment regimes.

The Multi-party Review Team agrees that YESAA constrains assessors’ abilities to consider future projects in a cumulative effects assessment. As noted by the consultant, wording in the Act directs assessors to consider “*other projects for which proposals have been submitted...*” or “*other existing or proposed activities in or outside Yukon that are known [to an assessors] from information provided to it or obtained by it under this Act.*” YESAB has concluded, for example, that the interpretation of ‘proposed’ in the context of Paragraph 42(1)(d)(ii) is constrained by other uses

⁵ SENES, Final Observations and Conclusions Report, pp. 44

⁶ See SENES Observations and Conclusions Report pp. 39-40 with references to both CEAA and MVRMA guidance.



of 'proposed' within YESAA. Other legislation like CEAA and the MacKenzie Valley Resource Management Act (MVRMA) are less restrictive about projects and activities that can be included in a cumulative effects assessment. As a result, assessors under those instruments have more flexibility to conduct effective comprehensive cumulative effects assessments.

The Multi-party Review Team agrees with the need for YESAA to be more consistent with other assessment legislation and clearly delineate the ability for assessors to consider 'reasonably foreseeable' projects in cumulative effects assessments. For example, the CEAA Operational Policy Statement 'Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*' and the 'CEAA Practitioners Guide' direct assessors to "consider projects that are 'certain' and 'reasonably foreseeable'" where 'reasonably foreseeable' projects are those where "the action may proceed, but there is some uncertainty about this conclusion."

In discussing the recommendation, the Multi-party Review Team recognized that increasing the range of projects that can be considered in a cumulative effects assessment is only one component of conducting thorough cumulative effects assessments. The practicality of cumulative effects assessments will continue to be constrained by the limitations on the level of detail of information that may be available for projects that are included within the scope of a cumulative effects assessment. These information needs and other constraints are in part addressed in other recommendations from the Review.

Implementation Action: Implementing this recommendation will require a legislative amendment to YESAA. The Multi-party Review Team discussed a number of legislative amendment options that included changes in cumulative effects provisions of Section 42 or the development of definitions for terms or phrases used in the cumulative effects provisions. These options can be discussed in more detail as part of the process of preparing legislative amendments. (Implementation category: LEGISLATIVE/ REGULATORY)

See Page 70 comments

Recommendation 23: The development and approval of regional LUPs should be made a priority.

Joint Response of Designated Representatives: VARY recommendation to: **The development and approval of regional land use plans will provide vital input for the assessment of projects under YESAA. The YESAA process would benefit from timely completion of regional land use plans.**

The Multi-party Review Team recognizes the importance of Regional Land Use Planning to the YESAA process, for example by providing guidance about cumulative effects and evaluating significance. Regional Land Use Plans also offer best management practices, mitigative measures, background information on values and resources and landscape management considerations. Development of Regional Land Use Plans is ongoing as a land claims implementation activity. However, the YESAA Five-year review does not have the scope to govern or direct implementation of Land Use Planning processes under the UFA. The current status of Regional Land Use Plan is as follows:

- North Yukon Regional Land Use Plan – in place
- Peel Watershed Regional Land Use Plan – Land Use Commission's final recommended plan has been released and is currently under review by the Parties
- Dawson Regional Land Use Plan – has been initiated

Implementation Action: The Parties will communicate the benefits of Regional Land Use Planning for the effective application of the YESAA process to their respective governments for



their consideration in establishing priorities for Land Use Planning activities. (Implementation category: OTHER EXTERNAL PROCESSES)

Recommendation 24: The role of Regional Land Use Planning Commissions following approval of a LUP should be clarified, and there should be a clear, ongoing role for commissions in order to keep LUPs up to date.

Joint Response of Designated Representatives: VARY recommendation to: **The role of Regional Land Use Planning Commissions following approval of a Land Use Plan should be clarified in the context of YESAA.**

The Multi-party Review Team agrees that the role of Regional Land Use Planning Commissions following the approval of a Land Use Plan needs to be clarified. Clarification is needed because provisions in YESAA require YESAB assessors to request that Land Use Planning Commissions perform project conformity checks with Regional Land Use Plans if a plan is in place. However, these commissions are no longer in place once a Regional Land Use Plan has been finalized. While YESAB has received formal communications that the Yukon Land Use Planning Council will provide the conformity checks for YESAB on proposed projects in areas with completed regional land use plans, this is not strictly consistent with YESAA provisions and legislative changes may still be required.

The Multi-party Review Team recognizes that regularly updated Land Use Plans would further facilitate the YESAA process by providing more current information and data over time for proposed project assessments and to support decision making. However, the YESAA Five-year review does not have the scope to govern or direct the mandate, tenure and funding of Yukon Land Use Planning Commissions under the UFA.

Implementation Action: The Parties and YESAB will confirm and communicate the process for project conformity checks with the Land Use Planning Council. The Parties will communicate with the Council about the benefits of keeping Regional Land Use Plans up to date for the effective application of the YESAA process. (ADMINISTRATIVE (short term) and LEGISLATIVE (long term))

Recommendation 25: Regional monitoring programs (biophysical and socio-economic) to establish baseline information and trends should be developed. There is a need for regional databases in each region of Yukon that focus upon measuring valued components. Regional databases are needed both for the implementation of YESAA legislation (cumulative effects management) and the implementation of the regional plans that delineate levels of acceptable change. Geographically similar boundaries for YESAA districts and regional planning region would support this integrated management framework.

Joint Response of Designated Representatives: VARY recommendation to: **‘The Parties should continue to support biophysical and socio-economic regional monitoring and information management programs and efforts to establish baseline information and trends.’**

The Multi-party Review Team recognizes the need for regional databases and research that focuses on measured valued environmental and socio-economic components. This type of information is critical to an effective assessment process and a number of initiatives have been undertaken to improve the knowledge base. For example, YESAB commissioned a regional cumulative effects study for the White Gold Area in June 2010 (www.yesab.ca). Environment



Yukon regularly reviews its regional data inventories and additional research needs in response to emerging projects or to support regional land use planning.

The Team agreed that implementing the recommendation will have an impact on resourcing for relevant agencies within Yukon and First Nation governments. However, resourcing priorities fall within the jurisdiction and discretion of each government.

The concept of having similar boundaries for planning regions and assessment districts is an oversimplification of the boundary issue identified by the independent consultant. A variety of regional boundaries could be relevant (e.g. watershed, land use planning, regulatory, wildlife ranges, ecosystem mapping, vegetation mapping, First Nation traditional territories) to assessments and these concepts were all discussed during lengthy negotiations for the current Designated Office boundaries established under YESAA. YESAB assessors have to consider all of these boundary types and will continue to do so regardless of which boundaries are selected. The revision of YESAA and regulatory boundaries does not appear to have significant benefit at this time.

Implementation Action: The Parties should communicate the benefits of regional monitoring programs and the important role these programs serve in the YESAA process to their respective governments for their consideration when establishing priorities. Governments and YESAB should consider the YESAA related benefits of increased data and information about biophysical and socio-economic values at a regional level when evaluating their priorities. (Implementation Category: ADMINISTRATIVE)

4.2.2 B) Timelines

Final Observations & Conclusions Report - Summary of Issue

"While timelines are a factor at all stages of the assessment process, input to the consultant's Review Team dealt predominantly with the "project discussion" and "assessment" phases. During the assessment phase participants review the project proposal and, along with the assessor, have the opportunity to make requests for additional information from the proponent. The YESAA process is intended to be "...conducted in a timely, efficient and effective manner..." (s.5(2)(i) of the Act). Most of the organizations and individuals the consultants' Review Team heard from recognize the importance of set timelines for development assessments; however, many people had concerns about the tight timelines involved for providing comments, especially during Designated Office evaluations where the standard response time is 14-days. Lack of adequate time during the "seeking views" and information gathering stage of an assessment is the primary issue, with concerns also raised by some that: the submission of proposals at the start of holidays can reduce the review period; the submission of

O&C Report Link:
Pages 44-47

"While the timelines established for project assessments conducted by YESAB generally work well, some adjustments are required depending on the complexity of the proposed project".

"Through YESAB's Designated Office Rules Review it appears that concerns heard by the Review Team about timelines will be addressed."



additional information near the end of the seeking views stage limits review time; and, extensions to the public comment period are sometimes unwarranted, unnecessarily delay project assessments."

Three recommendations were identified to address timelines.

Recommendation 26: For added clarity and transparency of process, the "Notice of Extension of Timeline for Submission of Views and Information" should include reasons for granting an extension.

Joint Response of Designated Representatives: ACCEPT. The new YESAB *Rules for Evaluations Conducted by Designated Offices* (June 2010) already implement this action. Part 5 of the Rules – Conducting the Evaluation contain specific clauses whereby the assessor is required to provide written notification with an explanation if an additional period of time is granted during the assessment.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation category: ADMINISTRATIVE)

Recommendation 27: Given the diversity of projects that are assessed at the Designated Office level changes to the timelines established for evaluations should be made to allow for longer timeframes for assessments of complex projects. This should be done as part of the revision to Designated Office evaluations such that two levels of assessment are created (see "Level of Assessment" in Section 3.2.2 of this Report).

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees with the issue stated by the consultant and the intent of the recommendation. While the methodology for resolving the issue is not the same as that recommended the issue has been addressed through revisions to YESAB's rules. The new *Rules for Evaluations Conducted by Designated Offices* (June 2010) now allow for greater flexibility in assessing larger, more complex projects as well as maintaining a streamlined process for straightforward, routine projects. Specifically, the seeking views and information period has been restructured into two separate periods of time to allow for pauses while the proponent is preparing additional information.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation category: ADMINISTRATIVE)

Recommendation 28: Consideration should be given to establishing a coordinated approach to requests for additional information during the "seeking views" stage of the assessment, especially for more complex projects. Approaches used in the Northwest Territories and Nunavut regimes could serve as useful benchmarks.

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team agrees about the need for a more coordinated approach to additional information requests during the assessment process, especially to provide time for reviewing additional information provided. During discussions YESAB indicated that the new *Rules for Evaluations Conducted by Designated Offices* (June 2010), implemented after the release of the *Final Observations and Conclusions Report* now address the issue. For example, the Rules create the ability for assessors



to: 1) stop timelines until an information request is answered and 2) the ability for an assessor to review comments received at the end of the seeking views period to determine if further information is still required. Both of these provisions allow for more effective consolidation of information requests.

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation category: ADMINISTRATIVE)

4.2.2. C) Level of Assessment

Final Observations & Conclusions Report - Summary of Issue

"The consultant's Review Team heard concern from First Nation and Yukon governments, YESAB, and some non-governmental organizations that some of the more complex Designated Office level projects are not being adequately assessed under the current Designated Office process and timelines. In their view, there should be more than one evaluation process at the Designated Office level so that larger projects are more adequately assessed. In addition, we also heard that other complex projects considered through a Designated Office evaluation should have more appropriately been directed to an Executive Committee level assessment without having to go through an entire evaluation only to get referred to the higher level. The issue can be summarized as follows:

- *too many different types of projects for one set of assessment rules at the Designated Office level; and,*
- *inability to directly refer a project to the Executive Committee."*

O&C Report Link:
 Pages 47-48

"The current rules for Designated Office evaluations do not adequately consider the diversity of projects that are presented for assessment at this level."

Three recommendations were identified to address levels of assessment.

Recommendation 29: The Designated Office rules should be amended so that there are different types of evaluations for different categories of projects (as per s. 31(1)(b) of the Act).

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees with the issue stated by the consultant and the intent of the recommendation. YESAB's new *Rules for Evaluations Conducted by Designated Offices* (June 2010) address varying complexities of projects by providing flexibility within the evaluation process although YESAB did not specifically create rules in accordance with paragraph 31(1)(b).

Implementation Action: No further action is required as the recommendation has been implemented. (Implementation category: ADMINISTRATIVE)

Recommendation 30: Amendments to Schedule 3 of the Assessable Activities, Exceptions and Executive Committee Projects Regulations should be considered to lower certain thresholds so that larger, more complex projects are assessed by the Executive Committee.



Joint Response of Designated Representatives: VARY recommendation to: ‘The Parties, YESAB and First Nations should work together to develop recommendations for amendments to Schedule 3 of the Assessable Activities, Exceptions and Executive Committee Projects Regulations.’

The Multi-party Review Team accepts the issue identified in Recommendation #30, but does not want to limit work done on the YESAA regulations to ‘lowering thresholds’. The Multi-party Review Team agrees that specific amendments to the YESAA Executive Committee projects regulations should be made. The work to review the regulations and identify appropriate amendments should be undertaken by the Parties and First Nations. The process to amend the regulations will include opportunities for input by regulators, proponents and other organizations. This recommendation is also linked to rec. #12.

Implementation Action:

The Multi-party Review Team has developed a preliminary compilation of problem areas and specific issues in the regulation that should be addressed in amended *Assessable Activities, Exceptions and Executive Committee Projects Regulations* (Appendix E). If authority is given to make legislative and regulatory changes, the Parties should establish a working group to finalize the review of the regulations and recommend specific amendments. (Implementation Category: LEGISLATIVE/ REGULATORY).

Recommendation 31: Based on the criteria used by an Executive Committee to refer a project to a Panel Review, amendments to YESAA should be made for Designated Office referrals to Executive Committees.

Joint Response of Designated Representatives: The Multi-party Review Team participants were unable to reach agreement on this recommendation and develop a joint response. The following recommendation differs due to the fact the Parties ‘agreed to disagree’. Each party has prepared a response to the recommendation provided below:

Canada AANDC Designated Representative Response: The issues identified in the body of the Report have been addressed within the current revisions to YESAB’s Rules and policies. This issue may also be addressed by making changes to regulations under YESAA if authority is given to make legislative and regulatory changes. The implementation of YESAB’s *Rules for Evaluations Conducted by Designated Offices* (June 2010), in combination with the proposed actions in response to Recommendation 30 should result in the appropriate referral of projects to the Executive Committee.

Yukon Government Designated Representative Response: Yukon government cannot support recommendation 31. The proposed YESAA legislative amendment is not required as the issues identified by the consultant in this recommendation in 2009 are effectively being addressed through existing non-legislative processes, future YESAB policy and a proposed review of the YESAA regulations. Specifically:

- YESAB’s revised *Rules for Evaluations Conducted by Designated Offices* (June 2010)
- YESAB’s implementation of other consultant recommendations specifically: sector-specific application forms (rec. 6) already underway, and future multi-party discussions on YESAB’s significance determination criteria and methodologies (rec. 32)
- a proposed review of assessment thresholds in the YESAA Activities Regulation (Schedules 1, 2 and 3) as part of YESAA Five-year Review implementation



Draft Review Report - INTERIM

Yukon government believes that the current YESAA provisions for referring Designated Office Evaluations to the Executive Committee in combination with YESAB's revised process under its new *Rules* give a Designated Office sufficient flexibility to refer projects to the Executive Committee when required.

CYFN Designated Representative and First Nations Response: ACCEPT. First Nations and CYFN concur with the intent of the recommendation, that YESAA should be amended to provide authority for projects that enter the YESAA process at the Designated Office level to be referred for more comprehensive assessments in conditions where those projects may contribute significantly to cumulative effects or socio-economic effects, cause significant public concern or involve the use of technology that is controversial in Yukon. In submissions to the consultant during the issues scoping phase of the YESAA Five-year Review, First Nations expressed concern about the limited authority for Designated Offices to refer such projects for more comprehensive assessments.

Some minor amendments were suggested by CYFN but they were not incorporated into this version.

Some administrative solutions for this issue were discussed by the Multi-party Review Team including:

- The revised Rules for Evaluations by Designated Offices provide some greater process flexibility for Designated Office evaluations, with more flexible timelines and better provisions for seeking further information. However, YESAA establishes three levels of assessment where the higher levels of assessment are intended to be more comprehensive. As a result, the improvements to the Designated Office evaluation process cannot fully address the need for more comprehensive assessments of projects that contribute significantly to cumulative or socio-economic effects, cause significant concern or involve the use of controversial technology.
- The Multi-party Review Team discussed whether projects that may contribute significantly to cumulative effects or socio-economic effects or involve controversial technology would consistently lead to Designated Offices being unable to determine if significant effects will occur, thereby providing for use of the existing authority for referral. This is not a forgone conclusion and it would be better to provide for referral of projects to a more appropriate level of assessment.
- Lowering the thresholds for projects that automatically require assessment by the Executive Committee require assessment of more projects at higher levels of assessment. However, such a mechanism does not address the concern that some small projects could contribute significantly to cumulative or socio-economic effects, rely on controversial technology or elicit significant public concern. Hard regulatory thresholds are intended to establish certainty about assessment requirements for projects that have the greatest risks of significant effects and complexities in their assessments. Conversely, the referral provisions at both levels of assessment should provide flexibility – a mechanism to address projects that do not fit within the expectations of the fixed rules.

YESAA Section 56 constrains the authority of Designated Offices to refer projects to higher levels of assessment to those conditions when the Designated Office cannot determine whether the project will cause significant adverse or socio-economic effects. Because of this legislative constraint, the need for flexibility to refer projects for more comprehensive assessment cannot be fully addressed by administrative solutions.

Flexibility for referral of projects to higher levels of assessment is provided in other assessment regimes including the Canadian Environmental Assessment Act which provides for assessors at the lowest level of assessment (screening) to refer projects directly to the highest level of



assessment (panel). In that case, the authority has been applied judiciously and referrals have been rare.

To provide consistent processes for all projects that may contribute significantly to socio-economic or cumulative effects, involve controversial technology or cause significant public concern, the authorities for referring projects for more comprehensive assessment should be reconciled for all levels of assessment in YESAA. The factors available to the Executive Committee for referrals are important determinants of whether a project warrants a more comprehensive assessment and ought to be available for both Designated Office and Executive Committee projects.

Implementation Action:

Recommended by Canada and Yukon Government:

Canada and Yukon government do not identify any specific implementation actions beyond those already identified in their respective responses.

Recommended by CYFN Designated Representative and First Nations:

In First Nations' and CYFN's view, implementing this recommendation requires amendment of the YESAA legislation and it should be included in the overall plans for legislative amendment.

There are several options that should be considered when selecting an amendment to address the intent of the recommendation. These may include:

- Providing the Executive Committee with authority, at the request of a Designated Office, to refer a project to review by a panel.
- Providing designated offices with authority to refer a project to the Executive Committee.
- Providing the Executive Committee with authority to take on projects for the reasons outlined above.
- Providing designated offices with the authority to refer projects to a panel review for the reasons outlined above.
- Providing designated offices with the authority to refer projects to the Executive Committee with the consent of the Executive Committee.

In all cases, the authorities for referral would be associated with projects that may contribute significantly to cumulative or socio-economic effects, cause significant public concern or involve controversial technology.

The implementation of any amendment would have to be accompanied by administrative policy and guidance to ensure judicious and consistent application of the provisions.

4.2.2 D) Determination of Significance of Environmental and Socio-economic Effects

Final Observations & Conclusions Report - Summary of Issue

"The consultants' Review Team heard concerns that the process used by assessors to determine the significance of environmental and socio-economic effects was generally unclear. From First Nation governments we also heard concerns related to how First Nation values and interests are considered in the assessment"

O&C Report Link:
Pages 48-51

"YESAB guidance on significance determination is not always followed by assessors."



process when decisions are being made regarding the significance of adverse effects on these values and interests."

Two recommendations were identified to address significance of environmental and socio-economic effects.

Recommendation 32: YESAB, in collaboration with interested parties should develop a methodology which works within the Yukon context to determine appropriate methodologies to establish a more transparent and consistent process for establishing significance criteria, realizing that a single approach may not apply in all situations.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that discussions on YESAB's assessment significance criteria and methods are needed. During discussions, the Review Team noted that this issue is not limited to YESAB but other participants such as First Nations, government agencies, regulators, and decision bodies.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. Significance criteria should be a specific topic for discussion at the forum. (Implementation category: FORUM)

Recommendation 33: YESAB should develop training programs and information opportunities to its assessors on significance determination.

Joint Response of Designated Representatives: ACCEPT. YESAB is currently providing training for its assessors about significance determinations.

Implementation Action: YESAB will continue to evaluate training needs for board members and staff including needs for further or continued training on significance determination. (Implementation category: ADMINISTRATIVE)

4.2.2. E) Impact on Treaty and Aboriginal Rights

Final Observations & Conclusions Report - Summary of Issue:

"Among the matters to be considered in the assessment process, s. 42(1)(g) of the Act identifies "the need to protect the rights of Yukon Indian persons under final agreements". The assessment of environmental, socio-economic and cumulative effects of project developments is fundamental to the protection of these rights. The consultants' Review Team heard from the Yukon Government that, as a result of insufficient consideration of treaty rights in the YESAB's Evaluation Reports and of specific recommendations

O&C Report Link:
Pages 51-54

"There appears to be inadequate implementation of s. 42(1)(g) of the Act. This creates uncertainty among First Nations, government departments and proponents about the potential impacts of proposed projects on treaty rights."



that address potential impacts on these rights, decision bodies are challenged to discharge their consultation obligations within the YESAA timelines. That and the lack of clarity on how YESAB addresses and treats "the need to protect the rights of Yukon Indian persons under final agreements" are the key aspects of this issue as identified by the consultants' Review Team."

Two recommendations were identified to address the issue of treaty rights.

Recommendation 34: The Parties should work together to clarify the specific treaty rights of Yukon Indian people that may be affected by land and resource development proposals.

Joint Response of Designated Representatives: ACCEPT. Multi-party Review Team discussions noted there is a lack of common understanding of what constitutes a First Nation 'treaty right'. There are many complicating factors, for example, differences between First Nations with Final Agreements and First Nations without Final Agreements and distinctions between 'aboriginal rights' and 'treaty rights'. All participants agree that further dialogue between all parties is needed and an improved common understanding of treaty rights would benefit the YESAA process.

Implementation Action: The Multi-Party Review Team recommends that the Parties utilize the proposed YESAA Forum to enable information sharing and specific discussions on treaty rights and how they are considered in the YESAA process. (Implementation Category: ADMINISTRATIVE or FORUM)

Recommendation 35: The Parties and YESAB should work with First Nations to determine how best to address the particular issue of potential impacts of projects on treaty rights. The input of First Nations on treaty rights may be required in advance of project proposals being deemed complete.

Joint Response of Designated Representatives: VARY recommendation to: **Decision Bodies and YESAB should work with First Nations to determine how best to address the particular issue of potential impacts of projects on treaty rights.**

The Multi-party Review Team agrees with the first portion of the recommendation that efforts are needed to address potential project impacts on First Nations treaty rights in YESAA assessments. The YESAA process is strengthened when more detailed treaty rights information is provided in an assessment and can lead to more comprehensive project decisions. However, a First Nation may wish to identify treaty rights during any stage of the YESAA process. Implementing the recommendation as written would place an onus on affected First Nations to identify treaty rights at the beginning of the assessment which may not be possible or the appropriate stage in the YESAA process.

Implementation Action: Based on the outcomes from implementing Recommendation No. 34 addressing the potential impacts of projects on treaty rights should be a topic for discussion at the proposed YESAA Forum. Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. (Implementation Category: FORUM)



4.2.2 F) Socio-economic Impact Assessment

Final Observations & Conclusions Report - Summary of Issue:

"The UFA and YESAA require that both the environmental and socio-economic effects of projects be considered in assessments conducted in the Yukon. In this crucial respect, the YESAA regime differs from the federal CEAA process, which requires that the socio-economic impacts of projects be considered only insofar as they are related to environmental impacts.

Under the s. 42(1) of YESAA, when assessing a project or existing project, Designated Offices, the Executive Committee or a Board panel are directed to consider "the significance of any environmental or socio-economic effects of the project or existing project that have occurred or might occur in or outside Yukon." They are also required to consider "the significance of any adverse cumulative environmental or socio-economic effects that have occurred or might occur in connection with the project or existing project..." Further, they must take into consideration project alternatives or alternative ways of undertaking or operating the project that would avoid or minimize significant environmental or socio-economic effects. They must also implement mitigative and compensatory measures for any such adverse effects. These "matters to be considered" are supported by a number of relevant YESAA purposes including not only fostering of beneficial socio-economic change (s. 5(2)(e)), but more specifically, recognizing and to the extent possible enhancing the traditional economy of First Nations (s. 5(2)(f)), and more broadly, protecting and promoting the well-being of First Nations and Yukon residents and the interests of Canadians (s. 5(2)(d)).

O&C Report Link:
 Pages 54-60

"To date, YESAB has undertaken very few comprehensive assessments of the socio-economic effects of a project, and it is clearly still developing its assessment methodologies for this purpose."

"Decision Bodies and regulators face significant challenges in implementing measures to effectively mitigate the socio-economic impacts identified in YESAA assessments."

"YESAB policies and methodologies do not fully allow for the effective assessment of the "cultural" impacts of projects, particularly impacts on First Nation cultures"

A key issue that has emerged in this Review concerns the effectiveness of the YESAA regime in conducting assessments of the socio-economic impacts of projects and in implementing mitigative measures to deal with them. The consultants' Review Team has heard a variety of concerns about the extent to which socio-economic impact assessments in the Yukon are adequately fulfilling the UFA objectives and the Purposes of the Act itself."

Four recommendations were identified to address socio-economic impact assessment. The Multi-party Review Team added one recommendation (39b).



Recommendation 36: The parties to the UFA should give careful consideration to the possibilities for incorporating stronger “sustainability” requirements into YESAB assessments. The Act should be amended so that it specifies more clearly how considerations of socio-economic sustainability are to be incorporated into assessments of project impacts. These should provide proponents and assessors with clearer direction on how to ensure that long term or sustainable socio-economic benefits are adequately addressed in YESAA assessments.

Joint Response of Designated Representatives : VARY Recommendation to: The Parties to the UFA should work with YESAB to incorporate sustainability considerations into the YESAA process by utilizing existing provisions in the Act. Requests for future legislative changes could be considered should these approaches prove ineffective.

The Multi-party Review Team agrees with the overall intent of the recommendation to strengthen the application of socio-economic effects assessment as it relates to “stronger sustainability requirements” and recognizes the legitimacy of the range of issues identified in the *Final Observations and Conclusions Report*. The Review Team supports the need to achieve the purpose statements in Section 5 of YESAA (and Objectives as stated in Chapter 12 of the UFA), but concluded that amendment of the legislation may not be necessary to achieve this.

The Multi-party Review Team, supported by more detailed working-group discussions, concluded that the YESAA allows sustainability objectives to be considered in project and strategic assessment processes where needed and that these existing provisions should be applied more effectively. Examples of relevant provisions include:

- Section 5(2) - This clause describes the purposes of YESAA and sets forth objectives for sustainable development and enhancement of traditional economies (linked to 12.1.1 Objectives from UFA, Chapter 12);
- Section 42(4) - This clause provides the assessor with the ability to consider any relevant matter. (Sustainability or positive benefits are matters that could be considered)
- Section 112 - This clause provides for an ability to request (the Executive Committee undertake) a study, (i.e. of environmental or socio-economic effects that are cumulative geographically or over time). This could include analyzing sustainability.
- Section 102-109 and section 122(f) - These clauses generally refer to a process for strategic assessment, and may provide an avenue to assess sustainability over time or space (i.e. via cumulative impact assessment) rather than project by project (i.e. assessments of plans, programs, policies or proposals as defined under 2(1) of the Act).

The success of achieving the overall intent of this recommendation requires effective implementation of existing YESAA provisions noted above and the acceptance and implementation of the related recommendations from the Five-year Review. These include: scoping of projects, scoping of effects assessment, cumulative effects, the requesting of studies, strategic assessments, socio-economic impact assessment, cultural impact assessment practices, and development of baseline information.

Although the Multi-party Review Team supports more effective application of existing provisions, it also recognizes that Section 56 of the Act, and other related provisions (e.g., 58; 72(4) do not provide the means for a Designated Office, Executive Committee or Panel of the Board, to provide recommendations intended to bring about positive socio-economic outcomes. Instead, the emphasis is limited to providing recommendations arising from potential significant adverse environmental and/ or socio-economic impacts. As such, the Review Team agrees that there may be value in making future amendments to the legislation, should



application of administrative and process changes prove ineffective in achieving the YESAA objectives that envision socio-economic enhancements.

The Multi-party Review Team also emphasizes the value of completing Regional Land Use Plans insofar as they provide guidance on matters related to sustainability in specific planning regions.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. More effective application of existing provisions of YESAA related to achieving sustainability objectives should be a topic for discussion at the proposed YESAA Forum. In the future, the Parties should evaluate the success of incorporating sustainability considerations through existing provisions of the Act and consider if there is a need for legislative changes. (Implementation category: FORUM, possible LEGISLATIVE)

Recommendation 37: Decision Bodies and regulators should become more innovative in how they formulate recommendations from YESAB on the measures required to address the socio-economic impacts of projects. A permanent forum should be considered, which brings together assessors and regulators to discuss effective and appropriate methods—both mitigative and monitoring—for addressing significant positive and negative socio-economic impacts from developments.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees more innovation is needed to address Decision Body implementation of accepted socio-economic mitigations. It is recognized that Decision Bodies and regulators face significant challenges in implementing measures to effectively mitigate socio-economic impacts. The Review Team supports the use of the proposed YESAA Forum for identifying practical solutions to these challenges.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. Socio-economic project impacts and mitigative measures should be a topic of discussion for the proposed YESAA Forum. (Implementation Category: FORUM)

Recommendation 38: A concerted effort should be made to develop state-of-the-art, comprehensive databases on socio-economic conditions and trends in the Yukon, which, once in place, will be available for use by proponents, assessors, government departments and other interveners alike during project assessments. This will require data sharing and the commitment of resources and technology by all parties, as well as directed studies, monitoring and surveys to fill in outstanding information gaps.

Joint Response of Designated Representatives: VARY recommendation to. The Parties should continue to support the development and management of information on socio-economic conditions and trends in Yukon to be shared among proponents, assessors, government departments and other participants during project assessments. This should include resources for data development, as well as planning to establish baselines and fill outstanding information gaps.

During discussions, the Multi-party Review Team members agreed on the importance of information and data in the YESAA process. This is not limited to socio-economic but



environmental data as well (see Recommendations 20 and 25). The Review Team agreed that more socio-economic data, information and better organization are needed to support assessments and decision making. Some tools have been developed, e.g. Yukon government's Socio-economic Web Portal (www.sewp.gov.yk.ca/home) but more comprehensive data is needed to maximize the portal's potential benefits to the YESAA process. First Nations identified that not all socio-economic information can be quantified as 'data', for example, information on the traditional economy of First Nations⁷. First Nations also raised issues regarding how socio-economic data is gathered and interpreted from communities with small populations.

The Review Team also agreed that implementing this recommendation will have a significant impact on resourcing for relevant agencies. However, resourcing priorities are within the jurisdiction and discretion of each government.

Implementation Action: The Multi-party Review Team suggests a two-part approach to implementing this recommendation – first, by improving communications and data integration to make better use of existing data and second, by establishing plans to undertake studies and gather new information in the future. The proposed YESAA Forum is the appropriate mechanism for such activities. To support the activities arising from discussions at the YESAA Forum, governments will consider the YESAA-related benefits of more comprehensive and accessible socio-economic information when evaluating funding needs. (Implementation Category: ADMINISTRATIVE and FORUM)

Recommendation 39: Additional training should be provided to YESAB staff and Board members in the techniques and principles of socio-economic impact assessment.

Appropriate training programs should be developed by YESAB, with input from the public and First Nation governments.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees with the first portion of the recommendation. YESAB notes that socio-economic impact assessment training has been and continues to be provided to their staff. However, the development of specific training programs on socio-economic impact assessment is not the sole responsibility of YESAB nor should it be limited to YESAB staff. Further training and workshops on socio-economic impact assessment - specifically tailored to the Yukon - should be developed in the future.

Implementation Action: Some implementation activities are already underway by YESAB. Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first YESAA Forum in the spring of 2012. The Forum should include a discussion on developing a joint socio-economic impact assessment workshop in the future. (Implementation Category: ADMINISTRATIVE and FORUM)

Additional Recommendation 39(b): YESAB and First Nations should jointly develop specific guidance and training on the assessment of First Nation cultural impacts.

⁷ Section 5(2)(f) of YESAA includes as a purpose of the Act, "to recognize and to the extent practicable, enhance the traditional economy of Yukon Indian persons and the special relationship with the wilderness environment.



Rationale: During discussions on Recommendation 39, First Nations voiced concern over how First Nation cultural impacts of projects are assessed. The distinct First Nation cultural component of socio-economic values is often missed in broader discussions and training on socio-economic impacts. Greater awareness and understanding is needed by assessors, proponents and decision bodies.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that training on First Nation cultural impact assessment should be incorporated as a specific component of socio-economic impact assessment guidance, training and workshops.

Implementation Action: YESAB, First Nations, Canada and Yukon should initiate discussions on how to better assess First Nations cultural impacts. YESAB and First Nation should jointly develop a plan for preparing guidance materials, and developing and delivering training programs. (Implementation Category: ADMINISTRATIVE)

4.2.2 G) Strategic Assessments (Plans, Policies, Programs)

Final Observations & Conclusions Report - Summary of Issue

"YESAA provides for the review of plans by YESAB whose implementation "it considers might have significant adverse environmental or socio-economic effects in Yukon." A plan is defined as "any plan, program, policy or proposal that is not a project or existing project." Sections 102 to 109 of the Act contemplate the establishment of panels by the Executive Committee of YESAB to undertake these reviews. The Executive Committee is also responsible for specifying the scope of a review and the panel's terms of reference. S. 108 (3) lists the matters that must be considered by a panel. The "originator" of any plan subject to such a review is required to give "full and fair consideration" to recommendations issued by such a panel. If requested, the Executive Committee may also undertake "(a) studies of environmental or socio-economic effects that are cumulative geographically or over time, or (b) research into any aspect to the assessment of activities (s.112 (1))."

O&C Report Link:
Pages 60-63

"Considerable support, especially among public and First Nations governments in the Yukon, exists for the increased use of strategic assessments as a key mechanism for increasing the overall effectiveness of the YESAA regime."

To date, no strategic assessments of "plans" or studies been have carried out by YESAB. The consultants' Review Team heard a variety of concerns about the lack of strategic assessments in Yukon, about the challenges that this regime faces in getting them underway, and about the potential benefits to be derived from these assessments."

Four recommendations were identified to address strategic assessments.

Introduction



The consultant identified strategic assessments (plans, policies, programs) as a valuable tool for addressing cumulative effects and other broad sustainability issues that cannot be adequately dealt with through project-specific YESAA assessments. To effectively address several inter-related challenges of strategic assessment under YESAA, they recommended a combination of legislative and policy changes. The Multi-Party Review Team agrees that strategic assessment (assessment of plans, policies or programs) can play an important role in the YESAA process by providing “big picture” assessment results (e.g. cumulative or regional effects) that can be applied in understanding effects and defining mitigation for project-specific assessments. Therefore, the Multi-Party Review Team has accepted the concepts contained in each of the four recommendations.

Recommendation 40: A regulation or regulations should be developed, as contemplated in the Act (see YESAA s. 105 and s. 122 (f)), which sets out clear legal requirements relating to strategic assessments, including which “plans” will be subject to assessment. This work should be undertaken by the parties to the UFA in close collaboration with YESAB and with input from the public.

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team agrees that regulations should be prepared to provide YESAB with the ability to initiate a review of certain plans, at YESAB’s discretion. Section 105 of YESAA provides for the possible review of certain plans by YESAB, where plans are defined as “*any plan program, policy or proposal that is not a project or existing project*”⁸ and regulations are enacted identifying the types of plans that may be reviewed. Implementation of section 105 relies on the completion of regulations that would specify the types of plans for which YESAB could initiate a review.

Implementation Action: If Canada obtains authority to draft this regulation, a working group would be established to identify and reach consensus on the types of plans that could be specified in this regulation developed under YESAA Subsection 122(f). These discussions will be undertaken in collaboration with YESAB. (Implementation Category: LEGISLATIVE/ REGULATORY)

Recommendation 41: YESAB should develop policy guidelines that detail how strategic assessment will be conducted within the YESAA regime. This should be done in parallel with proposed regulatory changes, and with input from the three parties to the UFA and the public.

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team agrees about the value of guidelines describing how strategic assessments (assessment of ‘plans’) will be conducted within the YESAA regime. Such guidelines will need to maintain flexibility in the strategic assessment process because of the variability in types of plans, policies and programs for which assessments may be initiated.

Preparation of guidelines for the conduct of strategic assessments will need to be completed in combination with the outcomes of Recommendation No. 42 which addresses the broader strategic assessment process within YESAA. The guidelines may also need to consider the outcomes of Recommendation No. 40 which addresses how strategic assessments may be initiated (either under YESAA section 103 or 105). However, the preparation of the guidelines can be completed without the completion of regulations as proposed in Rec. #40.

⁸ YESAA – Section 2 - definitions



Implementation Action: YESAB will prepare guidelines describing how it will conduct strategic assessments within the YESAA regime. If and when a guideline is prepared, YESAB will seek input from Canada, Yukon and First Nations and will use the YESAA Forum as a primary instrument for discussion and information exchange. (Implementation Category: ADMINISTRATIVE and FORUM)

Recommendation 42: The parties to the UFA, working in collaboration with YESAB, should come to agreement on more flexible, cost-effective alternatives to the current panels under the YESAA as mechanisms to conduct strategic assessments.

Joint Response of Designated Representatives: ACCEPT. The Multi-Party Review Team agrees about the need for flexible, cost-effective mechanisms to conduct strategic assessments. YESAA prescribes that plans be assessed through reviews by panels of the board. Since there have been no requests for reviews of plans to-date, YESAB and the Parties⁹ have not considered the provisions of YESAA in detail. As such, the degree of flexibility for strategic assessment mechanisms is not well understood. Canada, Yukon, First Nations and YESAB should work together to identify flexible, cost-effective mechanisms for strategic assessments such that a complex panel review process is not a deterrent to implementation of effective strategic assessment within the YESAA regime. The conclusion of the work may identify the need for future legislative changes.

Implementation Action: YESAB and any working group that may be established pursuant to Rec. #40 should discuss mechanisms for conducting strategic assessments under YESAA and identify flexible and cost-effective approaches. These may include mechanisms that use existing panel review processes or alternate approaches as appropriate. (Implementation Category: ADMINISTRATIVE)

Recommendation 43: The parties to the UFA should review possibilities for additional funding to be provided to the YESAA regime to support strategic assessments by YESAB, as well as the creation of integrated information management systems that link the results of these assessments to its work on project-specific assessments.

Joint Response of Designated Representatives: VARY recommendation to: **The Parties to the UFA should review possibilities for additional funding to be provided to the YESAA regime to support strategic assessments by YESAB. YESAB will work with Canada, Yukon and First Nations to determine how the results of strategic assessments can be linked to project-specific assessments.**

The Multi-Party Review Team identified two separate components in the recommendation. The Review Team accepted the first part – funding to support strategic assessments and varied the second part of the recommendation – the creation of integrated information management systems. With respect to the first part of the recommendation, the Multi-Party Review Team agreed that conducting strategic assessments would have resource implications for YESAB as well as other participants in the YESAA process. The outcomes of recommendations 40 through 42 are intended to raise the profile and increase the use of strategic assessment in the YESAA process. As a result, resources and costs will need to be considered and addressed as those recommendations are implemented



With respect to the second part, the Multi-Party Review Team concluded that the integration of results from strategic assessments into project-specific assessments will be critical for effectively utilizing strategic assessment within the YESAA regime. The creation of a new integrated information management system is one way of addressing this need, but there may be other options that create less pressure on time and resources. YESAB, in cooperation with government agencies, should review the current state of environmental and socio-economic information management, the integration of strategic and project assessments and implement appropriate information management solutions.

Implementation Action: The Multi-party Review Team suggests a two-part approach to implementing this recommendation. First, the working group that may be established to address issues related to strategic assessment (see Recommendation No. 40) and YESAB should identify resource and cost implications of YESAB conducting strategic assessments. The evaluation of funding implications should consider not only the direct costs for YESAB to conduct strategic assessments, but also the costs of other participants in the process including Yukon and First Nation governments. Funding implications and needs should be considered prior to implementing recommendation No. 40 and in discussions related to recommendation No. 60. Second, YESAB in collaboration with other agencies (e.g. Yukon Government, First Nations, Land Use Planning Council) should identify and implement appropriate information management approaches for integrating the results of strategic assessments into project-specific assessments. (Implementation Category: ADMINISTRATIVE)

4.2.3 DECISION PHASE

4.2.3 A) Decision Bodies

Final Observations & Conclusions Report - Summary of Issue

"The consultants' Review Team heard concerns about how and at what point in the assessment process decision bodies are identified, how decision bodies participate in the process, and how coordination between decision bodies may affect assessments."

O&C Report Link:
Pages 63-66

"Other than judicial review, there is no process in YESAA to reconcile situations where the parties have disparate views of the decision body status of one or more of the parties on a project undergoing assessment."

Three recommendations were identified to address decision body issues. The Multi-party Review Team added one recommendation (45b).

Recommendation 44: The Parties and YESAB should work together to develop a means of ensuring more effective and timely identification and participation of decision bodies. Considerations in this regard might be a federal coordinator located in the Yukon; follow-up by the assessor with potential decision bodies before the assessment phase proceeds; setting a time by which decision bodies need to self-declare in advance of an assessment proceeding; or, amending the Act to include a specific process for the identification of decision bodies.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that the Yukon Government, Canada, First Nations and YESAB should work together to identify more effective methods for decision body identification and



participation. The examples proposed in the recommendation represent some options but others may be considered. As part of early YESAA implementation an informal YESAA Decision Body Forum was established with representatives from Yukon government, Federal departments and First Nation governments. It met several times prior to the YESAA Five-year Review and provided the opportunity to discuss issues of mutual concern and information sharing. The new YESAA Forum being recommended as part of the Review could formalize the role previously filled by the YESAA Decision Body Forum.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. Timely identification and participation of decision bodies should be a topic for discussion by the YESAA forum. (Implementation category: FORUM)

Recommendation 45: Differences of opinion on matters such as the meaning of s. 18.3.2 of the UFA should be addressed; for example, through a Decision Body or YESAA Process Forum.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that differences of opinion between decision bodies when they self-declare their interest or jurisdiction on a project assessment need to be discussed. The consultant describes the issue in the *Final Observations and Conclusions Report*: “Other than through the definition of decision body, the Act [YESAA] does not speak to a process for decision bodies declaring their interest in an assessment or when this declaration should occur. Decision bodies “self-declare”, coming forward during an assessment when they feel they have jurisdiction.”

Judicial review is YESAA’s only mechanism for addressing differences of opinion about decision body jurisdictions. The Parties¹⁰ should undertake discussions on decision body jurisdictions and specifically on projects that occur on First Nations settlement lands, for example: for proposed mining activities on Category B Settlement Land or involving existing mineral rights on settlement land.

Implementation Action: The Multi-Party Review Team recommends that the Parties establish a process (e.g. a special forum or a working group) to discuss decision body jurisdiction with the goal of identifying mutually agreed upon definitions and/ or processes. (Implementation Category: SPECIAL FORUM)

Additional Recommendation 45 (b) : Gwich’in Tribal Council’s decision body role under YESAA.

Canada’s Designated Representative response:

In the Gwich’in Tribal Council’s (GTC) submission to the Review, the GTC raised concerns that YESAA does not provide Gwich’in organizations with decision body authority for assessable activities that may occur on Tetlit Gwich’in Yukon Land. In our view, the YESAA, and its definition of “decision body”, is in accordance with the “Gwich’in Comprehensive Land Claim Agreement” and its Appendix C, the Yukon Transboundary Agreement (“YTA”).

Rationale: The YTA defines “decision document” as to mean the document issued by the Tetlit Gwich’in pursuant to 8.2.3 YTA, which states that where a project is located wholly or partially on Tetlit Gwich’in Yukon Land, the Tetlit Gwich’in shall be authorized to issue the said decision



For recommendations the Parties could not reach agreement, it was agreed that each party would be provided the ability to write their own position in the report. This recommendation only includes Canada's position but not that of the First Nations

document. In Canada's view, YESAA is consistent with the YTA, as YESAA's definition of "decision body" and "first nation", when read together, authorize the Tetlit Gwich'in to issue a decision document. The YTA further states that title to Tetlit Gwich'in Yukon Land vests in the GTC. It is Canada's view that under YESAA, ownership of lands where assessable activities take place is not a criteria to consider in interpreting the definition of "decision body".

Implementation Action: Canada should endeavour to continue discussions with Gwich'in Tribal Council to learn more about their view regarding YESAA and the "Gwich'in Comprehensive Land Claim Agreement" and its Appendix C, the "Yukon Transboundary Agreement". (Implementation Category: ADMINISTRATIVE)

Recommendation 46: A guidance document about the role and responsibilities of a Decision Body and their importance to a timely process should be prepared by YESAB in conjunction with regulators

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that a guidance document outlining the roles and responsibilities of a decision body under YESAA should be prepared. This is the responsibility of decision bodies (Canada, Yukon, First Nations) rather than YESAB.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. The development of a guidance document for decision bodies should be discussed at the YESAA Forum and a sub-group of decision bodies should be established to complete the work. (Implementation Category: FORUM)

4.2.3 B) Treatment of Recommendations in Decision Documents

Final Observations & Conclusions Report - Summary of Issue

"In conducting its assessments, YESAB is required to consider—among other things—mitigative and compensatory measures for any "significant adverse environmental or socio-economic effects" (YESAA, s. 42). Then, in making their recommendations to decision bodies, Designated Offices, the Executive Committee and Board panels may include terms and conditions including mitigation measures (sections 56 and 58). In response, the Act requires decision bodies to issue documents "within the period prescribed by the regulations accepting, rejecting or varying the recommendation" (YESAA, s.75).

Decision bodies' treatment of recommendations from

O&C Report Link:
Pages 66-71

"There have been disputes between YESAB and decision bodies over the recommendations and mitigations in Evaluation Reports, with decision bodies varying or deleting substantial numbers of them on the basis that they are unenforceable or inconsistent with existing legislation."

"Assessors and decision bodies/regulators alike face challenges in identifying and implementing appropriate measures to mitigate the environmental and socioeconomic impacts of developments in the Yukon."



YESAB was a key issue of concern raised by participants in this Review. This was often linked to larger questions about the relationship between assessors and regulators within the YESAA regime, including their appropriate roles and responsibilities in the assessment process."

Three recommendations were identified to address how recommendations are treated in decision documents.

Recommendation 47: An ongoing forum should be created to enable the YESAB and decision bodies in Yukon to discuss issues relating to the more effective coordination and integration of Evaluation Reports and Decision Documents under the YESAA regime, in particular the treatment of YESAB recommendations by decision bodies.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that the assessment process would benefit from a more common understanding of mitigation approaches and could result in better integration between Evaluation Reports and Decision Documents. Discussions on these issues have occurred bilaterally between YESAB and Yukon over the past 2-3 years (known as Yukon government Regulator/ YESAB Assessor meetings). It would be beneficial for discussions like these to include First Nations. The new YESAA Forum being recommended as part of the Review is an appropriate mechanism for these discussions to occur.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012. Mitigation approaches and methods for Decision Document and Evaluation Report integration should be topics for ongoing discussions at the forum. (Implementation Category: FORUM)

Recommendation 48: Decision bodies and regulators should consider more innovative approaches to implementing monitoring and mitigation measures to address the environmental and socio-economic impacts of projects. Particular attention should be given to a variety of potential approaches to monitoring and mitigation, including those used in neighbouring jurisdictions to deal effectively with the impacts of development.

Joint Response: ACCEPT. The Multi-party Review Team agrees that decision bodies and government regulators need to identify more innovative approaches for mitigating and monitoring environmental and socio-economic effects of projects. Assessors, decision bodies and regulators should work together to develop effective methods for implementing assessment recommendations. The new YESAA Forum being recommended as part of the review would be an appropriate mechanism for these discussions.

YESAB noted that YESAA does not provide Designated Offices' with authority to prescribe monitoring activities as terms and conditions in their recommendations in the same way as the Executive Committee. This may constrain the development of implementation of monitoring measures, an issue that is addressed in Recommendation No.50(b).

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft Terms of Reference and plans are underway to have the first Forum in the spring of 2012.



Mitigation implementation and monitoring should be topics for discussion at the forum.
(Implementation Category: FORUM)

Recommendation 49: “Standard mitigation measures” should be developed for different classes of projects or activities in the Yukon as expeditiously as possible. YESAB should take the lead on this (under the authority of s. 32 of YESAA) and work in close cooperation with relevant decision bodies with input from governments and the public.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees that the YESAA process would benefit from having standard mitigation approaches identified for certain types of activities. Using YESAA’s formal authority to develop and apply “standard mitigation measures” under Section 32 and 37 is one option for achieving this outcome. YESAB initiated a project to develop standard mitigation measures, but has identified other less formal approaches that can be used, for example guidance, best practices¹¹ and policy documents. Some of these approaches are already being implemented. YESAB representatives have indicated that the development of standard mitigative measures under sections 32 and 37 of YESAA is not their priority at this time.

Implementation Action: YESAB in consultation with decision bodies and regulators will continue to assess the need for standard mitigation approaches and their implementation in the future. (Implementation Category: ADMINISTRATIVE)

4.2.4 REGULATORY PHASE

4.2.4 A) Follow-up and Monitoring

Final Observations & Conclusions Report - Summary of Issue

"S. 110 of YESAA provides for a Designated Office, the Executive Committee, or a panel of the Board, or a joint panel, to recommend that a project audit or effects monitoring be conducted for a project where they recommend that it be allowed to proceed. Decision bodies that accept such recommendations are required to provide the results of an audit or effects monitoring to the Designated Office or to the Executive Committee. The Designated Office, or Executive Committee, may "provide advice to the decision body on the basis of those results."

S. 111 requires the Executive Committee, if requested by ministers and First Nations, to undertake an audit or

O&C Report Link:
Pages 71-75

"YESAB receives very little feedback about the actual environmental and socio-economic impacts of projects that it assesses or about the adequacy of the mitigation measures that it proposes in relation to these projects."

"Given the lack of follow-up information, YESAB has only a limited capacity to evaluate and improve the effectiveness of its assessment policies and practices."

¹¹ For example, Yukon government publications, “Flying in Sheep Country”, “Flying in Caribou Country” and “Guidelines for Industrial Activity in Bear Country”. Available on Environment Yukon’s website – www.env.gov.yk.ca.



effects monitoring on an "existing project" and to report on the results. "Effects monitoring" is defined in the Act as "the monitoring of environmental and socio-economic effects, or of the effectiveness of mitigative measures" but no definition is offered of "project audit."

Government agencies, municipal governments, independent regulatory agencies and First Nation governments are also required, under s. 89, to notify YESAB whenever they issue, modify or withdraw authorizations for a project.

Since YESAA assessments began in November 2005, these "follow-up" provisions have only been implemented to a limited extent. During the course of this Review, a significant number of concerns were expressed about the lack of follow-up of project assessments and about the implications of this for the overall effectiveness of the YESAA regime."

Two recommendations were identified to address follow-up and monitoring. The Multi-party Review Team added one recommendation (50b).

Recommendation 50: YESAB should develop policy guidelines that detail when and how it proposes to address the "follow-up" requirements of the YESAA. These guidelines should be developed in close collaboration with the parties to the UFA, with input from the public.

Joint Response of Designated Representatives: ACCEPT WITH INTENT. The Multi-party Review Team agrees with the need to develop guidelines on implementing the follow-up provisions of YESAA. Given the joint responsibilities for follow-up, in developing such guidelines YESAB would need to collaborate with decision bodies, First Nations and regulators.

Implementation Action: YESAB will consider including the development of follow-up policy guidelines in their policy priority planning. If and when a guideline is developed, it will be completed jointly with decision bodies, regulators and First Nations. (Implementation category: ADMINISTRATIVE)

Additional Recommendation 50(b): The Parties should consider amending section 42(1) of the YESAA so that Designated Offices are obliged to consider the need for effects monitoring when conducting an evaluation. This would provide Designated Offices with the ability to make recommendations for monitoring similar to current provisions that are limited to Executive Committee Screenings and Panel Reviews (section 42(2)(a).

Rationale: YESAB and First Nations expressed concern that YESAA does not provide Designated Offices' with authority to prescribe monitoring activities as terms and conditions of their recommendations in the same way as the Executive Committee. Designated Offices are limited to the "audits and effects monitoring" provisions of YESAA (Sections 110-111). These provisions establish requirements for monitoring programs and their limited use to date has frequently resulted in the decision body deeming the programs too onerous for Designated Office level projects and as a result, the provisions have been varied or rejected.

Joint Response: ACCEPT. The Multi-party Review Team agrees to recommend an amendment to the YESAA legislation to provide greater flexibility for Designated Offices' to recommend monitoring activities.



Implementation Action: Implementing this recommendation would require amendment of section 42(1) of the YESAA legislation. It will be discussed in association with other recommended legislative amendments. (Implementation category: LEGISLATIVE)

See Page 70 comments

Recommendation 51: YESAB should develop a means of managing and tracking follow-up information so that it is used as a feedback loop that leads to more effective and efficient mitigation measures.

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees that YESAB should develop methods to manage and track follow-up information. However, this is a joint responsibility between YESAB, decision bodies, regulators and First Nations. YESAB has agreed to undertake this action but notes that tracking can only occur when follow-up information is provided to the assessors (e.g. from decision bodies or regulators).

Implementation Action: Implementation actions are already underway. YESAB has indicated they are in the process of developing a tracking system for follow-up information and will work in collaboration with follow-up information holders, e.g. decision bodies and regulators. This recommendation could be implemented by convening a working group with the parties that have a joint responsibility for this issue. (Implementation category: ADMINISTRATIVE)

4.3 Traditional Knowledge in the Development Assessment Process

Final Observations & Conclusions Report - Summary of Issue

"The consultant heard from many of the First Nation governments that the development assessment process, designed to recognize their "special relationship with the wilderness environment" has failed to adequately address the traditional knowledge and values they hold. As identified by one First Nation, "...First Nation values and knowledge are not being effectively brought into the assessment process at key stages." First Nation traditional knowledge is relevant to a number of issues addressed in the Issues Scoping report (Appendix A), including Funding and Capacity, Project Proposals, Weighting of Input Received, Paper Process, Treatment of Recommendations in Decision Documents, and No Input into Decision Documents.

Virtually every First Nation participating in the Review felt strongly that the YESAA regime has fallen short in achieving YESAA purposes (see. S. 5(2)(g) of the Act) with respect to traditional knowledge inputs. In interviews and submissions, they stressed that both YESAB and decision bodies are failing to consider traditional knowledge in assessments and decisions, and that it isn't being adequately included in proposals, evaluation reports and decision documents. Obstacles to adequate consideration

O&C Report Link:
Pages 75-81

"While much work has been done by First Nations to work with elders in compiling traditional knowledge, there remain significant gaps and much of the materials compiled remain inaccessible for use in assessment processes."

"Assessors are not always explicitly discussing how traditional knowledge was used in assessments, so it is difficult to track whether consideration has been "full and fair".

"There is a general lack of awareness, education and capacity about the nature, meaning and role of traditional knowledge in project planning and assessment processes. "



of traditional knowledge identified by First Nations include:

- *lack of common understanding of the nature of traditional knowledge;*
- *gaps in existing compilations of "baseline" traditional knowledge, and inaccessibility of recorded traditional knowledge materials;*
- *conflicting methodologies (the disproportionate weight placed on information that is written, quantitative, and science-based) for working with traditional knowledge; and,*
- *challenges with respect to sharing of sensitive and confidential traditional knowledge"*

Five recommendations were identified to address traditional knowledge in the assessment process.

Recommendation 52: A strategic plan for completing comprehensive baseline traditional knowledge studies in First Nation traditional territories should be developed through a process led by First Nations. This plan should address training, capacity-building and funding needs, and should be flexible enough to respond to a diversity of needs. The multi-stakeholder West Kitikmeot Slave Study program (for more information, see www.wkss.nt.ca) can be looked to as an institutional and funding model for plan implementation.

Joint Response of Designated Representatives: VARY Recommendation to: Each First Nation should consider completing and implementing a plan for on-going documentation of traditional knowledge in their traditional territory. These plans should address training and capacity building and address the need for on-going resources to achieve and maintain comprehensive records of traditional knowledge. The Parties should support efforts to achieve this goal.

The Multi-party Review Team recognizes the value that traditional knowledge (TK) can bring to the YESAA process and the importance of developing and maintaining comprehensive records of such information. As such, the Review Team agrees with the intent of consultants' recommendation to increase the capacity of First Nations' to complete plans for collection, management, use and sharing of traditional knowledge because this would benefit all Parties in the assessment process. Based on input from a working-group, the Review Team also recognizes the diversity of needs among First Nations and that a 'one-size-fits-all' comprehensive or strategic plan for all First Nations is not appropriate or desired and that each First Nation should lead its own traditional knowledge program.

The Multi-party Review Team acknowledges the consultant's reference to the West Kitikmeot Slave Study, but other concepts or examples should also be investigated for potential models for conducting such TK research.

While all parties would benefit from the completion and implementation of traditional knowledge plans, most First Nations are in a position of needing partnerships with other organizations or government to build capacity and obtain human and financial resources to achieve this goal. However, resourcing priorities fall within the purview of each government.

Completion of traditional knowledge plans alone will not guarantee successful incorporation of traditional knowledge into the YESAA regime as envisioned in the Final Agreements and in the purposes stated in Section 5 of YESAA. Successful incorporation of traditional knowledge into



the YESAA regime will also require implementation of related recommendations identified in the Five-year Review including, but not limited to:

- a) all those falling under the Traditional Knowledge heading 4.1 (#53-56);
- b) scoping of projects and effects (especially socio-economic and cultural effects)(#14);
- c) determination of significance (#32);
- d) socio-economic impact assessments (#36); and
- e) role of First Nations in the adequacy, project scoping, decision and follow-up and monitoring phases (#57).

Implementation Action: Each First Nation should endeavor to develop and implement plans for ongoing documentation of traditional knowledge. The Parties should consider efforts (i.e. funding, in-kind contributions, information sharing, etc.) to support First Nations in achieving this goal. (Implementation category: ADMINISTRATIVE)

Recommendation 53: A joint YESAB-First Nation traditional knowledge guidelines development process should be initiated, building on the model established by the Mackenzie Valley Environmental Impact Review Board traditional knowledge and socio-economic impact assessment guidelines, and MVEIRB's ongoing experience in the development of cultural impact assessment guidelines.

Joint Response of Designated Representatives: VARY recommendation to: YESAB and First Nations, with participation and input from other decision bodies, should jointly develop traditional knowledge guidelines that describe appropriate use, interpretation, sharing and management of traditional knowledge within the YESAA process. Multiple guideline documents may be required, addressing the needs and responsibilities of assessors, traditional knowledge owners, decision bodies and proponents, for example.

The Multi-Party Review Team agrees that guidelines should be established that describe appropriate use, interpretation, sharing and management of traditional knowledge (TK) information. Initiatives in other jurisdictions may also provide guidance. Ultimately, unique circumstances in Yukon will require the development of YESAA-specific guidelines. The Multi-Party Review Team varied the recommendation to provide more clarity about the purpose of traditional knowledge guidelines while recognizing a broader context in which to begin the guideline development process. The proposed variation also provides clarity about the participants in the guideline development process.

In addressing the broad topics of TK use, interpretation, sharing and management, some key concerns and challenges need to be addressed including:

- Sensitivity and/ or confidentiality of TK information
- The need for transparency in the assessment process
- Importance and relevance of context as part of TK information – i.e. TK often cannot be interpreted independently of its cultural context
- Time lines that constrain the ability to compile and submit TK information during an assessment
- Providing mechanisms that will permit and encourage submission of TK information in appropriate forums and formats
- TK ownership
- TK information sharing protocols
- Differences between and within First Nations regarding the use and sharing of TK
- Use of TK in evaluating significance
- Weighting of TK in the assessment process



- Appropriate mitigation for cultural impacts
- The role of TK owners in decision-making about TK management

The guidelines also need to address the role of traditional knowledge in the decision phase of the YESAA process. The Multi-Party Review Team acknowledges current challenges that can arise when assessors rely on confidential TK information that may not be accessible to decision bodies during the subsequent phase of the YESAA process. This challenge should be resolved and the Multi-Party Review Team has not identified a preferred mechanism for resolution but recognizes that some mechanisms may require changes to specific YESAA provisions.

Recommendation No. 56 also proposes establishment of a YESAA First Nations Caucus that could provide services in relation to the development of TK guidelines.

Implementation Action: YESAB and First Nations (possibly through a YESAA First Nations caucus established in response to Rec. #56) should establish a working group with a mandate to prepare traditional knowledge guidelines for the use, interpretation, sharing and management of TK information in the YESAA process. The working group will provide membership opportunities for other decision bodies as appropriate. The working group will be responsible to identify what guidelines will be required, establish priorities for guideline development, define processes for guideline development and review, and prepare guidelines. Processes for developing guidelines will include mechanisms for gathering input directly from TK owners and experts. (Implementation category: ADMINISTRATIVE)

Recommendation 54: Funding support should be allocated in order that each First Nation government is able to finalize and publish traditional knowledge guidelines.

Joint Response of Designated Representatives: VARY recommendation to: **Each FN should consider completing the development of their internal TK guidelines. The Parties should facilitate efforts (i.e. funding, in-kind contributions, information sharing, etc.) to support First Nations in achieving this goal.**

The Multi-Party Review Team agrees that the YESAA process would benefit from having First Nations complete internal traditional knowledge (TK) guidelines that formalize their specific protocols for collection, compilation, recording, sharing, use and management of TK within a First Nation. The recommendation proposes the allocation of funding to support preparation of the proposed guidelines, but does not propose any specific funding agency. The Multi-Party Review Team concluded that the completion of internal TK guidelines falls within the broad governance responsibilities of First Nation governments. As such, the Multi-Party Review Team wishes to highlight the importance of the guidelines to the YESAA process, but recognizes that funding priorities will be established independently by each government. The varied recommendation reflects these conclusions.

Completion of such guidelines will allow First Nations to participate more effectively in assessments and make decisions about TK sharing within the time frames required in assessments. Obviously challenges still exist with respect to collecting and compiling information, but these aspects are addressed by other recommendations (Nos. 52 and 53).

First Nation governments have reached various stages in the development of their internal policies and guidance related to TK. Some First Nations have finalized TK guidelines, some have prepared drafts and some have no formal documentation. As referenced in the consultants' report, the Yukon First Nation Heritage Group developed a "Traditional



Draft Review Report - INTERIM

Knowledge Policy Framework” in collaboration with various Yukon First Nations. This framework has provided the basis for protocols and guidelines developed by some First Nations.

In highlighting the importance of internal TK protocols and guidelines, the Multi-Party Review Team wishes to emphasize that the purpose of such guidelines is to formalize internal processes and policies within individual First Nations. The preparation of these internal guidelines is not intended to not create any obligations to share TK information outside the process or as part of any YESAA process. The value of these guidelines arises due to their role in an overall traditional knowledge framework for assessments, essentially their inter-relationship with other guidelines and protocols, especially those envisioned in Recommendation No. 53. The consultant identifies the importance of internal First Nation protocols and guidelines in their discussion about the role of TK in assessments: *“A robust traditional knowledge framework for assessments requires that First Nations possess their own documented traditional knowledge protocols and guidelines”* (p. 81). The Multi-Party Review Team agrees with this interpretation.

Implementation Action: Each First Nation should endeavor to complete internal traditional knowledge guidelines that formalize specific protocols for collection, compilation, recording, sharing, use and management of TK within the First Nation. To enhance effectiveness of the process, the development and use of consistent procedures and guidelines are encouraged. All parties should consider supporting the development of such guidelines as appropriate. Opportunities for support should be a topic for discussion at the proposed YESAA Forum. (Implementation category: ADMINISTRATIVE and FORUM)

First Nations were clear that this recommendation would become an outstanding issue, if we could not address the matter of funding adequacy. Since the Government of Canada and Yukon were not prepared to consider funding adequacy as part of the 5 year review, it remains an outstanding issue.

Recommendation 55: Linked with guidelines development, an educational program should be developed to enhance First Nation, proponent and assessor capacity in traditional knowledge research and monitoring related to assessment processes.

Joint Response of Designated Representatives (DR): ACCEPT. The Multi-Party Review Team agrees with the concepts presented in this recommendation: that education can enhance First Nation, proponent and assessor capacity in the area of traditional knowledge research and monitoring related to assessment processes, and that the YESAA process will benefit from increased capacity and knowledge. The development and delivery of educational programs is a joint responsibility. These educational programs should address TK research and monitoring of the incorporation/ consideration of TK in the assessment process. A YESAA First Nation Caucus being recommended as part of Rec. #56 could have a role in developing and delivering TK educational programs.

Implementation Action: YESAB, First Nations (via a YESAA First Nations Caucus established in accordance with Recommendation No. 56), Canada and Yukon should support the development of Traditional Knowledge education programs. First Nations will play a substantive role in delivery of the training programs. Delivery of education programs will be an ongoing requirement. Canada will support the implementation of this recommendation through its existing programs. (Implementation category: YESAA FIRST NATIONS CAUCUS and FORUM)

Recommendation 56: A standing First Nation body should be considered with a mandate to provide services to YESAB in developing guidelines, training assessors, guiding baseline research, supporting capacity-building efforts in First Nation communities, and monitoring assessments. The First Nation caucus during this Review has provided a model for the role such a body could play.



Draft Review Report - INTERIM

Joint Response of Designated Representatives: VARY recommendation to: **YESAB and First Nations should consider the benefit of establishing a First Nations Caucus, modeled on the First Nation caucus that participated in the YESAA Five-year Review. The YESAA First Nations Caucus should be a permanent committee with a flexible membership that provides First Nations an ongoing opportunity to collectively discuss and analyze YESAA related topics.**

The Multi-party Review Team agrees that the YESAA process would benefit from an effective forum that provides opportunities for First Nations to collectively address YESAA related topics and to share resources, experience, knowledge and expertise among themselves. As a result, the Review Team supports the recommendation for YESAB and First Nations to consider establishing a First Nation standing body. Such a body would be a valuable resource to help governments, assessors and decision bodies understand First Nation perspectives about traditional knowledge issues in the YESAA process and refine the process over time so that the management, incorporation and utilization of traditional knowledge more effectively addresses the objectives of Chapter 12 of the UFA and the purposes of YESAA.

During discussions about this recommendation, the Multi-party Review Team agreed that the role of an ongoing YESAA First Nations Caucus could be broader than the traditional knowledge role described by the consultant. A permanent Caucus should have a mandate related to the overall YESAA process as well as specific project assessments. The role on the overall YESAA process should be broad while the role in project assessments could be specifically focused on the management, interpretation and use of traditional knowledge information in the YESAA assessment and decision making processes. Section 5 (Implementation) sets out a framework for a YESAA First Nations Caucus and includes a list of potential roles the Caucus could perform.

For the Five-year Review, the First Nations Caucus has functioned as a forum for First Nations to discuss and analyze YESAA related issues. CYFN has coordinated the Caucus and Canada has provided funding to support that coordination role. First Nations have utilized the Caucus to share experience, knowledge and expertise. Resources provided through Canada's funding arrangements with CYFN have allowed the Caucus to retain administrative, policy and research resources that have supported the collective work of the Caucus and the individual participation of the First Nations. The work of the Caucus has helped to address capacity challenges that constrain individual First Nations' abilities to participate effectively in processes like the Five-year Review. The Multi-party Review Team recognizes the value of the Caucus' work during the Five-year Review and concludes that a similar body is needed on an ongoing basis for the foreseeable future to support collective work by First Nations during development and revision of YESAA related legislation, regulations, rules, guidelines, policies, etc.

With respect to the role of a YESAA First Nations Caucus specific to traditional knowledge, the Multi-party Review Team recognizes that YESAA and the First Nation Final Agreements require consideration of traditional knowledge in the assessment and decision document processes. The consultants' recommendations address the need to develop guidelines related to traditional knowledge. However, even with the development and implementation of guidance materials and training related to traditional knowledge, there are some key issues with respect to the management, interpretation and use of traditional knowledge that cannot be resolved without opportunities for First Nations to participate directly in decisions about, and interpretation and use of, traditional knowledge within project assessments.

YESAA project assessment processes and timing present some significant challenges for gathering and considering traditional knowledge information. Establishing a pool of expertise related to the management, interpretation and use of traditional knowledge would help to build



a more balanced approach to the full and fair consideration of both traditional knowledge and scientific information. In the current YESAA process, assessors rely heavily on extensive pools of scientific and technical expertise when evaluating project effects and developing assessment findings. In these fields, assessors often call on consultants and government experts to assist in interpreting the information provided during assessments and reaching assessment conclusions. Decision bodies also rely on various sources of scientific and technical expertise. A YESAA First Nations Caucus would be a parallel source of expertise to help improve the utilization of traditional knowledge information.

The Multi-party Review Team notes that there are substantial differences among and within First Nations regarding the management of traditional knowledge. As a result, the make-up of a pool of traditional knowledge expertise with project assessment responsibilities would need to be flexible so that these differences could be addressed. The operation of the permanent YESAA First Nation Caucus would also need to be flexible to provide for timely participation of appropriate individuals in relation to project assessments.

Implementation Action: CYFN will coordinate a discussion among all First Nations (Yukon First Nations and Gwich'in Tribal Council) with a view to establishing a permanent YESAA First Nations Caucus that will provide a forum for collective discussion and analysis of YESAA related topics. The Parties should investigate funding sources and potential mechanisms to assist in establishing the Caucus. (Implementation Action: YESAA FIRST NATIONS CAUCUS)

4.4 Role of First Nation Governments in the Development Assessment Process

Final Observations & Conclusions Report - Summary of Issue

"In accordance with the objectives of Chapter 12 of the UFA and the Final Agreements, one of the purposes of YESAA pursuant to s. 5(2)(g) is to "guarantee opportunities for the participation of Yukon Indian persons and to make use of their knowledge and experience in the assessment process". The participation of Yukon Indian people in the development assessment process is distinct from that of the public at large, which is provided for under s. 5(2)(h).

As recognized governments, First Nations feel that they should play a more substantive role throughout the entire development assessment process, not just during the "seeking views" stage. They feel they are treated as little more than "stakeholders", notably in relation to projects located on non-settlement lands but within traditional territories.

O&C Report Link:
Pages 81-84

"While there are divergent views between First Nation governments and the Yukon Government regarding the role First Nations governments should have in the YESAA process, it is the view of the Review Team that improvements are required to better include First Nations throughout the YESAA process, whether or not they have signed Final Agreements and Self-Government Agreements."

"It is not clear that the Government of Canada has fulfilled its obligation, under s. 12.19.1.2 of the UFA, to prepare a plan, in consultation with First Nations with unsettled claims, setting out how the development assessment legislation will be applied on their traditional territory until final agreements have been negotiated."



First Nations that have not entered into Final Agreements suggest that YESAA does not offer them the same opportunities as it does to First Nations with settled claims. These First Nations further suggest that the YESAA process infringes upon Aboriginal rights and title and that both YESAB and government decision-makers fail to meet the Crown's constitutional duty to consult from the earliest stages of resource development.

The Yukon government disagrees with the views of First Nations and feels that YESAA provides adequate consultation opportunities to all Yukon First Nations."

Three recommendations were identified to address First Nations participation in the assessment process. The Multi-party Review Team split recommendation 57 into two-parts to address the decision making phase separately.

Recommendation 57: The Parties, First Nations and YESAB should establish a forum to work together to develop means by which First Nations can be better involved in:

- a) the development of rules, guidance, and assessment policy documents
- b) the project discussion phase, including project scoping and proposal adequacy
- c) the decision phase (NOTE: this has been removed and is addressed separately in recommendation 57(B))
- d) follow-up and monitoring

Joint Response of Designated Representatives: ACCEPT. The Multi-party Review Team agrees with the benefits of better First Nation involvement in the areas identify - a), b) and d). Subsection c – the decision phase has been removed and is addressed in a separate recommendation – 57(B).

YESAB has already initiated some mechanisms that provide better First Nation participation: for example, YESAB has refined its process for developing guidelines to provide for more effective input from First Nations. Although not currently specified in the new *Rules for Evaluations Conducted by Designated Offices* (June 2010), Designated Office assessors have involved First Nations in the project discussion phase. The Executive Committee has refined its process and now seeks input from First Nations during the project discussion phase for screening-level projects. The new *Rules for Evaluations Conducted by Designated Offices* (June 2010) provide additional flexibility during this phase and also provide for the Designated Office to establish technical committees. These revisions improve the opportunities for First Nation participation during the early phases of the assessment process.

The Multi-Party Review Team recognized that the changes undertaken by YESAB provide a partial resolution of the issues raised by First Nations. However, other agencies may also be in positions to improve the role of First Nations in assessments, for example decision bodies who are involved in pre-assessment discussions with proponents.

A YESAA forum would provide an effective opportunity for the Parties to discuss the involvement of First Nations in each of a), b) and d). The intent of these discussions would be to identify any constraints on effective First Nation participation and to address these constraints as appropriate.

Implementation Action: Section 5 of this report (Implementation) provides a framework for the recommended YESAA forum. The Parties, First Nations and YESAB have prepared a draft



Terms of Reference and plans are underway to have the first Forum in the spring of 2012. The role of First Nations in various assessment functions will be a standing topic for discussion. (Implementation category: FORUM)

Additional Recommendation 57(B): The Parties, First Nations and YESAB should establish a forum to work together to develop means by which First Nations can be better involved in the decision making phase

The Multi-party Review Team participants were unable to reach agreement on this recommendation and develop a joint response. The issue remains outstanding.

Recommendation 58: The Government of Canada, Yukon Government and First Nations without final agreements should work together to resolve concerns with respect to YESAA implementation.

Joint Response of Designated Representatives (DR):ACCEPT. The Multi-Party Review Team agrees that First Nations without Final Agreements have unique concerns and issues related to implementation of the YESAA process. The Parties have agreed to work together to attempt to resolve these concerns. Because of the important role that YESAB plays in implementing the YESAA process, the parties feel that YESAB should have input into discussions and outcomes.

The Multi-Party Review Team notes that two First Nations without Final Agreements (Liard First Nation and Ross River Dena Council), were not present during discussions of this recommendation, and therefore the acceptance of this recommendation may not reflect the views of these First Nations.

Implementation Action: Canada, Yukon and First Nations without Final Agreements should convene a joint process to discuss and resolve concerns raised by First Nations without Final Agreements about implementation of the YESAA process and their effective participation. (Implementation category: ADMINISTRATIVE)

Recommendation 59: The Parties should investigate processes needed to ensure that the rights and interests of First Nations are accommodated before a decision document is issued. Examples could be drawn from other jurisdictions, such as the Harmonized Ruby Creek Molybdenum Process with the Taku River Tlingit First Nation in BC, which set up a government-to-government accommodation table parallel to the environmental assessment process and resulted in an “accommodation package” before issuance of an environmental assessment certificate.

The Multi-party Review Team participants were unable to reach agreement on this recommendation and develop a joint response. The issue remains outstanding.

4.5 Non-Process Issues

4.5 A) Funding

Final Observations & Conclusions Report - Summary of Issue



Draft Review Report - INTERIM

"Issues of funding challenges were identified by all First Nation governments, Yukon Government and YESAB, as well as some municipal governments, non-governmental organizations, and UFA boards and councils. Generally, the consultants' Review Team was told that the amount of information to digest and submissions to prepare during a project assessment place a human resource and financial burden on organizations above and beyond what was anticipated to be required for participation in the YESAA process. In the case of First Nations and Yukon governments, who are specifically funded for YESAA activities, the issue is that funding levels are not commensurate with the actual work required for full participation. In the case of non-government entities the lack of participant funding was the primary concern. YESAB, for its part, didn't identify operational limitations due to funding, but did raise the issue of the need for participant funding for assessments other than just Panel Reviews."

O&C Report Link:
 Pages 85-87

"Current funding for government participation in the YESAA process appears inadequate and doesn't reflect actual project activity in the Yukon."

"Funding mechanisms can place an administrative burden on recipients, reducing their ability to more effectively participate in project reviews."

Three recommendations were identified to address funding.

Recommendation 60: As was done during the review of the final agreement implementation, the Parties should undertake a comprehensive review of funding for governments to participate in the YESAA process, with the objective of ensuring that levels are adequate for full participation and that funding mechanisms are reasonable.

The Multi-party Review Team participants were unable to reach agreement on this recommendation and develop a joint response. The issue remains outstanding.

Recommendation 61: Regulations under s.122(g) of YESAA should be developed. While there hasn't been a Panel Review yet under YESAA it is important to have the regulations in place for when a Panel is required.

Joint Response of Designated Representatives (DR): ACCEPT. The Multi-party Review Team agrees there is a need to develop regulations that establish a participant funding program for panel reviews. The provisions in YESAA provide for such regulations, but no funding is currently identified for such a program. During discussions, the Review Team noted that there may be a number of funding sources to establish a participant funding program for panel reviews (e.g. proponents, cost recovery, government agencies).

Implementation Action: The Parties should explore options for a participant funding program and, should funding sources be identified, then develop regulations under Section 122(g). The outcome of Rec. #62 has a potential effect on the scope of any participant funding program. (Implementation category: ADMINISTRATIVE – possible LEGISLATIVE/ REGULATORY)

Recommendation 62: The Parties should consider amending s.122(g) to include regulations for participant funding for certain Designated Office and Executive Committee assessments.



Draft Review Report - INTERIM

Joint Response of Designated Representatives (DR): ACCEPT. Participant funding programs would be beneficial for some larger or controversial projects assessed by Designated Offices and the Executive Committee. The Multi-party Review Team agrees that the Parties should amend the legislation to provide for participant funding for other levels of assessment.

Implementation Action: As part of the discussions related to implementation of Recommendation No. 61 the parties may need to amend Section 122(g) to provide for participant funding for other levels of assessment. (Implementation category: LEGISLATIVE/ REGULATORY)

See Page 70 comments

4.5 B) Need for Ongoing Reviews of the YESAA Process

Final Observations & Conclusions Report - Summary of Issue

"This Review of the YESAA process is being conducted as a requirement of s. 12.19.3 of the UFA which states:

"A comprehensive review of the development assessment process by the parties to the Umbrella Final Agreement shall be completed five years after the enactment of Development Assessment Legislation."

The UFA required a one-time review; however, the consultants' Review Team heard from numerous participants, including Yukon Government, First Nation governments, and non-governmental organizations, that regular future reviews should be conducted in order to continually evaluate changes made in response to previous reviews and assess the overall functioning of the YESAA process. Also, as Federal legislation there is concern that without a formal requirement for similar reviews when required, there will be no further evaluations or ability to make changes."

O&C Report Link:
Pages 87-89

"The YESAA process is relatively new with numerous components of the Act not having been tested yet."

"The current Review is providing recommendations that may result in additional changes."

"Ongoing reviews could facilitate and focus improvements to the YESAA process as it evolves in response to the challenges posed by future project assessments."

One recommendation was identified to address the need for ongoing review of the YESAA process.

Recommendation 63: The Parties should establish a regular cycle (e.g., every five to seven years) for comprehensive and/or focused interim reviews of the Yukon development assessment process, and these ongoing reviews should include an evaluation of the regulatory regime.

The Multi-party Review Team participants were unable to reach agreement on this recommendation and develop a joint response. The issue remains outstanding.



Section 5.0: Recommended Implementation Actions

The joint responses in Section 4 of the report are each followed by a recommended implementation action statement. The Implementation actions fall into five different categories of activities which are described in this Chapter.

The five categories are:

- (5.1) the YESAA Forum
- (5.2) YESAA First Nation Caucus
- (5.3) Workshops
- (5.4) Legislative and / or Regulatory changes,
- (5.5) Administrative, and
- (5.6) Other External Processes.

In a few cases, the recommended implementation action is to refer the matter to another process or to refer the matter for specific discussion by subject matter experts. This chapter provides more detail about the approaches recommended under each implementation category.

Please refer to the Implementation Schedule for a tabular summary of responsibilities.

No implementation schedule developed

5.1 YESAA Forum

Recommendations 1, 2, 17(b), 18, 21, 32, 34, 35, 36, 37, 38, 39, 41, 44, 46, 47, 48, 54, 55, 57
 Consultants' Recommendation 2 proposes the establishment of "an open forum for discussing a variety of environmental and socio-economic assessment topics, and organiz[ing] workshops for stakeholder information exchange."

The Multi-party Review Team agreed about the need to establish a YESAA forum where the Parties, assessors, decision bodies and First Nations without final and self-government agreements can engage in open discussions about YESAA related topics of mutual interest. The Multi-party Review Team agreed that the YESAA Forum could be established immediately, as additional authorities were not required to proceed with its implementation. The Yukon government – Development Assessment Branch has agreed to act as the secretariat to the YESAA Forum and has coordinated several meetings to develop a preliminary Terms of Reference for the Forum which will be presented to members for approval and adoption at the first YESAA Forum meeting planned for April 2012.

The YESAA forum will be an important vehicle for implementing some of the findings of the YESAA Five-year Review. The responses to the consultant recommendations, described in Section 4 of this report, demonstrate that the Multi-party Review Team has relied heavily on the proposed YESAA Forum, with expectations that this new group can advise on overcoming some of the ongoing challenges and issues facing the YESAA process. The YESAA Forum could continue to serve as a vehicle for ongoing analysis, evaluation, refinement and improvement of a dynamic and adaptive YESAA process long after the Review is completed.

Recommendations to be implemented through the YESAA Forum



The following topics and issues, arising from the recommendations and responses in the YESAA Five-year Review, are recommended for discussion at the YESAA Forum. YESAA Forum members will develop an annual work plan and schedule for these discussions. :

- YEASAA Public outreach methods and tools (Rec. 1)
- Criteria and approaches for managing sensitive but non-confidential information (Rec. 17(b)).
- Options for integrating requirements for heritage resource assessments within authorizations (Rec. 18)
- Organizing research and participatory forums related to cumulative effects assessment for the purpose of educating assessment practitioners (Rec. 21)
- Development and/ or refinement of transparent and consistent criteria for evaluating significance (Rec. 32)
- Information sharing and improved common understanding of treaty rights (Rec 34)
- Determining how to address the effects of projects on treaty rights of First Nations (Rec. 35)
- More effective application of existing provisions of YESAA related to achieving sustainability objectives (Rec. 36)
- Development of innovative methods for implementing conditions and recommendations intended to address socio-economic effects of projects (Rec. 37)
- Discussing, developing and coordinating plans to undertake studies and gather new information related to socio-economic conditions (Rec. 38)
- Discussion on development of a joint socio-economic impact assessment workshop (Rec. 39(a)).
- Discussion and information exchange on implementation of new YESAB guidelines describing how strategic assessments are to be conducted within the YESAA regime (Rec 41).
- Timely identification and participation of Decision Bodies (Rec. 44)
- Development of a guidance document about the roles and responsibilities of a Decision Body (Rec. 46)
- Coordination and integration between assessment reports and decision documents (Rec. 47)
- Implementing monitoring and mitigation measures to address the potential environmental and socio-economic effects of projects (Re. 48)
- Mechanisms for supporting First Nations in their development of internal traditional knowledge guidelines (Rec. 54)
- Development of traditional knowledge education programs (Rec. 55)
- The role of First Nations in various assessment functions (Rec 57).

5.2 YESAA First Nation Caucus

Recommendations 55, 56

With Recommendation 56, the Multi-party Review Team envisions the establishment of a permanent First Nations YESAA Caucus that will provide a forum for collective discussion and analysis of YESAA related topics by First Nations and for coordination among First Nations. The purposes of the YESAA First Nations Caucus are described in the Team's varied recommendation and include: (1) providing a pool of expertise in the field of traditional



Draft Review Report - INTERIM

knowledge, (2) providing services to YESAB and decision bodies in relation to traditional knowledge, (3) providing a forum for First Nations to discuss issues and coordinate YESAA related work and research, and (4) support and facilitate capacity building activities. As part of this role, the YESAA First Nation Caucus should work with Canada, Yukon and YESAB to develop and deliver traditional knowledge training programs as per Recommendation 55.

Membership

The YESAA First Nation Caucus should be open to participation by all Yukon First Nations (with or without final and self-government agreements) and the Gwich'in Tribal Council.

Planning

CYFN will coordinate a discussion among all Yukon First Nations and the Gwich'in Tribal Council, with the intent of establishing a permanent YESAA First Nation Caucus. Based on the outcomes of these exploratory discussions, First Nations will endeavor to establish the Caucus. The Parties should investigate funding sources and potential mechanisms to assist in establishing the Caucus.

The YESAA First Nations Caucus should develop, and update as appropriate, a Terms of Reference.

5.3 Workshops

Recommendations 15(a), 15(b), 21

Project scoping and cumulative effects assessment are two topics that received significant input during the YESAA Five-year Review. Both topics have significant influence on the effectiveness of the overall assessment regime and they present significant challenges in understanding and reconciling the views of various YESAA participants. As a result, the Multi-party Review Team recommends further research and discussion about these topics by a wide range of YESAA participants.

To address this need for further research and discussion, the Multi-party Review Team concluded that YESAB or the YESAA Forum should convene workshops on project scoping and cumulative effects assessment. The workshops should bring together assessors, decision bodies, First Nations, proponents, project reviewers, other relevant YESAA participants, and researchers. Participants would discuss the topics of project scoping and cumulative effects assessment and identify appropriate approaches within the YESAA regime.

The project scoping workshop should be designed to achieve a number of outcomes, which are: (1) a common understanding of current project scoping approaches and practices, (2) a thorough understanding of various parties' perspectives on project scoping, and (3) recommendations for scoping guidance that will best address the range of perspectives within the legal framework of YESAA. The conclusions of the workshop should form the basis for YESAB's revisions of its scoping guidance.

The cumulative effects workshop should be designed to (1) develop a common understanding about current cumulative effects assessment approaches, (2) identify participants' cumulative effects expectations and their relationships to UFA Chapter 12 objective and YESAA purposes, (3) understand the existing constraints on cumulative effects assessments, (4) identify



approaches for overcoming existing constraints on cumulative effects assessment, and (5) develop cumulative effects assessment methods that will help to meet UFA Chapter 12 objectives and YESAA purposes.

During discussions, the Multi-party Review Team considered workshops on other topics. However, final decisions about the need for other workshops were assigned to the YESAA Forum. As such, the Forum may choose to convene workshops on other topics.

5.4 Legislative and/or Regulatory Changes

Recommendations 11(c), 12, 13, 15(c), 22, 24, 30, 36, 40, 45B, 50(b), 61, 62

The YESAA Five-Year review made a number of recommendations for amendments to the legislation and to the existing regulations as well as for the development of additional regulations for certain matters where the regulation-making authority is already provided in the legislation.

All legislative and regulatory changes will require the support of the Minister of Aboriginal Affairs and Northern Development and legislative changes will also require approval by the federal Cabinet. The development of a new regulation establishing a funding program to facilitate participation in the reviews of projects also requires that a source of funds be identified prior to initiating the drafting of this regulation.

As part of the YESAA Five-year Review, a working group with representatives from Canada, Yukon, First Nations and YESAB developed a comprehensive list of YESAA activities listed in Schedules 1, 2 and 3 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulation* that are being recommended for further review and/ or amendment required (see Appendix E). With the Minister's concurrence, Canada would seek the necessary authority from Cabinet to amend the *Yukon Environmental and Socio-economic Assessment Act* as well as the authority to consult on drafts of the legislative amendments.

As was done during the preparation of the initial YESAA legislation, Canada would establish a working group with representatives from Canada, Yukon and First Nations to provide advice and guidance during the drafting of regulatory amendments, new regulations and drafting of legislative amendments.

This does not go into enough detail to explain the need for a collaborative joint process for carrying out amendments to the Legislation and Regulations, in keeping with the joint drafting and consensus based methods used in the drafting of YESAA and through the 5 year review. Amendments to Bill S-6 never occurred this way, but rather followed a unilateral processes driven by Canada.

5.5 Administrative

Recommendations 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 11(b), 11(c), 14, 14(b), 14(c), 14(d), 15(b), 15(c), 16, 17, 17(b), 18, 19, 20, 24, 25, 26, 27, 28, 29, 33, 34, 38, 39, 39(b), 41, 42, 43, 45(b), 49, 50, 51, 52, 53, 54, 58, and 61

Implementing the majority of the recommendations and joint responses described in Section 4 of this report requires administrative or policy actions by individual or multiple parties. In a number of cases, the recommended implementation action has been identified as falling into more than one category. In these cases, the Multi-Party Working Group was of the view that administrative or policy mechanisms should be investigated first to address these issues, and if unsuccessful, then further action, such as legislative or regulatory change may be required.



A large number of the recommendations for administrative change are directed at YESAB and work on implementing these has advanced during the time that the Five-Year Review was being conducted. During this time, YESAB conducted its own rules review and has since published its new *Rules for Evaluations Conducted by Designated Offices* which came into force in June 2010. The new rules and several other administrative changes made by YESAB have implemented a number of the recommendations found in the interim report, and where this is the case, this has been reflected in the detailed descriptions of each recommendation in Chapter 4 of this report.

5.6 Other External Processes

Recommendations 17 and 23

These recommendations refer to processes outside of the responsibilities of the Parties to this review and are referred to other external processes.



Appendices

Pending

- Appendix A: Terms of Reference – YESAA Five-Year Review
- Appendix B: Final Issues Scoping Report – Phase I
- Appendix C: Final Observations and Conclusions Report – Phase II
- Appendix D: Recommendations (list)
- Appendix E: Table – YESAA Activities listed in Schedule 1, 2 and 3 of the YESAA
Assessable Activities, Exceptions & Executive Committee Projects Regulation
recommended for further review and/ or amendment

Memorandum

To: Gail Barnaby

From: Bill Slater, Bill Slater Environmental Consulting

Date: October 19, 2012

Re: **YESAA Five-year Review**
Draft Review Report – Interim, March 31, 2012

As discussed earlier this week, I have reviewed the “YESAA Five-year Review Draft Review Report – Interim” (the “Interim Report”) distributed by Lawrence Ignace (AANDC) on October 9, 2012. Specifically, I reviewed the report to identify and evaluate changes made by Canada in response to compiled comments from First Nations that I provided to you on May 25, 2012, and which were shared with the YESAA Five-year Review Steering Committee at a meeting on June 4, 2012. I also looked for any changes made to address subsequent comments provided directly to Canada by White River First Nation (J. Vandermeer).

With very few exceptions, in finalizing the Interim Report, Canada has systematically ignored the suggestions and comments provided in the compiled First Nation comments. The only exceptions are a few very minor editorial changes to address grammar and typographical issues. As a result, none of the important issues and concerns expressed by First Nations have been addressed in the finalized report. In many cases, the characterization of responses and implementation actions for YESAA Review recommendations does not accurately reflect First Nations’ understandings of the agreements that were reached.

At the Steering Committee meeting on June 4, 2012. Canada set the agenda and provided an opportunity for parties (including CYFN on behalf of First Nations) to “share” their comments on the draft Interim Report, but not to “discuss” them. Canada advised that after the meeting, it would unilaterally revise the report after “considering input provided by First Nations and doing [their] best to incorporate comments.” At the time, and in a subsequent letter from the Grand Chief to the AANDC Minister, CYFN expressed strong opposition to this approach by Canada, citing the terms of reference for the YESAA Five-year Review, as well as the requirements of the Final Agreements.

Canada has now followed through on its proposed approach, and astoundingly chosen not to address any of the comments provided by First Nations. To make matters worse, Canada has left CYFN’s logo on the Interim Report, indicating that CYFN has endorsed the content of the report. No rationale has yet been provided for this outcome. Canada’s actions represent a significant departure from the collaborative approach that has been followed throughout the Review. It is not consistent with

implementation plan for Chapter 12 of the UFA that assigns the responsibility for providing a report to all three parties, which implies that all parties would support the report. It is also not consistent with the Terms of Reference for the Review that require the representatives of the three parties to “jointly develop and provide a Review Report.”

This memo does not attempt to specifically address each of the comments provided by First Nations in relation to the Interim Report. Instead, I have attached the “track changes” version that was provided on May 25, 2012 – essentially all of the comments have not been addressed. A few of the more substantive areas are discussed below:

- The introduction to the report states that the Interim Report fulfils the Designated Representatives obligations under the Final Agreements to conduct the YESAA Five-year Review. There are several key outstanding issues and CYFN has stated unequivocally that it does not consider this obligation to be fulfilled. Canada is not in a position to unilaterally conclude that the obligations have been fulfilled.
- The introduction fails to acknowledge that there are several outstanding issues that have not been resolved. Throughout the report, any suggestions for references to the outstanding issues have been removed or ignored.
- Section 3.2 continues to state: “From the outset and despite the fact that 12.19.3 of the Umbrella Final Agreement refers to the Parties, which includes the CYFN, First Nations maintained that neither CYFN nor the caucus represented them in the Review.” First Nations considered this statement offensive to the review approach that was taken from the outset, and agreed to by other parties.
- There are several places where the Interim Report continues to refer to an Implementation Schedule, even though that component was never prepared.
- For some recommendations (E.g. Recommendations Nos. 13 and 30) that include proposed legislative changes, Canada’s wording does not reflect any commitment to work with First Nations during the development or review of legislative changes. Instead the wording envisions a unilateral process in which Canada will complete legal research and may decide to propose amendments. This is not consistent with past practices for development of YESAA or with approaches outlined by Canada’s representatives during Five-year Review discussions.
- There are several instances in which Canada assigns responsibility for certain implementation actions to Yukon, First Nations and/or YESAB, where Canada appears to also have responsibility (e.g. Recommendation No. 25 related to baseline monitoring). Canada did not make any changes to acknowledge responsibility in any of the areas suggested by the First Nation comments.
- For Recommendation Nos. 31 and 45(b), the Parties could not reach a mutual resolution about the recommendations and, in accordance with the terms of reference, agreed to prepare a report that included positions of each party. In these cases, each party had the ability to write its own position. For No. 31 (Referral of projects to the Executive Committee), the First Nation comments included some minor revisions to the First Nation position. Canada did not make these changes. For No. 45(b) (Gwich’in Tribal Council issues), the report does not contain the

First Nation position at all. The May 25 2012 comments included text for the First Nation position, but Canada chose not to include it. Thus the report completely fails to present the alternative position, instead only presenting Canada's position.

- For Recommendation No. 54 (funding for traditional knowledge guidelines), the First Nation comments were very clear that the previous understanding reached about this recommendation was no longer valid given the inability to resolve the overall funding issue. As a result, First Nations requested that this be identified as an outstanding issue. Canada chose not to do this.
- Section 5 of the report includes a description of a proposed First Nation caucus. Despite requests to have the section revised to more accurately reflect First Nations' vision for a caucus, Canada chose not to make any changes.



COUNCIL OF YUKON FIRST NATIONS

Office of the Grand Chief

October 26, 2012

The Honourable John Duncan, PC, MP
Minister of Aboriginal Affairs and Northern Development Canada
Terrasses de la Chaudière
10 Wellington Street – North Tower
Ottawa, Ontario
K1A 0H4

Dear Minister Duncan:

Re: Five-year Review of the Yukon Environmental and Socio-Economic Assessment Act

Thank you for your letter dated October 4, 2012 regarding the Five-year Review of the Yukon Environmental and Socio-economic Assessment Act (YESAA). The Council of Yukon First Nations (CYFN) also received a copy of Canada's "YESAA Five-year Review Draft Review Report – Interim" (the "Draft Interim Report") dated March 31, 2012, via email from your officials on October 9, 2012.

For the reasons set out in this letter, the CYFN does not agree that the obligation to conduct a comprehensive review of YESAA has been met, and that the Draft Interim Report represents a suitable conclusion to this work. We therefore request that you refrain from making any representations that suggest that the CYFN in any way agrees with the review being concluded, including distributing the Draft Interim Report with the CYFN's logo attached. There are two main reasons why the CYFN cannot endorse your statements about the status of the Review. First, the Draft Interim Report does not fulfill the requirements of the review as described in the YESAA Five-year Review Terms of Reference (April 2008). Second, we are very concerned about Canada's approach to finalizing the Draft Interim Report including your department's decision to represent this as a report that is supported by the CYFN, when it is not.

Clause 12.19.3 of the Umbrella Final Agreement requires that the parties complete a comprehensive review of the YESAA process five years after enactment. The Yukon Development Assessment Process Implementation Plan (January 2005), directs representatives of all three parties (Canada, Yukon and the CYFN) to conduct the review, beginning with the development of Terms of Reference and concluding with preparation of a review report. The Terms of Reference provide for the parties' designated representatives to jointly develop and provide a final review report to the AANDC Minister, the Yukon Premier and the CYFN Grand Chief. The current report has been finalized and provided by only one of the three parties.

Draft Interim Report does not Fulfill Requirements of the Review

The CYFN, as directed by First Nation leadership, has been unequivocal in stating that we cannot conclude the final report of the YESAA five-year review until three key outstanding priorities have been satisfactorily addressed.

For these priority issues, related to funding, engagement with First Nations during decision-making, and future reviews, the Parties' representatives have been unable to develop joint responses as required in order to finalize the Review. Until such time as further discussions allow us to address these priorities, our representatives are unable to jointly provide a final report for the YESAA Review and cannot fulfill the requirements of the Terms of Reference, Implementation Plan or the Umbrella Final Agreement. The Terms of Reference further state that the completion of the review requires the preparation of a final report that includes an implementation and follow-up schedule. This important component of the review remains incomplete and is not present in the Draft Interim Report. As such, the Draft Interim Report does not fulfill the agreed upon requirements of the review.

Canada's Approach to Finalizing the Draft Interim Report

Despite the current lack of progress on the outstanding issues, the CYFN representatives agreed to proceed with the development of a draft interim report that would describe current areas of agreement for the YESAA Review, while recognizing that the Review remains incomplete. All parties agreed on the benefits of finalizing a Draft Interim Report that would allow us to initiate implementation of important findings from the Review.

On May 25, 2012, the CYFN provided substantive comments on a March 28, 2012 version of the Draft Interim Report. Representatives from the CYFN further presented these comments at a meeting of the YESAA Five-year Review Steering Committee on June 4, 2012, at which three representatives of Canada were present, including Canada's Designated Representative for the YESAA Five-year Review. At that time, Canada's Designated Representative stated that they would "hear comments and do their best to incorporate them in the report" before sending the report to you. The CYFN's participants at the meeting stated strong objection to this approach, noting that it is a significant departure from the collaborative approach followed to-date in the Review and it is not consistent with the Terms of Reference that require the Designated Representatives to jointly develop and provide the report. I further addressed this issue in my letter to you dated (need date of letter – week of June 12 likely), stating : "If the Interim Report is finalized unilaterally by Canada, CYFN cannot consider it as a jointly developed report."

The CYFN has now reviewed the Draft Interim Report in comparison to the comments provided on May 25, 2012. We are very disappointed with the outcome of our review. With very few exceptions, Canada has systematically ignored the suggestions and comments provided in the compiled First Nation comments that were provided by the CYFN. The only exceptions are a few very minor editorial changes to address grammar and typographical issues.

None of the important issues and concerns expressed by First Nations about the earlier draft have been addressed in the finalized report. Some notable examples include:

- In describing the direct role of Yukon First Nations in the Review, Canada's wording challenges the approach taken by First Nations, despite the agreement by all parties in the early stages of the

review about the approach that would be used. In June 2012, the CYFN's officials described this wording as offensive to the First Nations good faith participation throughout the review, but Canada chose to retain the wording.

- Commitments from Canada to work collaboratively with Yukon First Nations when proposing legislative and regulatory changes are not reflected in the Draft Interim Report, though these commitments were previously stated in meetings and reflected in earlier draft reports.
- For two recommendations in the report, the Designated Representatives agreed to present the differing positions of each party because they could not reach agreement. In one instance, the Draft Interim Report presents only Canada's position, despite the CYFN's May 25 submission including text for a First Nation position. In the other instance, the CYFN's May 25 submission proposed some minor changes to wording of the First Nation position, but these were not accepted.
- For one recommendation, the First Nations' perspective is influenced substantially by the inability to resolve funding issues. As such, First Nations requested major changes in relation to that recommendation. All of these changes were rejected.

While these are only a few examples of the systematic failure to address the CYFN's comments, they illustrate why the CYFN cannot endorse the Draft Interim Report as finalized by Canada.

Closing

As per the Terms of Reference and the Implementation Plan, the YESAA Review can only be concluded by the three parties jointly providing a final report to the Parties. No final report has been prepared. In addition, the CYFN has not endorsed the Draft Interim Report. As a result, there should be no further statements that the requirements for the YESAA Review have been met, and there must be no implication or statement that the CYFN has endorsed the current Draft Interim Report.

The CYFN remains committed to concluding the YESAA Review. Our officials are ready to work jointly with Canada and Yukon to finalize the Draft Interim Report, including finding agreeable ways to address the comments provided by the CYFN. With respect to the outstanding issues, we acknowledge that your letter proposes no further action or discussion. However, as we have stated previously, our leadership has directed us that we cannot conclude the YESAA Review until a satisfactory outcome has been identified. Our leadership would welcome the opportunity to discuss the path forward with you directly.

Yours Sincerely,



Ruth Massie
Grand Chief

cc. Premier Darrell Pasloski
Mr. Ryan Leef, MP
Yukon First Nation Chiefs