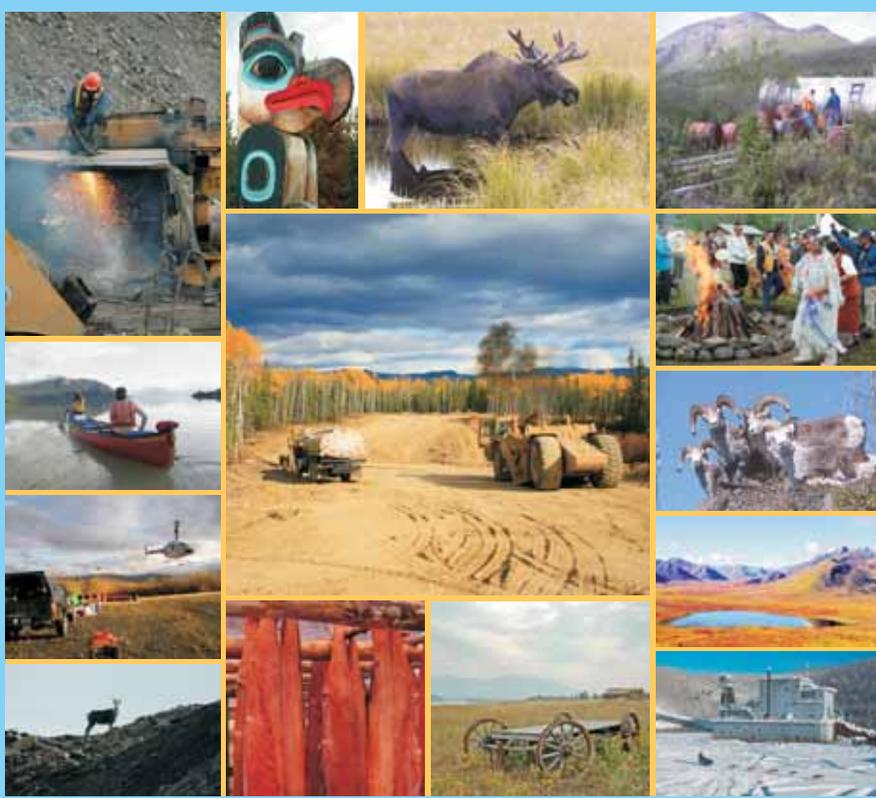


DRAFT
OBSERVATIONS AND CONCLUSIONS
REPORT



Prepared For:
YESAA Five-year Review Steering Committee

Prepared By:
SENES Consultants Limited

July 2009



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OBSERVATIONS AND CONCLUSIONS

Prepared for:

YESAA Five-year Review Steering Committee

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EXECUTIVE SUMMARY

Introduction

The Umbrella Final Agreement (UFA) requires the completion of a comprehensive review of the development assessment process within five years of the enactment of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). SENES Consultants Limited (SENES) was selected through a national competition by a Steering Committee made up of representatives of the Council of Yukon First Nations, Government of Yukon, and Government of Canada to conduct the YESAA Five-year Review.

The purpose of the Review is to examine Yukon's development assessment process in its entirety and in the context of the objectives of the UFA. The overall framework for undertaking the Review was established by the Steering Committee and consists of three phases: (1) information gathering and issues scoping; (2) issues analysis; and (3) response by the Parties to the UFA. The first two phases are the responsibility of SENES, while Phase 3 will be conducted by the Parties. Phase 1 of the Review was initiated in November 2008 and completed in May 2009 with the submission of the Final Issues Scoping Report (see Appendix A).

This Report presents the findings of Phase 2, during which the Review Team conducted analysis based upon the significant issues identified in Phase 1. In carrying out its assignment, the Review Team compiled and assessed the views on the development assessment process from a broad range of groups, including representatives of: First Nation governments and citizens; Yukon Government; Government of Canada; UFA boards and councils; city/village/town councils; business/industry organizations; businesses/industry; non-governmental organizations; other boards, councils and associations; and the general public.

Summary of Findings

Taking into consideration that the development assessment process in the Yukon under YESAA has only been in practice since late November 2005, the Review Team found that much has been accomplished in developing and applying implementation mechanisms, but that ongoing efforts are needed to refine and improve the mechanics to be consistent with the intent of the new regime. In the course of carrying out the Review, the Review Team noted that continual adjustments have been made in these first three years as the Yukon Environmental and Socio-economic Assessment Board (YESAB), Canada, Yukon and First Nation governments, proponents, and other participants engaged in the YESAA process and wrestled with the first hand aspects of implementation (e.g., what worked as expected and what was causing difficulties).

Generally, we found that in conducting YESAA reviews for proposed projects: opportunities for public participation are provided; timelines for assessments have been established, with reasonable adjustments applied as necessary; and, a reasonable level of certainty about the assessment process is set out. While YESAA assessments were found to cover a broad range of environmental and socio-economic issues to differing degrees, in general, additional focus is required to ensure comprehensive assessments of the full scope of applicable heritage, cultural and socio-economic issues are completed, and to ensure that beneficial environmental and socio-economic aspects of projects are fully considered. Further, due to regulatory and institutional gaps, it is not clear that the YESAA process is fully managing potentially adverse impacts to all environmental components in an integrated manner.

Given the unique attribute of the YESAA process in including a broad consideration of socio-economic effects in addition to environmental effects, one of the most significant shortcomings identified is the absence of clear regulatory tools to assess and mitigate social, economic and cultural impacts from development. While a variety of non-regulatory approaches exist that could help address these potential impacts, the Review Team found that, in general, they are not being used. We heard from many interested parties that such impacts are not being addressed to the same extent as biophysical impacts. While we agree, we were unable to determine if this has resulted in significant adverse impacts that can reasonably be addressed by the YESAA process. Nonetheless, there is a clear need for action to better consider a wide array of social and cultural issues within the YESAA process.

In addition to the management of socio-economic and cultural effects, other important limitations noted included unresolved issues about the role of First Nation governments in the process, inadequate follow-up and monitoring to determine the accuracy of the conclusions of assessments and the effectiveness of mitigation measures, and the absence of land use plans and regional monitoring which are critical to adequate cumulative effects assessments.

Given the significant progress made since implementation of the YESAA process, we feel that many of the initial challenges, frustrations and uncertainty of process expressed throughout this Review can be overcome by continued evaluation of the process and commitment to improvement on the part of all parties.

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PREAMBLE

SENES Consultants Limited (SENES) is pleased to have conducted the Five-year Review of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). The Review scope encompassed a vast land area and a broad spectrum of organizations and cultures. The Review occurred at a time when processes, organizations and governments were at varying stages of evolution and maturity both within the overall governance framework as well as with respect to the YESAA process. Control over land and resource development devolved to the Yukon Government on April 1 2003, YESAA came into force in May 2003, the Yukon Environmental and Socio-economic Assessment Board (YESAB) only began conducting assessments in late 2005, and several Yukon First Nations remain without final agreements.

In the context of this setting, SENES strived to establish a review framework and methodology that could be implemented in a manner respectful of all organizations and groups. Our work plan also needed to be consistent with the fiscal and time limitations of the project. The development of the work plan required careful and deliberate thought, significant time, and the cooperation of many individuals. In particular, the members of the YESAA Five-year Review Steering Committee consisting of representatives of the three Parties to the Umbrella Final Agreement (UFA); Yukon Government, Council of Yukon First Nations, and Government of Canada, who laboured to develop the Terms of Reference for the Review, met regularly with, and provided feedback and guidance to SENES during the development of the work plan, and provided support to SENES in establishing contacts for the Review.

In carrying out the Review, SENES received input from of a wide range of organizations and individuals. Review participants included members of the public, advisory boards and organizations, First Nation, Yukon, and Canada government departments and agencies, 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. We would like to acknowledge the time, cooperation and extensive input received from all those who participated in the YESAA Five-year Review.

The Review Team recognizes that not all of the issues presented to us during the issues scoping and information gathering phase are addressed in this Report. Timeline and budgetary constraints did not allow for a truly detailed analysis of all topics. However, it is our view that the issues presented, and accompanying recommendations, address the substantive areas requiring improvement, and some of the issues that arise on a frequent basis. It is our hope that the results of this Review will provide constructive information to the three Parties and those involved in the challenge of managing and protecting the biophysical and socio-economic environment of the Yukon within the commitments made in the UFA, First Nation Final Agreements, and YESAA.

1.0 INTRODUCTION

1.1 BASIS FOR THE FIVE-YEAR REVIEW

In 1993 a framework agreement, the Umbrella Final Agreement (UFA), for negotiating land claim agreements with Yukon First Nations was signed by the Government of Canada, the Council of Yukon First Nations, and the Government of the Yukon (the Parties). Chapter 12 of the UFA provides for the creation and implementation of a legislated development assessment process. On May 13, 2003 this provision was addressed when the *Yukon Environmental and Socio-economic Assessment Act* (YESAA) received Royal Assent.

The UFA (s.12.19.3) requires the completion of a comprehensive review of the development assessment process within five years of the legislation's enactment – the YESAA Five-year Review. SENES Consultants Limited (SENES) was selected through a national competition by a Steering Committee made up of representatives of the Council of Yukon First Nations, Government of Yukon, and Government of Canada to conduct the YESAA Five-year Review.

1.2 FIVE-YEAR REVIEW MANDATE

The purpose of the Review is to examine Yukon's development assessment process in its entirety and in the context of the objectives of the UFA. The Review has a broad scope to examine all aspects of the development assessment process including, but not limited to:

- YESAA and its regulations;
- The implementation, assessment and decision-making processes;
- The implementation plan;
- Funding;
- Opportunities for public participation in the process;
- Phases and timelines;
- Process performance expectations;
- Process documents such as rules, guides, forms; and,
- The responsibilities, duties and functions of decision bodies, the Yukon Environmental and Socio-economic Assessment Board (YESAB) and other participants and their timelines and supporting documentation.

The Review consists of three main phases with the following objectives and outputs:

Phase 1 – Information gathering and issues scoping

Phase 1 of the Review is the primary opportunity for seeking and compiling views on the development assessment process and identifying issues that require further research and consideration. Phase 1 concluded with the Issues Scoping Report (see Appendix A).

Phase 2 – Issues analysis

Phase 2 of the Review includes additional research and analysis to evaluate the issues identified in Phase 1. This phase includes the development of observations, conclusions and/or recommendations. The initial output of this phase is this Draft Observations and Conclusions Report. Following public review, the Report will be finalized in September 2009.

Phase 3 – Response

During Phase 3 of the Review, the designated representatives, First Nation governments and YESAB will consider the Final Observations and Conclusions Report. They will then develop a joint response that describes the outcome of their assessment in a draft Review Report. The designated representatives will then prepare a final Review Report that will include an implementation and follow-up schedule.

It should be noted that the Review focus is limited to the development assessment process as established by YESAA, and does not include a comprehensive review of the project aspects related to the regulatory/permitting regime. While linkages to these are being considered by the Review, the evaluation of regulatory and permitting processes are outside the Review Team's mandate.

1.3 PHASE 1 ENGAGEMENT PROCESS

Phase 1 of the Five-year Review, the information gathering and issues scoping phase, was initiated after the development of agreed to work and contract plans including review protocols and lines of enquiry. The information collection was conducted primarily via community visits and meetings during the last three weeks of January, early February, and one in early March. In addition numerous telephone interviews were also conducted during this period. Furthermore, as per contract requirements, prior to finalizing the Issues Scoping Report, two workshops, one with First Nation government representatives and one with the Steering Committee, were held to discuss and confirm the accuracy of the issues identified during the information collection period as described in the draft issues report and identify any gaps that may have been noted by the participants.

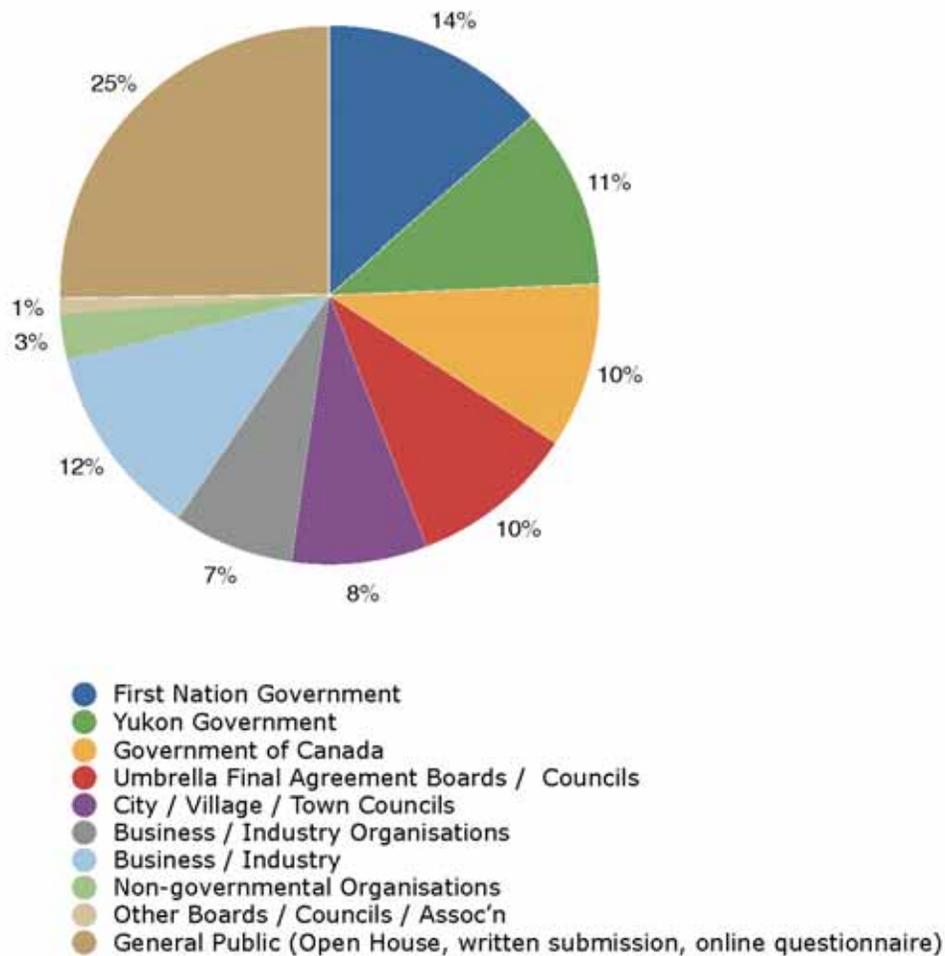
The Review Team gathered views from a wide range of stakeholders. During the engagement phase we initially contacted 143 groups/organization representatives, conducted 78 meetings, and received 71 written submissions. Figure 1 presents a summary of the groups who provided the Review Team with input (through meetings or written submissions) during the information gathering phase. Complete details of the Phase 1 engagement process can be found in the final Issues Scoping Report appended to this Report (Appendix A).

While the Review Team’s solicitation of input during Phase 1 was broad reaching, the Terms of Reference (TOR) for the Review established by the Steering Committee were explicit in the need for ensuring First Nation participation. As stated in the Request for Proposals package:

“The foundations of the development assessment process and the need for a review were laid in First Nation Final Agreements. Therefore, the implementation plan, the TOR and the Parties recognize that special efforts need to be taken to ensure the effective participation of First Nation governments and citizens in the review.”

To this end, a First Nations Liaison was hired by the Council of Yukon First Nations, through the Steering Committee, to “... work directly with the Contractor to assist in ensuring that information exchange meets First Nation participation expectations.”

FIGURE 1
SUMMARY OF SOURCES OF INPUT RECEIVED DURING THE INFORMATION GATHERING PHASE



1.4 UFA AND YESAA CONTEXT

The UFA, signed by the Parties in 1993, provides a framework for Yukon First Nations and Governments in their negotiations to conclude Yukon First Nation Final Agreements. Through twenty-eight chapters it sets out general provisions to be included in Final Agreements such as establishing Special Management Areas, Land Use Plans, and a Development Assessment Process.

The YESAA regime had its origins in the negotiations around the UFA and the individual Final Agreements, in which First Nations, Canada and the Yukon Government worked out its principal features as part of a broader, integrated development assessment regime. To set the context for the UFA, the “whereas” clauses at the beginning of the Agreement state the general purposes and values for the entire agreement. For example:

“the parties to the Umbrella Final Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Yukon Indian People and the land”

“the parties to the Umbrella Final Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Yukon Indian People”

“the parties to the Umbrella Final Agreement wish to enhance the ability of Yukon First Nations and Yukon Indian People to participate fully in all aspects of the economy of the Yukon”

When looking specifically at the development assessment chapter of the UFA and the YESAA, these statements and values are captured in the “objectives” as stated in Chapter 12 of the UFA and the “purposes” of the Act. Chapter 12 of the UFA is explicit in the purpose of a Yukon development assessment process with regards to the benefits meant to accrue to First Nations, and the First Nation values to be protected and enhanced, where practicable, through development. As noted therein, the development assessment process is, in part, intended to: (1) improve opportunities for First Nation participation in assessments, and (2) value and utilize First Nation contributions to assessments. Additionally, YESAA creates a Yukon specific process intended to provide comprehensive environmental and socio-economic assessments, while maintaining procedural certainty for participants and avoiding duplication of multiple jurisdictions.

1.5 PURPOSE OF THIS REPORT

This draft Observations and Conclusions Report is the Review Team’s analysis of priority issues identified in Phase 1 and presents observations and recommendations highlighting challenges and opportunities for improving the development assessment process.

The Report represents the Review Team's best efforts to assess and characterize YESAA implementation status to date, identify strengths and weaknesses of the development assessment process in meeting its objectives, and identify areas for improvement. Additionally, we have attempted to identify any constraints or limitations on the Review itself; for example, aspects of the process that could not be assessed.

Through the presentation of key issues and the identification of recommendations for addressing existing shortfalls, this Report is intended to assist the Parties and YESAB in their Phase 3 activities. The scope of this Review did not allow for the level of detailed analysis and discussion required to prescribe specific changes for each identified issue. Rather, the observations and recommendations presented in this Report are intended to provide guidance to the Parties regarding the steps that might be taken to ensure the YESAA process better realizes the intentions behind its creation.

For the purpose of creating a manageable report and one that doesn't present the Parties with an overwhelming list of recommendations, the Review Team consolidated and prioritized some of the issues raised. Several issues are captured within other issues (e.g., land use plans are captured in the discussion of cumulative effects) and some issues are likely to be resolved by addressing a broader concern in the YESAA process (e.g., YESAB as an adaptive, learning institution). Additionally, the analysis focuses on Designated Office level assessments as they represent the vast majority conducted to date.

1.6 REPORT FORMAT

In addition to the Executive Summary, the Report is presented in six chapters:

Chapter 1: Background and description of the YESAA Five-year Review.

Chapter 2: Overview of the Review Team's findings, providing a broad discussion on whether or not, and to what extent, the YESAA process is meeting the objectives of the UFA and the purposes of the Act.

Chapter 3: Analysis of the main issues with a presentation of the Review Team's observations and recommendations.

Chapter 4: Summary of the recommendations for addressing the main issues identified in this Review.

Chapter 5: Concluding remarks presenting the Review Team's reflections on the Review process.

Chapter 6: Listing of references cited in the Report.

2.0 OVERVIEW OF FINDINGS

Although YESAA legislation had been enacted for over five years by the start of this comprehensive Review, actual YESAA assessments had only been conducted for about three years, since November 2005. Therefore, this Review covers a relatively short period of assessment and decision-making experience within the new regime.

In the course of carrying out the Review, the Review Team noted that continual adjustments have been made in these first three years as YESAB, Canada, Yukon and First Nation governments, proponents and other participants engaged in the YESAA process and wrestled with the first hand aspects of implementation (e.g., what worked as expected and what was causing difficulties). As a new and evolving process, implementation mechanisms needed to be developed and applied. In this respect the Review Team found that significant strides have been made in that direction but ongoing efforts are needed to refine and improve the mechanics to be consistent with the intent of the Act. This is a recognized need as demonstrated by the YESAB-initiated review of its Designated Office rules last year which overlapped SENES's work on this Review. Based on limited feedback from YESAB, it is anticipated that YESAB's separate review will result in rule changes related to some of the same concerns raised during our issues scoping phase.

Through our interviews and workshops, the Review Team heard examples of how, over the last three years, assessors and some regulators have had meetings which resulted in better delineation of each party's responsibilities. There have also been discussion forums among Decision Bodies that have served to highlight issues of concern and, at times, resulted in new approaches. Guideline documents, policies, and practices have also evolved over the last three years. In general, it appears that awareness and understanding of the new process is for the most part expanding, but that ongoing communication between the parties is necessary in support of continued improvement. As such, the process SENES has reviewed is seen as a dynamic, adaptive process.

This Review is the first independent and comprehensive look at the entire YESAA process in light of the objectives of the UFA and the purposes of the Act. These objectives and purposes have provided the overarching framework for SENES' analysis of the issues raised during the Review.

Using the purposes of YESAA (s. 5(2)) as a framework, we have summarized our findings below (Table 1). This overview integrates our analysis of a diversity of issues discovered in the course of our Review. The analysis of specific issues and related observations and recommendations can be found in Chapter 3 of this Report.

TABLE 1
OVERVIEW OF THE REVIEW TEAM'S FINDINGS

YESAA Purpose	Overview of Findings
<i>Provide a comprehensive, neutrally conducted assessment process applicable in Yukon.</i>	<ul style="list-style-type: none"> • Additional focus is required to ensure comprehensive assessments of the full scope of applicable heritage, cultural and socio-economic issues are completed. • YESAB is an agency independent of government.
<i>Require that, before projects are undertaken, their environmental and socio-economic effects are considered.</i>	<ul style="list-style-type: none"> • YESAB guidance and rules address environmental and socio-economic effects • There is a clear need for action to better consider a wide array of social and cultural issues within the YESAA process
<i>Protect and maintain environmental quality and heritage resources.</i>	<ul style="list-style-type: none"> • The absence of land use plans and regional monitoring result in inadequate cumulative effects assessments which are important to determining environmental quality. • Inadequate follow-up and monitoring to determine the accuracy of the conclusions of assessments and the effectiveness of mitigation measures makes it difficult to determine if this purpose is being met. • YESAA, the UFA and the <i>Historic Resources Act</i> define “<i>heritage resources</i>” differently. This has contributed to disagreements about how well heritage resources are being maintained or protected.
<i>Protect and promote the well-being of Yukon Indian persons, their societies and Yukon residents generally, as well as the interests of other Canadians.</i>	<ul style="list-style-type: none"> • The protection and promotion of well-being of the groups listed requires improvements in baseline data on the current well-being of people and communities in the Yukon. • The YESAA process is legislated to prevent “<i>adverse</i>” effects, making the “<i>promotion</i>” aspects of this purpose difficult to achieve.
<i>Ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities, their residents, and societies in general, depend.</i>	<ul style="list-style-type: none"> • The lack of approved land use plans and inadequate cumulative effects assessments hinder this purpose being achieved. • The absence of clear regulatory tools to assess and mitigate social, economic and cultural impacts from development is a significant shortcoming in the YESAA process.

TABLE 1 (cont'd)
OVERVIEW OF THE REVIEW TEAM'S FINDINGS

YESAA Purpose	Overview of Findings
<i>Recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment.</i>	<ul style="list-style-type: none"> • In the absence of baseline data, it is difficult to evaluate how well the traditional economy has been “enhanced”. • The YESAA process is structured to prevent adverse effects, making the enhancement of something difficult to achieve. • YESAB guidance recognizes this special relationship.
<i>Guarantee opportunities for the participation of Yukon Indian persons and make use of their knowledge and experience in the assessment process.</i>	<ul style="list-style-type: none"> • Unresolved issues with respect to the role of First Nation governments in the YESAA process is seen as an important limitation to fully achieving this purpose. • There is a need for improved guidelines for YESAB staff, policies and rules on confidentiality, and understanding of traditional knowledge. • There is also a need for First Nations to strengthen their collection and communication of traditional knowledge and find ways of making it effectively available for consideration and use in the review process.
<i>Provide opportunities for public participation in the assessment process.</i>	<ul style="list-style-type: none"> • Opportunities for public participation are provided. • The YESAB online registry is a good tool for keeping the public informed.
<i>Ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication.</i>	<ul style="list-style-type: none"> • Timelines for assessments have been established, with reasonable adjustments applied as necessary. • The inability of Designated Offices to refer projects directly to the Executive Committee level can create delays and possible duplication of effort. • Lack of adequate guidance for project proposals assessed at the Designated Office level can lead to delays due to multiple requests for additional information.
<i>Provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.</i>	<ul style="list-style-type: none"> • The assessment process is set up fairly clearly for proponents, but multiple requests for information for project proposals erodes this certainty. • For all participants in the process there is a reasonable level of certainty through to the issuance of assessment recommendations. The treatment of recommendations by decision bodies (high proportion of variances) introduces uncertainty.

Overall the findings indicate that a number of changes would assist in bringing YESAA and its implementation into greater alignment with its purposes and the objectives of Chapter 12 of the UFA.

As noted in the recommendations presented throughout Chapter 3 (and summarized in Chapter 4), the scope of actions could incorporate changes to the legislation and regulations, rules, policies and guidelines, practices, and attitudes and awareness. Improvements to data collection and management are also required. The specific changes that are required in each of these categories will require ongoing dialogue between the Parties to the UFA and YESAB, and consultation with affected parties. The scope of this Review did not allow for the level of detailed analysis or discussion that is required to prescribe specific changes for each identified issue. Rather, this Review provides guidance for the steps that might be taken by the Parties to ensure the process better realizes the intentions behind its creation. YESAA has the potential, with continued commitment to its purposes, to become a model environmental and socio-economic assessment process for Canada.

3.0 ANALYSIS OF ISSUES

This chapter of the Report provides the Review Team's analysis of major issues identified during the information gathering phase. In addition to the analysis of issues, this chapter presents the Review Team's observations and recommendations for improving the development assessment process.

The analysis of issues in this chapter is grouped under six main headings:

- 3.1. YESAB Administration;
- 3.2. Development Assessment Process;
 - i. Project Discussion
 - ii. Assessment Phase
 - iii. Decision Phase
 - iv. Regulatory Phase
- 3.3. Traditional Knowledge in the Development Assessment Process;
- 3.4. Role of First Nation Governments in the Development Assessment Process; and,
- 3.5. Non-Process Issues

For the purpose of creating a manageable report that doesn't present the Parties with overwhelming analytical details and number of recommendations, the Review Team consolidated and prioritized some of the issues raised, such that some issues are considered within other issues (e.g., land use plans are captured in the analysis of cumulative effects) and some issues are likely to be resolved by addressing those presented in this Report (e.g., YESAB as an adaptive, learning institution). Additionally, our analysis focuses on what we consider to be the most pressing issues, those that affect the YESAA process on a frequent basis. Table 2 provides a listing of the principal issues analyzed and indicates which sub-issues, if any, are considered in the analysis.

The analysis of the issues throughout the chapter follows the same structure whereby the issues are each addressed under the following sub-headings:

- Summary of Issue
- Analysis
- Observations
- Recommendations

The observations and recommendations presented in this chapter are intended to provide guidance to the Parties and YESAB as they move into Phase 3 of the Review.

TABLE 2
PRINCIPAL ISSUES AND SUB-ISSUES ADDRESSED IN THIS CHAPTER

Principal Issue	Other Issue(s) Considered
3.1 YESAB Administration	
Community Engagement and Outreach	<ul style="list-style-type: none"> • Public Notification of Projects • Geo-Spatial Information/Mapping
YESAB Rules, Guidance Documents	<ul style="list-style-type: none"> • Inconsistency Among Designated Offices
YESAB Capacity	<ul style="list-style-type: none"> • Board Appointments
3.2 Development Assessment Process	
3.2.1 Project Discussion	
What Gets Assessed	<ul style="list-style-type: none"> • Assessable Activities Regulations
Project proposals	<ul style="list-style-type: none"> • Adequacy • Matters to be Considered
Project Scoping	<ul style="list-style-type: none"> • Narrow Interpretation of the Act
Heritage Assessments	<ul style="list-style-type: none"> • Capacity
3.2.2 Assessment Phase	
Cumulative Effects	<ul style="list-style-type: none"> • Land Use Plans • Narrow Interpretation of the Act
Timelines	
Level of Assessment	
Determination of Significance	
Impact on Treaty Rights	<ul style="list-style-type: none"> • Matters to be Considered
Socio-economic Impact Assessment	<ul style="list-style-type: none"> • Mitigation Measures • Matters to be Considered
Strategic Assessments	
3.2.3 Decision Phase	
Decision Bodies	
Treatment of Recommendations	<ul style="list-style-type: none"> • Mitigation Measures • Narrow Interpretation of the Act
3.2.4 Regulatory Phase	
Follow-up and Monitoring	
3.3 Traditional Knowledge in the Development Assessment Process	
	<ul style="list-style-type: none"> • Paper Process
3.4 Role of First Nation Governments in the Development Assessment Process	
	<ul style="list-style-type: none"> • No Input into Decision Documents
	<ul style="list-style-type: none"> • First Nations without Final Agreements
3.5 Non-process Issues	
Funding	<ul style="list-style-type: none"> • Capacity
Need for Ongoing Reviews	

3.1 YESAB ADMINISTRATION

a) Community Engagement and Outreach

Summary of Issue

Based on input received by the 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

Analysis

At public meetings, as well as, interviews with some municipal councils and UFA boards and councils, it was evident to the Review Team that there is a need for more communication regarding the goals and functioning of the YESAA process and YESAB operations. We heard that when the YESAA process first came into effect, both the Board and Designated Offices held extensive public meetings and educational workshops to introduce local people to the new regime. More recently there has been much less focus on ongoing communication regarding the YESAA process. Even individuals and organizations well versed in the YESAA process recognize the importance of being kept up to date on the evolution of the process and lessons learned along the way. To this end, we highlight an initiative in the Northwest Territories as a good example.

Since 2005 the Mackenzie Valley Environmental Impact Review Board (MVEIRB) has hosted annual “Environmental Impact Assessment Practitioners’ workshops” to: bring together a range of stakeholders to examine different aspects of the environmental assessment process; identify information needs, problems and potential solutions; and, educate each other on roles and responsibilities in the environmental assessment process. Workshop themes have included: lessons learned by Board staff from selected environmental assessments; socio-economic impact assessment; and, the importance of proponents doing early work with communities and regulators. Based upon direct experience of some members of the Review Team in these workshops, these forums are an important way of informing participants about the process and allow the Board to continually evaluate and improve its practices.

Part of the awareness building of the YESAA process is to have good notification mechanisms in place to ensure that all parties and the public are adequately informed about ongoing project assessments and know that they have an opportunity to participate if they wish. One of the main issues in this regard relates to the “Public Notice” issued by YESAB when a project

assessment is getting underway. While these notices provide basic information such as which Designated Office is the lead, project number and description, sector, deadline for comments, and a general map, concerns were raised about the quality of the project location details. The map provided is usually a portion of a standard 1:50,000 topographic map. No information is provided to show which traditional territory the project is in, or where settlement lands are, and no traditional place names are used. These additional details would provide better information for participants to locate the proposed project and determine their interest in the project, and should help to avoid errors in proposals that state that projects are not located on settlement lands when in fact they are (e.g., 2008-0033 Erich Rauguth on Bonanza Creek and Cripple Hill).

Other concerns with the notification process relates to the means used to get information out about a project assessment. Newspaper and radio advertisements and automatic e-mail notification from the online registry are useful, but have limitations. For example, for the latter, one needs internet access and prior registration. More direct means of contacting potentially affected parties or relevant organizations are also important. As told to the Review Team by the Yukon Government, *“Experience from land applications has demonstrated that direct notification of neighbours is necessary to ensure adequate assessment of socio-economic factors.”*

A commonly heard complaint during the Review was that the assessment process is too focused on paper and internet information exchange. While we did hear that Designated Office staff are very helpful if one calls for information or goes to the office for project materials, there is general dissatisfaction with the lack of dialogue during assessments. Table 3 provides a summary of assessment-related meetings conducted by YESAB assessors as of March 2009. Since 2006 there have been 11 projects for which meetings were organized. Three of those were Executive Committee Screenings and one ended up being referred to the Executive Committee (mv Yukon Queen II). Given that there have been over 900 Designated Office evaluations since November 2005, many of which have been large, complex projects, it is the view of the Review Team that organizing meetings for only 8 of those projects is not adequate. Based on experience of the Review Team in other jurisdictions public/stakeholder meetings for larger projects is common practice.

As evidenced by the practice of MVEIRB in the Northwest Territories and the Nunavut Impact Review Board (NIRB), open dialogue between proponents, regulators, governments, and other intervenors early in an environmental assessment can go a long way to resolving issues before the formal assessment gets underway. In the case of MVEIRB, for certain project reviews the assessment officer will organize technical sessions early in the process so that any concerns about a project can be discussed amongst the parties to the review. In many cases issues that would otherwise end up in back and forth information requests are resolved through discussion.

**TABLE 3
SUMMARY OF PROJECT ASSESSMENT MEETINGS ORGANIZED BY YESAB**

Project	Meeting Location/Details
2006-0040 Peel Plateau 3D Seismic Program	Fort McPherson public meeting
2006- 0237 Old Crow Access Road	Old Crow public meeting
2006- 0069 Fox Haven Estates	Whitehorse public meeting
2006-0057 Raven’s Ridge Country Residential Subdivision	Whitehorse public meeting
2006-0145 Grizzly Valley Rural Residential Subdivision	Hootalinqua public meeting
2006-0050 Carmacks Copper Project (Executive Committee Screening)	Carmacks <ul style="list-style-type: none"> • 1 public meeting • 2 meetings w/Chief & Council • 1 meeting w/town Council • 1 multi-stakeholder tour of site
2006-0286 Carmacks-Stewart/Minto Spur Transmission Line (Executive Committee Screening)	Carmacks <ul style="list-style-type: none"> • 1 public meeting • 1 meeting w/Northern Tutchone Council • 1 multi-stakeholder tour of portions of the line
2007-0240 Carcross Tagish First Nation (CTFN) C-82B Rural Residential Subdivision	meeting w/Carcross Tagish First Nation
2007-0241 Taan Kwächän Council C-23B Rural Residential Subdivision	meeting w/Ta’an Kwach’an Council
2007-0144 City of Dawson - Wastewater Treatment Project (Executive Committee Screening)	Dawson <ul style="list-style-type: none"> • 1 public meeting • 1 meeting w/Tr’ondëk Hwëch’in First Nation • 1 meeting w/Mayor and Council
2008-0070 mv Yukon Queen II	Dawson public meeting

Observations

- Not enough public outreach is being done by YESAB to educate people about YESAA and the Yukon development assessment process.
- Not enough project-related community meetings are occurring during assessments.

Recommendations

- 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.
- YESAB should establish an open forum for discussing a variety of environmental and socio-economic assessment topics, and organize workshops for stakeholder information exchange.
- 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.
- 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.
- YESAB should develop guidelines regarding when public or technical meetings should be held during a project assessment.

b) YESAB Rules, Guidance Documents

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 Review Team heard a number of criticisms directed at the Board concerning the adequacy of its rules and procedures. This section of the 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.

Analysis

For the purposes of this analysis, the Review Team examined the following documents which were either downloaded from the YESAB website or provided to the Review Team by Board staff in order to verify whether YESAB has acted to fulfill the requirements set out in sections 30 to 38 of the Act.

Rules (Final)

- Rules for Evaluations Conducted by Designated Offices- Nov. 2005
- Form 1 Appendix (Section 18) Project Proposal
- Designated Office Evaluation Flowchart
- Rules for Screenings Conducted by the Executive Committee- Nov. 2005

- Executive Committee Screening Flowchart
- Rules for Reviews Conducted by Panels of YESAB- Feb. 2006

Guides (Final)

- Proponents' Guide to Information Requirements for Executive Committee Project Proposal Submissions- 2005
- Guide to Interested Persons and the Public to participate in Assessments- 2006
- Guide to Socio-economic Effects Assessment- 2006
- Proponents' Guide to Project Proposal Submission to a Designated Office
- Assessors' Guide to the Assessment of Cumulative Effects
- Assessors' Guide to the Management of Confidential Information- 2006.

Drafts

- Considerations for Determining Significant Public Concern
- Project Proposal Guide: Placer Mining
- Assessors' Guide to the Assessment of Environmental Effects
- Guide to the Incorporation of Traditional Knowledge into Assessments
- Integration and Implementation of Wildlife Baseline and Monitoring Programs in Yukon: A Proponents' Guide

Internal Documents

- Assessors' Guide to using the YESAB Online Registry-2009
- Executive Committee Assessors' Adequacy Checklist
- YOR Designated Offices Project Checklist
- Manual of Map Package Assembly Procedures- Sept.2006
- YESAB Guidelines regarding Project Scope
- Significant Public Concerns

Agreements

- Cooperation Agreement between YESAB and MVEIRB (NWT)

Our analysis dealt with the YESAA provisions that *require* the Board to make certain rules and guidelines separately from those that merely *permit* it to do so. The analysis begins with a summary of the status of rule making. This is followed by an assessment of the scope and content of these rules.

The Review Team found that the Board has fulfilled its legislated requirement for rule making where rules were required to be made by the Board. The status of these rules is summarized below:

- All matters (form and content of proposals, determination of project scope, public participation, and time periods) for which rules applicable to screenings by the executive committee and reviews by panels of the Board required under s. 30(1) of the Act have been addressed in the *Rules for Reviews Conducted by Panels* and the *Rules for Screenings Conducted by the Executive Committee*. Issues relating to the form and content of proposals are also covered in the *Proponents' Guide to Information Requirements for Executive Committee Project Proposal Submission*. Additional guidance on public participation is provided in the *Guide to Interested Persons and the Public to Participate in Assessments*
- S. 31(1) of the Act requires the Board to make rules with respect to the conduct of evaluations of projects by designated offices. These rules may include rules for different phases of the evaluation of projects and different types of evaluations for different categories of projects. To date, YESAB has not made rules for the latter.
- All of the matters for which rules applicable to evaluations of projects by designated offices required under S. 31(2) of the Act are addressed in the *Rules for Evaluations Conducted by Designated Offices*. Pages 4 to 7 of these *Rules* provide in some detail for the submission of proposals for projects located in two or more assessment districts and for the conduct of evaluations by two or more designated offices. The “form and content of proposals” are also discussed at length in the *Proponents' Guide to Project Proposal Submission to a Designated Office*.
- All of the matters for which rules are required under S. 33 of the Act are found in Parts 11 and 12 of *Rules for Reviews Conducted by Panels*, in Parts 6 and 7 of *Rules for Screenings Conducted by the Executive Committee*, and in Parts 6 and 7 of the *Rules for Evaluations Conducted by Designated Offices*. Issues of confidentiality are also discussed in the *Assessors' Guide to the Management of Confidential Information*. Section 4 of the *Guide to the Incorporation of Traditional Knowledge into Assessments* deals with the integration of traditional knowledge with scientific information and other information, but this document has not been made public yet.
- Procedures to comply with publication of proposed and finalized rules as required by S. 34 has been established by the Board. The YESAB website explains that: “*Beginning on June 18, 2005, notice of YESAB's draft Rules were published in the Canada Gazette, the Yukon News and the Inuvik Drum. Notices were also sent for posting in all Yukon community post offices. From June 18 to September 30, 2005, the Board invited written representations on the proposed Rules. Now that this period has come to a close, the Board has given full and fair consideration to all written submissions and has finalized the Rules for Designated Office evaluations, Executive Committee screenings and reviews conducted by Panels of the Board. All changes have been formally approved by the Board.*”
- Board staff informed the Review Team that various processes were utilized to ensure broader input into the preparation of some of its Rules and Guidelines, examples of which are provided below:

- *Assessors' Guide to the Assessment of Cumulative Effects*: Developed through internal process with some opportunity for review by governments, primarily the Yukon Government;
- *Assessors' Guide to the Assessment of Environmental Effects*: Developed through internal process with some opportunity for review by governments, primarily the Yukon Government;
- *Guide to the Incorporation of Traditional Knowledge into Assessments*: Developed through involvement and review by the Yukon First Nation Heritage Group, which also played a role in reviewing the discussion document on Traditional Knowledge and Assessments;
- *Proponents' Guide to Project Proposal Submission to a Designated Office*: Developed through internal process with integration of comments and suggestions from governments, proponents, and organizations representing various business sectors.

The Review Team found that the Board and other permitted parties had created rules for some, but not all, matters for which discretionary powers have been granted under the Act. The status of discretionary rule making is summarized below:

- With the exception of rules regarding the cooperation by the Executive Committee and Board panels with other bodies (s. 30(2)(e)), YESAB has prepared rules for the Executive Committee and Panel identified under s. 30(2) of the Act. The *Proponents' Guide to Information Requirements for Executive Committee Project Proposal Submissions* addresses the need for proponents to consult with First Nations and community residents, for the purposes of s. 50(3). *Rules for Screenings Conducted by the Executive Committee* deal with project screenings and *Rules for Reviews Conducted by Panels of the YESAB* provide direction on panel reviews. Provisions on the referral back of recommendations may be found in Part 9 of the *Rules for Reviews Conducted by Panels* of YESAB and on page 14 of the *Rules for Screenings Conducted by the Executive Committee*. Part 3 of the *Rules for Reviews Conducted by Panels* addresses issues relating to panel membership and terms of reference.
- To date, YESAB has not made rules for the Executive Committee and Panel identified under s. 30(3) of the Act regarding reviews of existing projects, reviews of plans and reviews of activities outside Yukon; the conduct of audits, and effects monitoring of projects and existing projects under sections 110 and 111; and the conduct of studies and research under s. 112.
- Rules for the Executive Committee and Panel identified under s. 30 of the Act do not yet provide for different types of screenings or reviews for different categories of projects, existing projects or plans, or activities outside Yukon, as the case may be.
- Rules with respect to cooperation by designated offices with other bodies, including the coordination of functions, under s. 31(3) have been made in the *Rules for Evaluations Conducted by Designated Offices* respecting cooperation and the coordination of functions

among Designated Offices; however, at this time, the YESAB has not developed rules that address the cooperation of Designated Offices with “other bodies.”

- The Review Team found no evidence that a Designated Office had made its own rules regarding “the conduct of its evaluations” as allowed for under s. 31(5) of the Act.
- YESAB has not finalized rules under s. 32(1) of the Act that address the development of standard mitigative measures by Designated Offices or the Executive Committee under s. 37 of the Act and found no evidence that either the Executive Committee or Designated Offices have developed standard mitigative measures as allowed under s. 37. YESAB has been developing rules on “best practices” (including mitigation) in consultation with various parties, but these have not been made public or shared with the Review Team.

To gain a broader perspective on YESAB’s *Rules* and *Guides*, the Review Team compared these with the Rules formulated by NIRB and MVEIRB. Both of these assessment bodies have been in place longer than YESAB. It is however, noted that as neither the NIRB nor MVEIRB regimes have the same complex internal structure as YESAB with its Designated Offices, their requirements for rules/guidelines are different. Even so, all three bodies share much in common, namely they operate in northern territorial jurisdictions and they were established in fulfillment of the requirements of land claim agreements.

The Review Team found that the Board’s *Rules* and *Guides* compare quite favourably with the publicly available guidelines used by NIRB and MVEIRB. YESAB procedural rules for assessors and guidelines for proponents appear to be more fully developed than those of NIRB for which many guidance documents were still in the form of PowerPoint presentations (notably its *Rules of Procedure*, Cordillera Roundup 2007) or brief information booklets. The Review Team was unable to locate any equivalents on the NIRB website for some YESAB documents, notably those related to cumulative effects assessment, socio-economic impact assessment, and the use of traditional knowledge.

While MVEIRB has fewer rules and guides than YESAB, they are set out in larger documents which appear to consolidate requirements that are dispersed among various sets of rules formulated by YESAB. Based on our Review it appears that there has been considerable information sharing between YESAB and MVEIRB, and some YESAB *Guides* refer to, and make use of, the contents of MVEIRB documents, in particular, MVEIRB’s *Socio-Economic Impact Assessment Guidelines*.

The Review Team was aware that YESAB has been undertaking an internal review of its Designated Office Rules in parallel with this Review. The Board began a public review of these rules in November 2007, and identified a number of key issues and ideas for improving the assessment process by Designated Offices. Over the past year, YESAB has been considering potential improvements to its Designated Office rules, and these are currently being reviewed internally and re-drafted. The new rules are anticipated to be ready for public review by late

summer 2009. It is our understanding the Board has also committed to review its *Rules for Screenings Conducted by the Executive Committee* within the next year.

The Board informed the Review Team that some of the key issues which have arisen in its rules review which it hopes to address with rule changes include the need for:

- sector-specific proposal forms for project proponents;
- rules on timelines and processes designed to accommodate large, complex projects;
- the online registry to provide more focused notifications with relevant information;
- assessors to provide some rationale for any extensions of the first period of seeking views and information.

The Review Team is confident that the observations and recommendations in our Report will be consistent with, and supportive of, the Board's current efforts to revise its guidance rules for assessments.

Inconsistency Among Designated Offices

The Review Team heard a number of criticisms of YESAB for perceived inconsistencies among its Designated Offices and their officials in how they treat project proposals. Several participants in this Review argued that differences in expectations exist among the Designated Offices and that this results in differential treatment of projects across assessment districts under the YESAA.

It was not possible for the Review Team to verify the extent of these inconsistencies between the Designated Offices in any comprehensive way, given the sheer volume of documents involved; however, we did conduct a detailed examination of a limited set of Evaluation Reports from the Designated Offices in an effort to confirm whether and to what the extent they were inconsistent. All of these Evaluation Reports addressed project proposals for local solid waste facilities, and one representative Report was selected from each of the six Designated Offices. Our review focused on the following Evaluation Reports:

# 2008-0269 Braeburn Solid Waste Facility	Whitehorse Designated Office
# 2008-0303 Eagle Plains Solid Waste Facility	Dawson Designated Office
# 2008-0255 Canyon Creek Solid Waste Facility	Haines Junction Designated Office
# 2008-0251 Ross River Solid Waste Facility	Watson Lake Designated Office
# 2008-0301 Swift River Solid Waste Facility	Teslin Designated Office
# 2008-0275 Village of Mayo Solid Waste Facility	Mayo Designated Office

The Team found a significant degree of consistency among the six Evaluation Reports. The Reports from the Dawson and the Teslin Designated Offices differed from the others to a limited extent, in that they made unique provision for permafrost operating conditions and for

sewage sites, respectively. However, in general, all six made roughly the same impact predictions and recommendations on the terms and conditions for operating the waste facilities in question. The same key issues were identified in each Report, notably the detrimental effects of “open burning” of solid wastes and the need for facility operators to be on site. Interestingly, the same recommendations in each Report were varied by the decision body in its Decision Documents.

Observations

- 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.
- The Board’s *Rules* and *Guides* compare favourably with similar guidance documents prepared by NIRB and MVEIRB, which have been in operation for longer periods.
- A comprehensive list has not yet been developed of all the available YESAB documents, which makes any systematic review of them difficult.
- Not all of YESAB’s guidance documents are available online and are therefore not readily accessible. Some of these have the status of internal documents for use by assessors or are intended for proponents.
- A number of YESAB *Rules* and *Guides* are still in draft form, and their status is unclear.

Recommendations

- The YESAB should develop rules relating to project evaluations by Designated Offices that provide for “different types of evaluations for different categories of projects”.
- The Board should make best efforts to finalize and make public any rules and guidelines that are still currently in draft form.
- 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.

c) YESAB Capacity

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.

Analysis

Given the requirement that Panels for large projects be drawn from the Board, we heard concerns with respect to whether the application of current Board selection procedures results in the selection and appointment of members with the appropriate educational background and experience necessary to review large scale, complex projects. There were various calls for changes to the current method of Board appointments, and business and non-governmental organizations argued for a new process that places greater emphasis on the selection of individuals with broader and more flexible skills and qualifications. Similar concerns were expressed regarding the skill sets of Board staff, particularly those in Designated Offices, to address the issues raised by large development projects.

The Review Team wasn't in a position to validate these concerns through reviews of curriculum vitae, nor were we given the opportunity to speak directly to Designated Office staff; however, we were told by YESAB's Executive Director that "*All assessment staff have backgrounds in both socio-economic and environmental assessment.*" Additionally, we were told that:

"Board and staff participate in ongoing training and professional development in everything from courses and workshops on Environmental Law, Cumulative Effects Assessment, Best Practices for Oil and Gas, Ozi Explorer, GIS, Wildlife, Yukon First Nations History, Culture, Agreements and Self-government, Metal Leaching and Acid Rock Drainage, Water and Wastewater, Erosion and Sediment Control, Technical Writing, Riparian Area, Regulations, Social Impact Assessment, Mining Reclamation, Yukon Environment, Environmental Monitoring for Construction Projects, Ecosystem Based Planning, Socio-economic Assessments, Metal Mining Discharges -Impacts and Control, Invasive Species, Yukon Trapper Education Workshops, Northern Oil & Gas and the Environment, to those that focus on people skills such as communicating, listening and dealing with conflict. We also participate in custom-designed training in a variety of area, and have an organizational culture that strongly supports professional development".

Parties to the *Negotiators' Memorandum of Understanding: Yukon DAP Implementation Plan* (2005) also recognize: "... *the importance of selecting prospective members with sufficient knowledge and qualifications related to the functions and duties of the Board*" (MOU, s. 4.3). Annex A sets out "Guidelines for the Selection of Nominations for the Board" that highlight the importance of expertise related to: "*environmental, social, economic and fiscal impact assessment*", "*the values and community attitudes regarding those values which the YESAA process is designed to protect*", "*industrial or resource project management*", and "*procedures and administration of public bodies.*"

The Review Team believes that these selection guidelines are adequate; however, we cannot comment with authority on whether or not they are being followed by all Parties who appoint Board members.

The Report of the Implementation Review Group (2007) gives attention to a range of issues about the appointment processes for several Boards (but not YESAB) under the UFA that are similar to those identified in this Review. They include: delays in appointments; Parties failing to make “reasonable efforts” to reach consensus on the nominees; unsuitable Board appointments affecting the credibility of Boards and their ability to work together efficiently and productively; nominees insufficiently informed about the responsibilities of membership; and, the need for staggering of appointments.

Several of the Implementation Review Group’s recommendations on Board appointments are relevant to the concerns of this Review; notably:

- *“The Parties [should] institute staggered appointments for all Boards currently without them, notwithstanding the requirements of UFA 2.12.2.11 which provides for staggering only of the initial appointments.*
- *Nominating Parties [should] establish and maintain internal and/or joint tracking systems for Board member appointments that will enable them to anticipate when Board member appointments are due to expire.*
- *The Parties [should] seek information from Boards about the attributes and skills that would be most beneficial to the Board, before identifying their nominees.*
- *The Parties [should] inform prospective nominees of the mandate of the relevant Board and responsibilities associated with membership.”*

In its response to the Review Team’s Final Issues Scoping Report, YESAB puts forward two recommendations that relate to the first two Implementation Review Group findings above: (1) that the Parties consider staggering the term of the Board appointments to allow for assistance and continuity of Board operations; and (2) that the Parties consider amending YESAA to address the expiry of a Board member’s appointment while the member is participating in a review as part of a panel of the Board.

As was also addressed by the Implementation Review Group, YESAB’s first recommendation is intended to *“provide better continuity and lessen the potential for significant disruption to the Board’s operations as a result of changes to the Board’s membership”*. This is of special concern to YESAB as five of its seven appointments are presently due to expire on the same date. The second recommendation addresses the concern that the term of one or more panel members may expire during the course of a lengthy review. In recognition of this possibility, the Board would like to see a new “saving provision” added to the Act that will enable *“a panel member whose term has expired to be deemed to continue to hold office for the limited purpose of concluding that review.”*

Any changes to the Board selection process will have to take into account key provisions of the *Negotiators' Memorandum of Understanding: Yukon DAP Implementation Plan* (2005). In particular the s. 4.2 requirement that states:

"The procedures and criteria to be used in [the process of nomination and appointment of Board members] respect, to the extent not expressly provided for in the Act or the UFA, are within the discretion of the Parties."

Observations

- 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.
- Selection guidelines documented in the *Negotiators' Memorandum of Understanding: Yukon DAP Implementation Plan, 2005* provide a solid foundation for defining qualifications and competencies for the selection of Board members.
- Staggering appointments to the YESAB, as a way of addressing the pressures placed on the Board's effectiveness by the current system of fixed-term appointments would be an improvement.

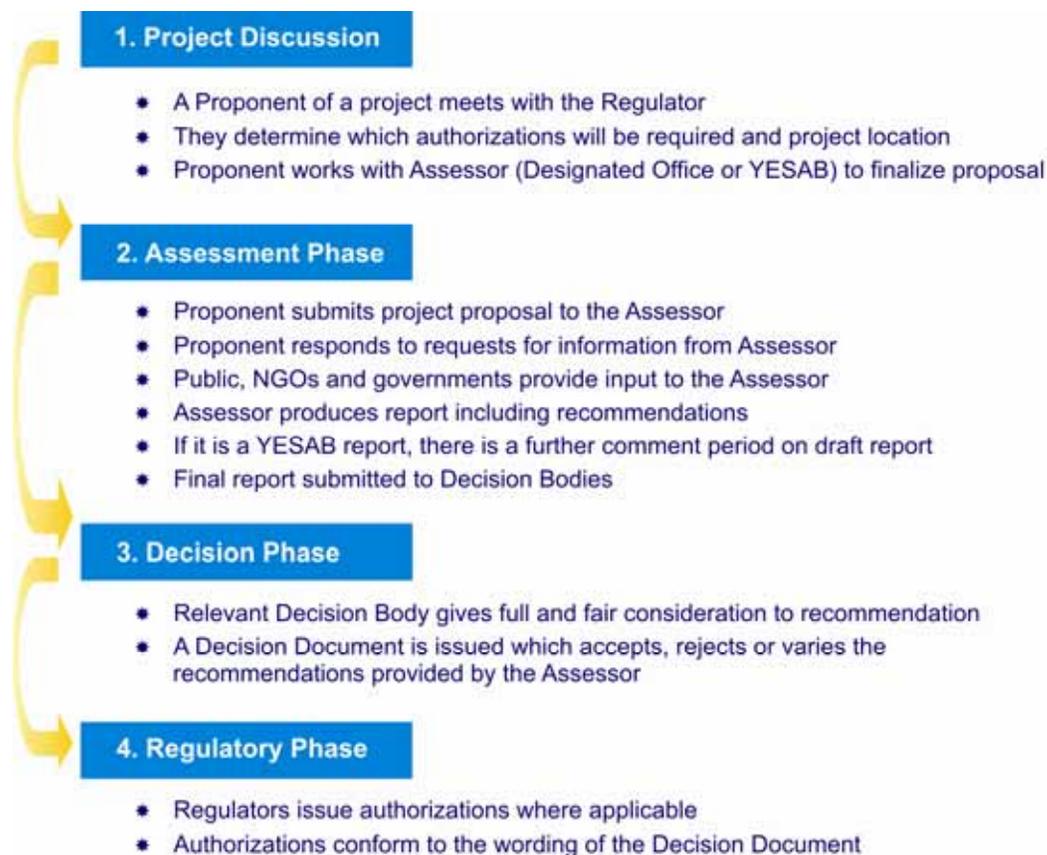
Recommendations

- 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.
- 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.

3.2 DEVELOPMENT ASSESSMENT PROCESS

In this section we present issues the Review Team heard about that relate specifically to the four phases of the development assessment process, as shown in Figure 2.

FIGURE 2
GENERAL PHASES OF A YESAA PROJECT ASSESSMENT



3.2.1 Project Discussion

a) What Gets Assessed

Summary of Issue

What activities get captured for assessment under YESAA was a common issue for many of the groups the 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.

A sampling of feedback provided to the Review Team about assessable projects is listed below:

- 1000 m³ trigger for logging is too high;
- exploration activities should be exempt;
- construction/installation of a power line and extension/expansion of a power line should be considered the same;
- the trigger for hydroelectric and other electricity generation projects are too low;
- routine maintenance of public services such as sewer and water is inappropriate;
- YESAA trigger based on funding is often inappropriate; and,
- trigger for the installation of septic tanks needs to be reviewed.

Analysis

Proposed activities to be undertaken in the Yukon that need to undergo an assessment under YESAA are set out in the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*. While it is beyond the scope of the Review to evaluate the Regulation triggers in detail, the following examples are presented with respect to some of the concerns raised during the Review.

There is significant concern that the thresholds for some activities requiring assessment are set too low, particularly for certain activities which require a land use permit. Certainly, in the case of project file 2007-0106 Power Pole Installation, triggered by Part 4, Item 1 of the *Regulations*, there is a need to consider adding “Specific Exceptions” under Column 2 of the *Regulations* for undertakings of this scale. Similarly, for Part 13, Item 12 – clearing, moving earth on Crown land or settlement land using a self-propelled power-driven machine, there are exceptions provided for settlement land but not Crown land. This part of the *Regulations* triggered an assessment of a project to put in a new residential driveway that measured 300-m long by 8-m wide (2006-0136 Residential Driveway). In another example, the construction of an addition to an existing Ross River Dena Council home within the municipality of Ross River (2008-0203 RRDC House Addition #102) triggered an assessment under Part 13, Item 26 of the *Regulations*

where “*On Crown land administered by a Minister of the Government of Canada other than in a national park, national park reserve and national historic site, the construction, operation, modification, decommissioning or abandonment of a structure, facility or installation*” requires an assessment, with no exceptions.

The Review Team notes that in each of the above examples the Designated Office evaluation report recommended that the project proceed pursuant to s.56(1)(a) of the Act, whereby it was determined that the activity will not have significant adverse environmental or socio-economic effects in or outside Yukon.

It is the view of the Review Team that assessing such projects does not add value to the land use permitting regulatory regime which is equipped to address any mitigation which might be required for activities of this scale. There is a similar concern for activities that are heavily regulated such as the installation or removal of a fuel storage tank. The assessment of these types of projects where there is no perceived potential for significant adverse environmental or socio-economic impact does not add value to the implementation of the project and creates a significant amount of unnecessary work which compounds the issue of limited capacity and resources available for some of the participants in the YESAA process. It also results in time and effort being spent where it could be more efficiently and effectively expended on projects which may have a potential for significant adverse environmental or socio-economic impacts.

Another trigger issue relates to projects that require assessment under the *Canadian Environmental Assessment Act*. Known as “CEAA pop-ups”, these are projects that don’t trigger YESAA but because of federal funding and a federal funding agreement that requires the project to be assessed under federal assessment legislation, the project must be assessed under the *Canadian Environmental Assessment Act*. For example, in most instances the remediation of less than 3000 m³ of contaminated material will trigger the *Canadian Environmental Assessment Act*. As stated in the Yukon Government written submission:

“The 3000 m³ exemption [in the Regulations] currently does not apply to materials from a site administered by the federal government, meaning that a single drum of dirty dirt from an RCMP station needs an assessment. This is unnecessary and delays remediation.”

Observations

- The general concerns raised to the 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*.

Recommendations

- 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.
- Amendments should be made to revise the relationship of YESAA with the *Canadian Environmental Assessment Act*.

b) Project Proposals

Summary of Issue

During the review we heard from First Nation, 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.

In the first instance, the concern cited was that project proposals circulated for public review are often incomplete (e.g., incomplete project descriptions, no description of alternatives, effects not described, inadequate maps, etc.). Thus it was felt that interested parties are challenged to understand the full impact a project may have and to make informed comments during the “seeking views” stage of the assessment. In the second instance, the Review Team heard, primarily from industry and Yukon government representatives, that at times YESAB assessors request too much detail in project proposals, details that should be left to the regulatory phase when authorizations are issued.

Analysis

S.50(2) of YESAA provides direction for proponents in preparing project proposals:

The proponent of a project shall, in preparing a proposal,
(a) take into consideration the matters referred to in paragraphs 42(1)(b), (c), (e) and (f), in the case of a proposal submitted to a designated office, or the matters referred to in paragraphs 42(1)(b), (c) and (e) to (h), in the case of a proposal submitted to the executive committee; and
(b) incorporate any mitigative measures that may be appropriate.

S. 42(1) of the Act provides direction to assessors regarding the “*matters to be considered*” in an assessment. Interestingly, despite the fact that all YESAB assessors, regardless of the level of assessment, “*shall take*” all the matters listed in s. 42(1) into consideration, not all of these matters necessarily need to be considered in proposals to a Designated Office. For example, absent in the direction to proponents are considerations regarding the purpose of the project (s.42(1)(a)); any adverse cumulative effects (s.42(1)(d)); the need to protect the rights of First

Nations with final agreements and their special relationship to the land (s.42(1)(g)); and, the interests of Yukon residents and Canadians, in general (s.42(1)(h)). Consequently, without adequate additional guidance from YESAB, it is understandable that some project proposals that conform to s. 50(2) requirements may be seen to be lacking information that the assessor is required to consider.

YESAB provides a generic proponent guide for project proposals for Designated Office evaluations (*Proponent's Guide to Project Proposal Submission to a Designated Office*). It is intended to assist proponents in completing the required "Project Proposal for a Designated Office (Form 1)". The Review Team believes that the guidance does not include sufficient information requirements for all project types, particularly for more complex projects. The information provided is in keeping with s. 50(2); however, with respect to the "matters to be considered" important things such as cumulative effects are not addressed. Based on information provided to the Review Team by YESAB the lack of project- or sector-specific guidance is also an issue that has arisen during the Designated Office Rules Review. We understand that YESAB is developing activity specific guides. For example, a draft *Project Proposal Guide: Placer Mining* has been prepared but is not yet in use.

For Executive Committee assessments YESAB has also prepared a guidance document for proponents, *Proponent's Guide to Information Requirements for Executive Committee Project Proposal Submissions*. Commensurate with the size and complexity of projects anticipated to be assessed by the Executive Committee the guidance document is detailed in its requirements. The Review Team believes that a similar level of detail may be required for at least some of the projects (e.g., mine development projects) that are assessed at the Designated Office level. The objective of this guidance should more fully align the information required to be submitted by proponents under s. 50(2) of the Act with the matters to be considered under s. 42(1) of the Act. At a minimum, project proposals for larger projects should include: a detailed description of the project location (including maps that indicate, where appropriate, First Nation traditional territories and settlement lands) and proposed activities; stages of the project; potential cumulative effects (subject to a review of the alignment of s. 50(2) and 42(1) requirements); significance of effects; alternatives; mitigative measures; and, any preliminary meetings with affected First Nations. On the latter, the Review Team recognizes the importance of establishing dialogue early with affected parties and feels that this is an important consideration for inclusion in guidance documents. For example, in the case of the Ketz River quartz mining project evaluation (2007-0148) good communications with the affected First Nation resulted in minimal concerns/comments being submitted by the Ross River Dena Council, as noted below:

"We have reviewed the application and here are our comments.

- 1) We have a good communication with the mine on there [their] existing exploration permit. We have had some discussion with them and are working to document the area of the work to let them know of our interest and use area.*

- 2) *We are also working with them on fish study and water monitoring within the area. We have agreed on a process to have some traditional knowledge documented of this area and this will be an on going process which involved our elders and they will decide how this will be use[d].*
- 3) *The company has involved the Council on the plans of the area and if they continue we have [no] problems [with their] interest in exploration.*

This concludes our comments on the application.”

The Review Team recognizes that information gaps in project proposals can unduly extend the assessment timeline by requiring assessors to request additional information during the pre-assessment/adequacy review phase, or by requiring the assessor and participants to make multiple information requests during the “seeking views” stage. Balancing this requirement for information is the potential impacts on proponents if the assessor requests too much detail in a project proposal. For example, while greater detail will be required for large, complex projects (CEAA 2007), this information is not always readily available at the project proposal stage. This limitation is echoed in the written submission from Yukon Energy Corporation:

“It is understood that the assessment of project proposals under YESAA requires considerable front-end loading of information and that as much information as is necessary for an effective assessment should be provided by the proponent at the outset. It should be recognized, however, that the planning trajectory for engineering or other element design often means that detailed design of certain project components may not have been initiated or has not yet been completed at the time a project proposal is submitted for assessment. In many cases the uncertainty associated with how the project may change as a result of the assessment, or whether it will even be feasible to proceed with development, is too great at the assessment stage to justify the expenditure of time and resources on detailed design for all project features. Further development beyond conceptual designs/plans is typically left for the subsequent permitting stages, where project design constraints or requirements are more clearly defined.”

Observations

- Project proposal guidance developed by YESAB for Designated Office evaluations does not require sufficient information from proponents to allow Designated Offices to consider all matters specified under s. 42(1) of YESAA for larger projects.
- Improved guidance and communication with proponents about project proposal requirements are likely to assist in reducing assessment delays.

Recommendation

- 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.

c) Project Scoping

Summary of Issue

The 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, as discussed below. 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.

Analysis

As presented in the *Draft Assessor’s Guide to the Assessment of Environmental Effects*, YESAB provides guidance to assessors to rely primarily on the principal project/accessory test for determining which project components to include in assessment. This test guides project scope decisions primarily from a project and activity perspective. Other assessment processes, notably the process for project scoping of major development proposals under the *Canadian Environmental Assessment Act*, are moving towards making project scope decisions based on potential effects – if a component or activity may affect an environmental or socio-economic value, then it should be included within the project scope.

The Lewes Marsh/Sawmill Creek Logging Road Development (2008-0119) where the Yukon Government Forest Management Branch was the proponent provides an example of a project where we feel the scope was too narrowly defined. As presented in the proponent’s proposal the project activities were building access roads for logging and overseeing/managing the harvesting of the wood. The Designated Office scoped the project to be only the construction of access roads because the assessor determined there was no “proponent” for the actual logging activities. The Forest Management Branch submitted the following comment regarding the Designated Office’s scoping determination:

“The Forest Management Branch (FMB) is disappointed by the Whitehorse designated office’s decision to scope the project narrowly. We view the decision not to scope the operating units into the project as inconsistent with section 51 of the Yukon Environmental and Socio-economic Assessment Act (YESAA); under this section a designated office must include “...any other activity that it considers likely to be undertaken in relation to an activity so identified and sufficiently related to it to be included in the project”. In our view, the operating units clearly fall within this criterion. Furthermore, we view the narrow scoping applied to this project is inconsistent with sections 46 and 47 of the Designated Office Rules, which require the inclusion of activities (46(b)) “likely to be undertaken in relation to an activity so identified...” within the scope of the project.”

The scope of the project remained unchanged and in the end the assessor recommended the project not proceed on the basis of s. 56(1) of YESAA, “...as the Designated Office has determined that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated.” The rationale was that appropriate terms and conditions could not be identified.

The Designated Office recommendation was rejected by the decision body, the Forest Management Branch. The decision document states the following:

“By inappropriately narrowing the scope of the Project via the exclusion of an activity identified in the Project proposal (harvesting of trees), the DO frustrated its ability to lawfully recommend appropriate terms and conditions for the purposes of mitigating identified significant adverse environmental/socio-economic effects related to that activity.”

Interestingly, in an assessment for a similar project conducted by the same Designated Office a few months later, narrow scoping was not an issue. The Yukon Government Forest Management Branch proposed another timber harvest project at Little Fox Lake (2008-0227) where activities were the development of logging roads to open up a cut block. The logging activities were scoped in. The Public Notice and Scope document stated:

“The project proposal identifies the salvage harvest of up to 3900 m³ within the 78 hectare Operating Unit. While the harvest activities would not be undertaken by the proponent, the assessor has decided to include these activities in the scope of the project, as the assessor considers these activities likely to be undertaken in relation to activities identified in the proposal which are to be undertaken by the proponent and sufficiently related to those activities. Accordingly, as provided under Section 51 of YESAA and the designated office Rules, the scope of the project has included the forest harvest activities.”

The Review Team believes that the scoping of the above project is more in line with the provisions of the Act. Additionally, it seems to indicate an example of assessment issues being

dealt with through dialogue between the assessors and the regulators. It is our understanding, based on input from YESAB, that the scoping of timber harvest and subdivision projects have for the most part been resolved.

Observations

- 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.

Recommendations

- YESAB should improve its scoping guidance to allow for more inclusive project scoping.
- YESAB should develop project scoping as part of the initial training program for assessors and the Board.

d) Heritage Assessments

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.

Analysis

Under the UFA and the *Historic Resources Act*, First Nations and the Yukon Government share the ownership and management of heritage resources. On settlement land, heritage assessments are done by the respective First Nation. The Yukon Government is typically the primary agency that has been conducting heritage assessments on non-settlement land. Many First Nations, however, are interested in also conducting heritage assessments on non-settlement lands in their traditional territory, as they are owners and managers of most ethnographic heritage resources that are directly linked to their culture and history (UFA 13.3.2). However, First Nations have indicated that limited resources and timelines present challenges to conducting these assessments.

Chapter 13 of the UFA and the Yukon's *Historic Resources Act* and regulations govern the protection and management of heritage resources in the territory. However, the relevant definitions in YESAA, the UFA and the *Historic Resources Act* are different. For one, the UFA and YESAA refer to "Heritage Resources" whereas "heritage" does not appear in the *Historic Resources Act*; the term "Historic Resources" is used in its place. As YESAB has articulated in a discussion document on draft guidelines for heritage assessments, the differences of definitions in the respective acts and UFA may affect opinions on what a "heritage resource" is and, therefore, what should be covered in a heritage resource assessment (Randall 2009). This view was also articulated in interviews and written submissions completed during Phase 1 of this Review, as well as at the May 2009 workshop of Designated Representatives.

First Nations interviews during the Review and comments on project assessments have indicated that their definition of "heritage resources" is broader than the definition of "Historic Resources" used by the Yukon Government in its heritage assessments (e.g., see Tr'ondëk Hwëch'in's comments on 2008-0286 - White Gold; and Champagne & Aishihik First Nations' comments on 2008-0249 - Agricultural Application #692-2, Mendenhall). These include resources like plants used for medicines, spiritual and sacred places, wildlife habitat, and place names and their associated stories.

In YESAA, effects on heritage resources are listed as socio-economic effects. Other socio-economic effects, which must be considered in project assessments, include effects on economies, culture, traditions and lifestyles. Combined, the range of these additional socio-economic effects more fully encompass the values and interpretations of "heritage" resources and values that First Nations have articulated. However, as noted in this paper's section on

socio-economic impact assessment Section 3.2.2 (f), such assessments have not been effectively employed in the YESAA process.

In the Northwest Territories, MVEIRB is engaged in a process of developing new “cultural impact assessment guidelines” (MVEIRB 2009). As the Board notes,

“Cultural impact assessment is not just about “bones and stones” – the identification of physical heritage resources. Communities want to be involved in the identification of relevant criteria and indicators linked directly to valued components of cultural vitality and community wellness, and the collection and interpretation of this data. Tapping community knowledge is important when gathering and assessing such data.”

The MVEIRB report notes that there are several ways of gathering information to assess cultural impacts. These include traditional land use studies, place name research, collection of oral histories and a number of other approaches.

Relying on archaeological techniques, heritage assessments by the Yukon Government are not able to assess the full range of tangible and intangible heritage resources in an area, particularly for resources that fall outside the scope of the *Historic Resources Act*. As noted in an email (Feb. 1/07) from the Heritage Unit to the Whitehorse Designated Office on project 2006-0302 – Agriculture Application # 787-1:

“The heritage information provide by [Laberge Renewable Resource Council] is based on traditional knowledge: as you know, not all of this information can be assessed by conventional archaeological techniques, where tangible remains may not be present (evidence of trails, battle sites and even fish camps may not be preserved in the ground for more than a short period of time).”

As noted earlier, there are other concerns with how heritage assessments are used in the YESAA that extend beyond “who does” heritage assessments, and what “heritage resources” they should cover. In cases where the Yukon Government is involved in the project prior to its submission to YESAA (e.g., in the case of land dispositions or when the Yukon Government is the proponent), the Heritage Resources Unit is requested to do their assessment in advance of a project submission to YESAA (e.g., Project 2008-0234 - Agricultural Application 873-1 and 873-2, Near Mendenhall). Otherwise, however, unless a proponent has contacted the First Nation in advance of submitting a project, the relevant First Nation(s) only first learns of the project when it is submitted to YESAB and must, therefore, conduct any assessment they wish in the timelines allowed by YESAB rules. In many cases, the available time period occurs during snow and frost months when a field assessment is not possible (e.g., 2008-0234 - Agricultural Application 873-1,2, Near Mendenhall; 2007-0052 - Sixty Mile Placers Ltd.; 2006-0318 - Agricultural Land Application #861). First Nations have indicated that the nature of heritage

assessments, particularly those involving the collection of traditional knowledge, and limited capacity in many First Nation's, also make it difficult to complete assessments within YESAA timelines at the Designated Office assessment level.

The amount of time and effort required to conduct a heritage assessment can vary significantly depending on the season, the historical use and importance of the site, the availability of existing information on the site and the type of new information that may be required to complete the assessment (e.g., field studies, gathering of traditional knowledge and other research). For Designated Office evaluations in particular, the current rules for timelines can present challenges to completing effective heritage assessments. As noted above, the Yukon Government Heritage Unit is sometimes provided with advanced notice of a proposed project and requested to do a pre-assessment of the heritage resources. Suggestions by First Nations that they be pre-notified in a similar fashion for anticipated projects at the same time as the Heritage Unit, to provide them with the same timeframe to conduct assessments, appear to be consistent with the principle of effective inter-governmental relations.

It is apparent that both governments would benefit from project proponents contacting their respective heritage branches in advance of submitting a project to YESAB. In cases where pre-assessment is not possible due to timelines or seasonal restrictions, it has been suggested that an appropriate mitigation may be to require, as a condition of an authorization, that a heritage assessment be completed prior to work starting. Effective implementation of this approach would require the cooperation of the regulator with the parties having heritage resource interests in the area.

When differences of opinion have occurred between a First Nation and the Yukon Government over the potential, or presence, of heritage resources in an area, the Yukon Government's input has, at times, been referred to as "expert opinion" whereas the First Nation's input was referred to as "policy or position" (e.g., 2008-0181 – Residential Land Application – KM 1592 Alaska Highway, Bear Creek). However, at other times, with a different Designated Office, heritage resource information from both sources has been denoted as "expert opinion" (e.g., 2006-0302 – Agriculture Application # 787-1). In the YESAB discussion document on draft guidelines for heritage assessments, YESAB indicates it will be asking for heritage resource assessments on all land applications (as they involve the permanent alienation of public lands) and that the proponent must indicate the qualifications of the person who conducted the assessment. It is not apparent what qualifications YESAB will consider as acceptable for such an assessment.

Observations

- 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.

- The assessment of additional socio-economic effects of culture, traditions and lifestyles are not the responsibility of the Heritage Resources Unit of the Yukon Government. This leaves a gap in the assessment of how impacts on heritage resources are interrelated to impacts on culture, traditions and lifestyle.
- There is an inconsistency in the notification process in that the Yukon Government Heritage Unit is sometimes provided with advanced notice of a proposed project and requested to do a pre-assessment of the heritage resources, whereas similar pre-notification is not provided to First Nations. This means that First Nations are often constrained to assessment timelines that may be inadequate or inappropriate.
- In cases where heritage assessments cannot be completed as the basis for Designated Office evaluations due to timelines or seasonal restrictions, there exists no standard approach to recommending proponent actions to identify and mitigate potential heritage impacts as a condition of project approval.
- The ability of all governments to conduct heritage resource assessments in a timely manner is limited by the availability of existing heritage resource and site information.
- There is an imbalance in the compilation and weighting of scientific and traditional knowledge information related to heritage assessment. YESAB staff may not possess the training and policy guidance necessary to consider the full range of expertise provided in a manner consistent with the purposes of YESAA.

Recommendations

- Structured dialogues/forums involving YESAB, the Yukon Government and First Nation governments should occur to:
 - 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.
 - develop protocols and guidelines on the appropriate scope of heritage resource assessments and steps for their implementation including, but not limited to:
 - early inter-governmental notification of proposed projects requiring heritage resource assessments;
 - appropriate approaches to encouraging proponents to engage, where appropriate, with First Nations and the Yukon Government Heritage Unit, prior to entering the YESAB system.
 - the appropriate qualifications of people conducting heritage resource assessments.
 - 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.

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

3.2.2 Assessment Phase

a) Cumulative Effects

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.

Analysis

As stated in Section 42(1)(d) of the Act, an assessment shall 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 in combination with the effects of

(i) other projects for which proposals have been submitted under subsection 50(1), or

(ii) other existing or proposed activities in or outside Yukon that are known to the designated office, executive committee or panel of the Board from information provided to it or obtained by it under this Act;

It is important to note that environmental and socio-economic cumulative effects can occur at both the site-specific/project level (e.g., localized water and air quality impacts) and regional/territorial level (e.g., caribou herd migration, global warming, watershed). Project-specific effects are the focus at the YESAB assessment level, while regional level effects should be tracked by government via tools such as land use planning and regional monitoring.

To assist with the project level CEA, YESAB has prepared three guidance documents: *Assessor's Guide to the Assessment of Cumulative Effects*, *Draft Assessor's Guide to the Assessment of Environmental Effects*, and, *Guide to Socio-economic Effects Assessments* (YESAB 2006). While these guides are quite comprehensive in their presentation of the subject matter, the Review found that, in practice, project assessments were relatively weak with respect to CEA conducted by proponents and CEA impacts considered by the assessors. The primary issue driving the lack of adequate attention to CEA appears to be driven by YESAB's interpretation of what projects or activities are to be include when considering cumulative effects. This issue is not unique to the YESAA process. Identifying what future projects to include in CEA has proven to be one of the most difficult and controversial aspects of CEA practice (Duinker and Grieg 2007). YESAB generally only considers cumulative effects of projects or proposals that have been assessed or submitted for assessment. This is due in part perhaps to the wording in the Act which 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 assessors] from information provided to it or obtained by it under this Act*".

Notwithstanding this interpretation, many CEA guidance documents recognize that consideration of induced development represents "best practice". For example, guidance given by MVEIRB in the Northwest Territories for preparation of environmental impact assessments under the *Mackenzie Valley Resource Management Act* directs proponents to include "*other developments that have not been formally proposed but can be reasonably foreseen*". Similarly, also based on "best practices", the *Cumulative Effects Assessment Practitioners Guide* (Cumulative Effects Assessment Working Group and Axy's Environmental Consulting Ltd., 1999) prepared for the Canadian Environmental Assessment Agency, identifies three categories of future activities:

- *those that are certain – i.e., actions that will occur or which are highly likely,*
- *those that are reasonably foreseeable – i.e., actions that may proceed, but there is uncertainty about them occurring, and*
- *hypothetical actions – i.e., actions about which there is considerable uncertainty as to whether they will ever proceed.*

The *Canadian Environmental Assessment Act* (CEAA) states the following with respect to what an assessment shall consider as relates to cumulative effects (s.16(1)(a)):

“(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out”

While the CEAA may seem restrictive regarding what might constitute a future project, an operational policy statement from the Canadian Environmental Assessment Agency (initially released in 1999 and updated in 2007) adopts a broader view. As stated:

“The Agency's 1994 Reference Guide advised that the assessment of cumulative environmental effects in relation to future projects should focus exclusively on imminent projects, that is, projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval. It is now recognized that this approach may not always be adequate to understand the implications of development activities on the future well-being of the environment. Also, it may limit the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future in the project area.

To better reflect the broad objectives of the Act [CEAA], the Agency position has evolved to include "certain" and "reasonably foreseeable" projects and, where appropriate those projects that are "hypothetical". This position is also consistent with the "best practices" approach of the Practitioners Guide.”

The Review Team agrees with the position of the Yukon Government, as stated in its consolidated corporate submission provided during Phase 1 of the Review:

“Without a clearly defined method for conducting cumulative effects assessments for all projects, there is no assurance that cumulative effects of activities and projects that are related (e.g., subdivisions) or multiple projects in one area (e.g., mining project near the Keno mine site, or multiple mineral exploration activities in one wilderness guide outfitting concession) will be adequately addressed. Not including projects that are reasonably likely to proceed (i.e., in a company business plan; zoning in place for development; presented or discussed publicly) in cumulative effects determination can result in an inadequate assessment of potentially significant cumulative effects due to incremental development in an area.”

Interestingly, this view is not held by Yukon Government Energy, Mines and Resources which is of the opinion that “YESAB does not, and cannot address issues about potential activities that have not been included in a proposal.” (YG EMR 2009).

Examples of projects where the CEA issue arises are 2007-0207 Wernecke Winter Road Access Project, and 2006-0192 Residential Land Development – Fish Lake Road. In the case of the Wernecke Winter Road Access Project, the proponent proposed supplying materials to four active mineral exploration programs via opening an existing winter road and using part of it for an airstrip, as well as using an existing spur route. The Designated Office evaluation drew a very large number of comments that focused predominantly on cumulative effects concerns. As stated in the submission from the Yukon Government's Environmental Protection Branch (2007-0207-206-1):

“Use of this winter trail in support of mineral exploration cannot be considered in isolation from the significant increase in mineral exploration currently underway in the Wernecke Mountains. Mobilization of fuel and equipment along this trail is directly linked and inter-dependant on existing Mining Land Use Permits on mineral claim blocks in the Wind and Bonnet Plume watersheds. These exploration activities have been assessed by YESAB over the last 2 years on an individual basis. It can reasonably be predicted that other mineral claim block holders with valid Mining Land Use Operating Permits in the Wernecke Mountains will also request use of this trail for fuel and equipment mobilization within the foreseeable future of a 5-year Mining Land Use Permit. A review of claim holdings indicates that there are more than 10 other exploration properties in the Bonnet Plume/Wind watershed that are currently conducting exploration activities or have the potential to conduct exploration. In addition, it can be anticipated that future proposals for spur trails to these mineral claim blocks off the Wind River Trail will reasonably occur within the next 5 years.”

Particular concern was also raised about the proposed airstrip, where Yukon Government Environment described the environmental and socio-economic effects of its use and control as “unknown”.

In contrast, the Evaluation Report stated:

“While these [induced industrial] activities may be facilitated by the proposed project, the locations, types, scales, timing, and logistics of these projects is unpredictable, and therefore cannot be considered in an assessment. ...If the specifics of future projects are known, and these projects are considered likely to proceed, they can be considered within the framework of a cumulative effects assessment. In this case, these details are not known and therefore potential future industrial activities are not considered in this assessment.”

The project was recommended to proceed with mitigation measures. The resulting Decision Document (issued by Yukon Government Energy, Mines and Resources Lands Branch) accepted the assessor's recommendation; however, rejected the airstrip on the reasoning that:

“...the Decision Body is of the view that it would require additional information on the potential of significant adverse cumulative environmental and socio-economic effects that may occur in connection with the construction of the aerodrome in combination with other activities occurring in the area, including trapping, big game outfitting and commercial and recreational wilderness travel.”

The second project example (2006-0192) was a proposal for the construction of a rural residential dwelling outside of the Whitehorse City limits. This was a relatively small assessment in as much as submissions were received only from the Yukon Government and two First Nation governments. However, the concern about potential cumulative effects was common, as was the suggestion that district or regional land use planning needed to occur before further spot land applications. As stated in the Yukon Government Community Services' submission, *“Community Services considers planned lot development to be an orderly and fair process of land disposition that can take into account the cumulative effects of residential lot development.... Spot land applications result in an adhoc incremental development pattern...”*. Yukon Government Environment stated, *“Cumulative impacts on this area are of great concern for the department of Environment... This single application must be reviewed with a scope which includes other potential future developments...”*.

In the Evaluation Report the assessor concluded there would be no significant adverse cumulative effects based in part on the fact that *“there are no future projects known to the assessor at this time. Only future projects that are under assessment or being planned for will be considered in an assessment as per section 42(1)(d) of the Act.”*

The Decision Body (Yukon Government Energy, Mines and Resources Lands Branch) rejected the assessor's recommendation that the project proceed *“due to inadequate assessment of cumulative effects”*.

Notwithstanding the issues related to the limited scope of CEA, for project-specific cumulative effects to be effectively addressed in the longer term, regional/territorial tools need to be in place. Ultimately, the management of cumulative effects requires government preparedness via the use of a variety of instruments such as land use plans, systems of protected areas, regional monitoring based on the identification of valued components and establishment of limits of acceptable change (thresholds), and strategic environmental assessments. To varying degrees, use of these management instruments is absent in the Yukon.

While work on land use planning is underway, approved LUPs are lacking in the Yukon. The *Final Recommended North Yukon Land Use Plan* was published in January 2009 and is being reviewed by Yukon and First Nation governments. In April 2009 the *Peel Watershed Draft Land Use Plan* was submitted for review, with the public comment period closing June 30 2009.

A further confounding factor associated with land use planning is the lack of certainty about an established role for Regional Land Use Planning Commissions once a plan is approved. As told to the Review Team by YESAB, the processes contemplated in s. 44 of YESAA and s. 12.17.0 of the UFA are premised on the continued existence of Regional Land Use Planning Commissions after approval of land use plans. However, it is not clear that Chapter 11 does in fact require or establish an ongoing role for the Commissions once they have recommended a land use plan for approval. As a result, s. 44 of YESAA may not be operable as written. If a Commission is no longer in existence it is unclear who an assessor is expected to approach in order to solicit advice with respect to project conformity to a plan. Additionally, LUPs are “living documents” that require updating in order to be useful. Again, it is unclear who will be responsible for this important task if the Commission that created the plan no longer exists. Finally, the apparent lack of enforceability of a LUP calls into question their overall worth in guiding responsible development. That is, s. 12.17.4 of the UFA states, “*Where a Decision Document states that a non-conforming Project may proceed, the Project proponent may proceed with the Project if permitted by and in accordance with Law.*”

Another challenge to regional/territorial assessment of cumulative effects in the Yukon is the lack of integrated environmental and socio-economic monitoring. In 2005, Environment Yukon's Water Quality Unit and Environment Canada's Pacific-Yukon Water Quality Monitoring and Surveillance group began monitoring four new river monitoring stations: Klondike River, McQuesten River downstream of the Keno mining district, and Yukon River upstream and downstream of Whitehorse. At some time in future, stations are expected to be added in the Peel Basin, Old Crow and Faro areas. Some spatial data is available from the Yukon Environment website related to land activities such as trapping concessions, game management areas, and wildlife key areas. Some socio-economic data are also available through the Yukon Bureau of Statistics (e.g., one-time surveys of social statistics, general social statistics on crime rates, and Canada Census data).

Another potential source for information about baseline data and trends should be Yukon Environment's State of Environment reporting; however, data contained in this reporting has been limited. The *Yukon Environment Act* requires the Yukon Government to report publicly on the state of the environment via a State of the Environment Report which is to be completed once every three years. As per s.47(2) of the *Yukon Environment Act* the purpose of a report is:

- (a) to provide early warning and analysis of potential problems for the environment;*
- (b) to allow the public to monitor progress toward the achievement of the objectives of this Act; and*
- (c) to provide baseline information for environmental planning, assessment, and regulation.*

Specific requirements for the reports are listed in s.48(2) of the *Yukon Environment Act* which states that:

The Yukon State of the Environment Report shall

- (a) present baseline information on the environment;*
- (b) incorporate the traditional knowledge of Yukon First Nation members as it relates to the environment;*
- (c) establish indicators of impairment of or improvement to the environment and identify and present analyses of trends or changes in the indicators; and,*
- (d) identify emerging problems for the environment, especially those involving long-term and cumulative effects.*

In addition to the mandated cycle of reports, the Yukon Government also publishes interim reports in intervening years which provide updates on selected environmental trends and indicators from the broad topic areas discussed in previous State of the Environment Reports. Between 1995, when the first full report was prepared, and 2006, when the most recent interim report was published, the reports have focused primarily on the biophysical environment, have dealt sporadically with cumulative effects, and present little data or tracking of socio-economic considerations such as community wellness, cultural vitality, or stressors on people.

Observations

- YESAB has interpreted s.42(1)(d)(ii) of YESAA narrowly and thus only considers cumulative effects of projects or proposals that have been assessed or submitted to YESAB for assessment. As a result, assessment of cumulative effects does not include activities that are reasonably likely to occur, and future projects that are known to technical experts.
- 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.
- The lack of regional land use plans in most areas of the Yukon is a significant void that is adding increased complexity and uncertainty to environmental assessment and management processes.

Recommendations

- YESAB should organize research and participatory forums related to cumulative effects assessment for the purpose of educating assessment practitioners (YESAB, governments, proponents, non-governmental organizations, etc.) in best practices.
- YESAB should adopt “best practice” in terms of application of the approach to “future projects” to bring YESAA practice in line with other jurisdictions.
- The development and approval of regional LUPs should be made a priority.

- 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.
- 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.

b) Timelines

Summary of Issue

While timelines are a factor at all stages of the assessment process, input to the 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 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 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.

Analysis

A scan of YESAB’s online registry for Designated Office evaluations confirms what the Review Team heard in Phase 1; that extensions to the “seeking views” stage are quite commonly requested and granted. While it is not possible within the Review timeframe to determine the percentage of assessments that have been granted extensions, or to validate whether the reasons given by participants for extensions were warranted, several random examples reviewed, suggest there are times when extensions are warranted. For example, in the case of 2008-0033 Erich Rauguth – Bonanza Creek and Cripple Creek, an extension was requested by the Tr’ondëk Hwëch’in First Nation because the proposed project was incorrectly identified as not being on settlement land, with this error not caught during the proposal adequacy review. In another project assessment (2008-0017 Temporary Exploration Camp: Jeff Lake Property), the Yukon

Government Lands Branch requested an extension “...to allow our Land Use Inspector in Ross River time to complete his on site inspection and submit his comments for the assessment of this project.”

The requests for extensions are posted to the public registry and, if granted, the assessor issues a “Notice of Extension of Timeline for Submission of Views and Information”. One concern heard by the Review Team about the notifications is that no rationale is given for providing additional time. This is a valid concern that can be easily dealt with by including reasons on the notifications.

A primary reason for project assessments at the Designated Office level being extended seems to relate to the size of the proposed project, with larger projects requiring greater information and therefore more time for participants to conduct their reviews. As stated in an industry written submission, “In general, the timelines for less complex projects are manageable. Proponents are now recognizing their need to submit project proposals in a manner that fits development timeframes.” Since a large variety of assessable projects are evaluated at the Designated Office level it is understandable that established timelines will be challenged at times. As discussed in the following section on “Level of Assessment” (3.2.2 (c)), the Review Team understands that through the Designated Office Rules Review, there will be changes proposed to create different levels of Designated Office evaluations based on project size. The Review Team concurs with this approach.

Requests for additional project information from proponents throughout the assessment phase are common. For some participants, this creates challenges for reviewing new information in the time given, while for other participants; proponents in particular, information requests are seen as unnecessary delays in the overall process. As addressed in the “Project Proposal” and “Project Scoping” discussions in Sections 3.2.1 (b) and 3.2.1 (c), respectively, requirements for proponents to provide extra project details can, in part, be due to shortfalls in guidance provided by YESAB for content of project proposals, as well as YESAB narrowly scoping projects. While it is beyond the scope of this Review to evaluate the necessity of information requests made throughout assessments, the Review Team does recognize that adequate time should be given for reviewing new information and that, as with some other jurisdictions, there should be more certainty on how the request for additional information phase will be conducted. For example, in the Northwest Territories and Nunavut, the assessment boards establish an “Information Request” stage during the review of proposals.

In the case of MVEIRB and NIRB, Information Requests are scheduled for a set time period – all requests have to be in by a certain date, they are sent to the proponent as a package, and there is one date for the answers to be submitted. Questions from participants in the assessment are prepared in an established format and submitted to the Board for approval before they are distributed. The Board will only issue information requests if they are: (i) related to the issues that were scoped into the assessment, (ii) appropriate, (iii) relevant to the assessment; and, (iv)

not repetitive or redundant. Such a process provides greater certainty to proponents and review participants alike, and supports a coordinated approach to evaluating project proposals.

Based upon information provided by YESAB regarding its ongoing Designated Office Rules Review, we understand that some of the concerns discussed above have been brought forward. Key aspects contemplated for change with respect to timelines include:

- Upon issuing an information request in the “seeking views and information period” the timelines would essentially stop until a response is received.
- At the end of the seeking views period, some time would be given to allow the assessor to review the comments received, and provide an opportunity to either extend the seeking views period or request additional information from the proponent.

Observations

- 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.

Recommendations

- 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.
- 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 (c) of this Report).
- 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.

c) Level of Assessment

Summary of Issue

The 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.

Analysis

To date, Designated Office evaluations represent nearly 100% of the assessments completed under the YESAA process. These assessments cover a wide array of projects, from small and routine (e.g., bridge repair) to large and complex (e.g., mine and milling operations); however, all projects are expected to be conducted under in the same manner and within the same timelines. On one hand, this can create uncertainty for proponents as they expect a certain timeline for an evaluation, but have to deal with potential “delays” in the seeking views and information gathering stages for more complex projects because extensions are being granted due to the amount of information to be reviewed. On the other hand, this singular approach can result in evaluations being rushed in order to meet established timelines.

The Review Team understands that YESAB’s Designated Office Rules Review received a lot of input on this same issue and amendments are being considered that will provide additional flexibility to manage more complex project proposals. Of note, s. 31(1)(b) of YESAA allows YESAB to set rules providing for “*different types of evaluations for different categories of projects*” but no rules have been established to date.

Another aspect of the issue is the fact that there is no authority for a Designated Office to refer a project to the Executive Committee level unless an evaluation of the project has been completed and the assessor has not been able to determine whether the project will have significant adverse environmental or socio-economic effects under s. 56(1)(d). This can result in extended timelines and potential duplication of effort. A recent example of how this process can extend timelines is the Designated Office evaluation of Silver Hart Mine Development and Production (2007-0206). The project proposal was received October 26, 2007, seeking views began September 3, 2008, and the Evaluation Report and referral were issued December 19, 2008.

The executive committee may make a referral to a panel of the Board pursuant to s. 58(1)(d) or s. 58(2) of the Act. S. 58(2) provides criteria for referring a project to a panel of the Board; these being:

- the project is likely to cause significant adverse cumulative environmental or socio-economic effects in the Yukon;
- the project is causing or is likely to cause significant public concern in the Yukon; or
- the project involves technology that is controversial in the Yukon or the effects of which are unknown.

Designated Offices currently assess some projects that pose significant public concern, significant cumulative effects and/or new technology that is controversial in the Yukon, however, unlike the Executive Committee's ability to refer these types of projects to a panel under s. 58(2), there are no mechanisms for a referral from a Designated Office to the Executive Committee.

Observations

- The current rules for Designated Office evaluations do not adequately consider the diversity of projects that are presented for assessment at this level.
- The inability of a Designated Office to refer a project directly to the Executive Committee can delay assessments and create uncertainty for proponents.

Recommendations

- 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).
- 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.
- 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.

d) Determination of Significance of Environmental and Socio-economic Effects

Summary of Issue

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

Analysis

A paper prepared for the Joint Review Panel for the proposed Mackenzie Gas Project (Lawrence Environmental 2005) presents three broad approaches to impact significance determination:

- (1) the technical approach which breaks significance questions down to their constituent parts and applies a technical procedure to progressively aggregate the relevant impact significance determination considerations;
- (2) the collaborative approach in which interested and affected parties jointly, in interactive forums closely connected to broader constituencies, determine what is acceptable and unacceptable, important and unimportant, and how much importance to attach to each concern and potential impact; and;
- (3) the reasoned argumentation approach which views significance determination as a process of making reasoned judgements, supported by technical and non-technical evidence.

Input provided by YESAB suggests that the technical approach is being applied with the following common criteria used:

- Duration: the length of time an effect will occur;
- Magnitude: the frequency of the event causing the effect;
- Extent: the size of the area that is affected;
- Likelihood: the probability of effect occurring; and,
- Reversibility: the ability for the environment to return to its previous state after the activity occurs.

YESAB's guidance document, *Draft Assessor's Guide to the Assessment of Environmental Effects*, provides the following instruction on determining significance:

“Any conclusions and recommendations from assessors to Decision Bodies are based upon the determination of significance of likely effects. All recommended mitigation measures are taken into account prior to determining significance. The assessor can draw one of three conclusions with respect to the residual (i.e. after mitigation) effects of the project: the effects are not significant, the effects are significant, or the significance cannot be adequately determined.”

Additionally, as stated in YESAB's *Procedural Guide to Designated Office Evaluations*, “*The Recommendation reflects the assessor's understanding of the project, the likelihood of success of mitigative measures, comments and concerns of the public, interested persons, First Nations and Decision Bodies, and the significance of residual adverse effects of the proposed project.*”

There are examples where this guidance does not seem to have been followed. In the case of the Little Violet Creek placer mining proposal (2008-0244) the Whitehorse Designated Office determined that the project would have significant adverse effects that could be mitigated by the following terms and conditions:

- “1. The proponent shall keep all garbage, including kitchen waste, in a container that prevents access by bears and other wildlife, until properly disposed of in accordance with the Solid Waste Regulation.*
- 2. When burning kitchen waste onsite it must be burned regularly to reduce odors that might attract wildlife and be burned to ash by forced air or fuel fired incineration.*
- 3. The proponent shall re-contour and/or stabilize the overburden dump area to maintain slope stability upon completion of each mining season.”*

The Decision Document issued by Yukon Government Mineral Resources rejected the recommendation based on the following:

“The three matters addressed in the terms and conditions, disposal of waste, erosion control and wildlife deterrence, do not constitute a significant adverse environmental or socio-economic effect that requires specific mitigation measures in our view.

The three terms and conditions recommended are not required as waste disposal, erosion control and wildlife management are matters addressed under laws of general application.”

As identified by Lawrence Environmental (2005), considering legal thresholds is one basic building block of technical impact significance determination. That is, are regulatory standards likely to be contravened? If “yes” then a determination of significant adverse impacts can be made. In the YESAA assessment example above it would appear that the answer to the question would be “no”.

Regarding the issue of significance determinations related to First Nations’ values, YESAB’s *Draft Assessor’s Guide to the Assessment of Environmental Effects* states the following:

“In determining significance, the assessor should also take into account general direction in the “purposes” of the Act to consider potential effects on:

- The special relationship between Yukon Indian persons and the wilderness environment of Yukon*
- The cultures, traditions, health and lifestyles of Yukon Indian persons*
- The cultures, traditions, health and lifestyles of other residents of Yukon*
- The interests of residents of Yukon and of Canadian residents outside Yukon”*

As discussed in Section 3.3 of this Report (Traditional Knowledge in the Development Assessment Process), it is not clear that this guidance is always fully considered.

Lawrence Environmental (2005) cites examples of common criticisms of prevailing impact significance determination requirements and practices. Some of these are:

- *“Tendency to be driven by non-Aboriginal society global and national values in contrast to local and regional Aboriginal values. Also, decisions concerning significance commonly fail to benefit from traditional knowledge or from consultation with Aboriginal people, and often fail to determine the significance of effects on Aboriginal culture, economy, health, social structure, and on Treaty and Aboriginal rights;*
- *A tendency by assessors to rely on their own judgements regarding impact significance rather than integrating the values of people;*
- *Insufficient consideration of the significance of social and economic effects, and a failure to appreciate the implications for significance determination of the differences between socio-economic and bio-physical impacts;*
- *An implicit and sometimes explicit bias toward the technical, the quantitative, and the positivistic at the expense of qualitative reasoning, contextual analysis, and public knowledge and perspectives; and,*
- *Insufficient systematic attention to insights from practice (e.g., which significance determination procedures and methods work well and which do not under various conditions).”*

Observations

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

Recommendations

- 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.
- YESAB should develop training programs and information opportunities to its assessors on significance determination.

e) Impact on Treaty Rights

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 Review Team heard from the Yukon Government that, as a result of insufficient consideration of Aboriginal rights in the Evaluation Reports and of specific recommendations 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 to the Review Team.

Analysis

The obligation of governments to protect Aboriginal and treaty rights as they makes decisions that may adversely impact these rights is now solidly established. This obligation has given rise to the jurisprudence on the duty to consult and accommodate, which is discussed further in Section 3.4 of this Report (Role of First Nation Governments in the Development Assessment Process). In order to meet this obligation, government must acknowledge the existence, nature and scope of the rights, and assess the possible impacts of project proposals on these rights.

In the case of a treaty, the government is presumed to be cognizant of the existence and nature of treaty rights (Mikisew 2005, para. 34: “In the case of a treaty the Crown, as a party, will always have notice of its content.”). Both Canada and the Yukon Government were parties to the UFA and Final Agreements and have knowledge of the existence of treaty rights.

The specific inclusion of First Nations’ rights in the list of matters to be considered in the development assessment process differentiates the YESAA process from most existing environmental assessment processes. Typically, environmental assessment processes require proponents and assessors to evaluate the impacts of projects on environmental, social, cultural, health and heritage issues and their significance. Consultation with affected First Nations is usually required. However, the impacts of projects on the *rights* of First Nations people are seldom identified in the list of matters to be considered. The 1995 *BC Environmental Assessment Act* did include “*effects on aboriginal rights*” in the list of content topics for project reports, but the 2002 Act no longer specifies the content of project reports (British Columbia 1995 and 2002). Under Alberta’s environmental assessment process, the terms of reference for large resource development projects include the identification of impacts on historical and cultural resources, and on traditional land uses (Alberta Environment 2004). However, Aboriginal land uses are not defined as actual treaty rights. The determination of the significance of adverse impacts on constitutionally protected rights calls for a much different “balancing act” than impacts on “land uses” by other “stakeholders” or the public at large, which are not protected by treaty (Marshall 1999: para. 45)

Two examples to illustrate the lack of attention paid to impacts on treaty rights in the development assessment process are presented. The first is the Carmacks Copper Project Assessment (2006-0050). The proposed mine site is located within trapping concession #147, operated by a trapper of the Little Salmon Carmacks First Nation. The Screening Report prepared by the Executive Committee identifies potential impacts of the mine site and access road on trapping activities under “Current Land Use”. The report concludes that the effects of the project on the trapper can be addressed by imposing certain terms and conditions (mitigative measures) to avoid effects to, and compensate, the holder of the trapping concession. However, there is no discussion of the potential impacts on the treaty rights of the Little Salmon Carmacks First Nation, including the trapping rights of its members.

Another example relates to an application for a Game Farm Expansion in the Ibex Valley (2008-0118). Both the Champagne and Aishihik First Nation and the Kwanlin Dun First Nation expressed concerns about detrimental impacts of this project on wildlife, aquatic resources, and their cultural values. The assessors had difficulty assessing effects on cultural values and ultimately determined that the project would not result in significant adverse effects to these values. There was no consideration by the assessors of the need to protect the treaty rights of the two First Nations, their relationship with the wilderness environment, or their cultures and traditions, as required under s. 42(1)(g) of YESAA.

It should be noted that even though s. 42(1)(g) of the Act only protects the rights of Yukon Indian persons (defined as those enrolled under a final agreement or the Tetlit Gwich'in), the obligation to protect the constitutional rights of First Nations is an all-encompassing obligation that rests on all governments. In this respect, even the Yukon First Nations that do not have a final agreement are protected by the Crown's duty to consult and accommodate. And in any case, the three First Nations without final agreements are listed among the Yukon First Nations in the UFA, and their traditional territories are known to both the Yukon and federal governments. All assessors and decision-makers involved in the YESAA process should be mindful of the need to protect and accommodate the rights of all First Nations peoples in the Yukon.

Observations

- 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.
- There appears to be uncertainty as to the exact nature and extent of Yukon Indians' treaty rights, in particular as to which provisions of Final Agreements contain treaty rights and which do not.

- Evaluation Reports rarely identify potential adverse effects of projects on First Nations' rights and do not adequately address the concerns raised by First Nations in their recommendations.
- YESAB is taking steps to rectify this issue by implementing recent changes to its notifications and information requests, and revising the format of the Designated Office Evaluation Reports so that an assessor's consideration of potential impacts on treaty rights is more clearly presented.

Recommendations

- 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.
- 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.

f) Socio-economic Impact Assessment

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)).

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 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.

Analysis

This Review has identified considerable dissatisfaction with the quality of the socio-economic assessments being conducted by YESAB. First Nation governments are concerned that these assessments focus primarily on mitigation of adverse effects while paying little attention to the enhancement of positive socio-economic impacts as required by s. 5.2(e) of the Act which states that “*The Purpose of the Act is ... to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change (emphasis added) without undermining the ecological and social systems on which communities and their residents, and societies in general, depend.*” Industry and some Yukon Government departments would also like to see assessors consider positive as well as negative impacts in Evaluation and Screening Reports. Questions have been raised by departments and First Nation governments about the assessment methodologies employed by YESAB and about the reliability of existing baseline socio-economic data. Some participants in this Review also expressed frustration at the inability of Decision Bodies and regulators to include effective socio-economic mitigation measures in project authorizations.

In an effort to verify some of these concerns, the Review Team looked at the treatment of socio-economic impacts in five recent project assessments (2006-0286 Carmacks Stewart/Minto Spur Transmission Project; 2008-0070 Yukon Queen II—referred to Executive Committee; 2008-0289 Mactung Advanced Exploration; 2007-0206 Silver Hart Mine Development and Production—referred to Executive Committee; and, 2006-0050 Carmacks Copper Project). These assessments were chosen because the projects in question are all of a substantial size and could potentially have significant socio-economic impacts. Our review found that the first four assessments confined their attention to a limited range of socio-economic impacts from these projects, typically focusing on land use, heritage resources, aesthetic values, and health and safety. The analysis conducted in the Evaluation Report on the Yukon Queen II project is more detailed and examines impacts on a broader range of socio-economic values but, again, it hardly constitutes a complete assessment of the socio-economic impacts at stake.

Of those reviewed, the Executive Committee’s Screening Report on the Carmacks Copper Project is the only assessment we found that seeks to deal more comprehensively with socio-economic impacts. In addition to the classical assessment of project impacts on Current Land Use and Heritage Resources, the “Community and Region” section of the Report considers impacts on the following Valued Socio-Economic Components: Community Structure and Dynamics; Economy and Employment; Community Services and Infrastructure; Education and

Training; and, Public and Worker Health and Safety. The report also attempts to deal with socio-economic impacts in a somewhat integrated fashion, and notes that “*the maintenance and positive development of communities is critical to ensuring that they are able to adapt to the changes brought about*” (pg. 124). Further in this vein, the report recognizes that a community’s ability to cope with change is “*determined in part by its vulnerability and resilience/adaptability...*” (pg.124). In the Review Team’s view, these assessments of socio-economic effects share a common limitation—they focus almost exclusively on identifying, and then providing mitigation for, significant adverse project effects. This comes out most clearly in the Evaluation Report on the Yukon Queen II, which explicitly states:

“The Yukon Environmental and Socio-Economic Assessment Act (YESAA) is the enabling legislation that outlines how YESAB undertakes assessments. Section 56 outlines the four recommendations that YESAB may make. As outlined in those recommendations, YESAB bases its final recommendations on the significance of any adverse (or negative) effects, and not on the extent of the positive socio-economic effects of a project. Nor does it do a “cost-benefit” weighing the adverse effects against the beneficial effects”.

Similarly, although at points the Carmacks Copper Project Screening Report considers positive and negative socio-economic effects together, its Effects Assessment Summary concludes that “*Significant adverse environmental or socio-economic Project and cumulative effects identified within the scope of the screening were adequately assessed*”.

This limitation is also evident in the kinds of mitigation measures for socio-economic impacts that are proposed in the five assessments and then implemented through Decision Documents (for three of them). In almost every case, these measures are clearly intended to address the negative socio-economic impacts of projects, and not to enhance their positive effects or to contribute to the sustainability of impacted communities. In the Carmacks Copper Project assessment, the Executive Committee at least appears to recognize these broader considerations but stops short of dealing with them in recommendations. Instead, it offers some tentative “suggestions” relating to the potential benefits of impacts and benefits agreements and related instruments, the need for monitoring by the proponent and the involvement of “stakeholders” in closure planning.

A useful point of comparison here is the environmental assessment regime in the Northwest Territories which, over the past dozen years, has taken a more innovative approach to mitigation for the socio-economic impacts of projects. The assessment bodies (first the Canadian Environmental Assessment Agency and then MVEIRB) have proposed, and government regulators have helped to promote, establishing a range of processes and instruments to deal with these impacts—including socio-economic agreements, impacts and benefits agreements, and project-specific and regional socio-economic monitoring boards (see

Galbraith et al. 2007, Bankes 2007, O’Faircheallaigh 2007, Mackenzie Gas Project Socio-Economic Agreement 2007).

YESAB’s limitations are clearly rooted in the legal requirements of YESAA, as noted above (see sections 42 and 56). These requirements seem to coexist uneasily with the spirit of the Act and its stated purposes, most notably in section 5(2)(e) which is “*to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend...*” Similar tensions can be found in YESAB’s *Guide to Socio-Economic Effects Assessment* (2006). This *Guide* refers to socio-economic assessment as “*the systematic analysis of the likely effects a proposed project will have...*”, and to the need to consider “*how will a project contribute to the sustainable development goals*” of a community. But, it also insists that: “*Potentially adverse and beneficial effects both contribute to the assessment, although the recommendations at the conclusion of the assessment are based on whether there are significant adverse effects that can’t be mitigated*”.

The approach to socio-economic impact assessment in the Yukon stands in contrast to a growing trend in Canadian (and international) assessment policy and practice towards “sustainability-based assessment”. Robert Gibson notes that “*the central concern of sustainability-based assessments is what effects the proposed undertaking may have on the current prospects for progress towards sustainability...*” (Gibson 2007). Several prominent project assessments have recently made use of a “sustainability-based” framework, including the Whites Point Quarry and Marine Terminal Joint Panel Review (Nova Scotia), the Voisey’s Bay Mine and Mill Project Joint Panel Assessment (Northern Labrador) and the Red Hill Creek Expressway Federal Panel Review (Ontario). Perhaps most notable is the ongoing Joint Review Panel of the proposed Mackenzie Gas Project in the Northwest Territories and Alberta. This latter review has made explicit reference to “sustainability” criteria in its deliberations, guideline documents and public statements (see Gibson 2006).

According to Gibson, sustainability-based assessments are guided by five requirements:

- “*ensure every undertaking makes a “positive contribution to sustainability” (“positive contribution” means a much higher test than just to ensure mitigation of significant adverse effects; “to sustainability” means attention to lasting effects – the legacy of the project);*
- *pay attention to all key areas of improvements needed for progress towards sustainability, including both local and global aspects, recognizing that they are all deeply interconnected;*
- *focus on identifying the best option and achieving multiple, mutually-reinforcing and lasting gains;*
- *address and justify trade-offs explicitly; and*
- *accept the broader overall need to build a culture of sustainability, as well as, to make better individual decisions.” (Gibson 2007)*

There are two additional gaps or shortcomings in the YESAA regime's approach to socio-economic impact assessment that the Review Team believes should be highlighted. First, the assessments we studied gave hardly any consideration to the impacts of projects on culture, especially on "cultural impacts" as identified by First Nations. The requirement to assess cultural issues clearly flows from the definition of "socio-economic effects" in the Act which include "effects on economies, health, culture, traditions, life-styles and heritage resources." This is further confirmed in YESAB's *Guide to Socio-Economic Effects Assessment* which defines cultural effects as: "Any effect on the set of values, norms and beliefs that guide the behaviour of individuals who associate with each other in a communal way... Cultural effects are included under the umbrella of SEIA." (Guide, Glossary of Terms)

To date, socio-economic impact assessments undertaken under the YESAA process generally seem to have either given little attention to these kinds of cultural impacts or to have overlooked them entirely. Heritage impact assessments focus mainly on the need to preserve and maintain "heritage resources" as narrowly defined in the Act, and show less concern for project impacts on larger "heritage" or "cultural" values like traditions or lifestyles (see Heritage Assessments discussion in Section 3.2.1 (d)). Similarly, YESAB's assessments of regional and community socio-economic impacts examine project effects on health and safety, employment, training, community services and infrastructure, and land use but give much less consideration to impacts on the complex cultural dimensions of community life.

Assessment regimes elsewhere in Canada are starting to give serious attention to the need to assess "cultural" impacts as an integral part of socio-economic impact assessments. An example of this trend in assessment practice worth noting is in the Northwest Territories, where MVEIRB is in the process of developing new cultural impact assessment guidelines. A recent Board circular identifies elements of Aboriginal "culture" as including: traditional knowledge; commonly held values; oral history; spiritual practice; language; physical heritage resources; traditional dances and songs; place names; spiritual sites and cultural landscapes; traditional land use; and, values associated with the land (see MVEIRB 2009). As MVEIRB notes:

"Cultural impact assessment is not just about "bones and stones" – the identification of physical heritage resources. Communities want to be involved in the identification of relevant criteria and indicators linked directly to valued components of cultural vitality and community wellness, and the collection and interpretation of this data. Tapping community knowledge is important when gathering and assessing such data."

Second, the Review Team recognizes the widespread concern shared by participants in this Review about the lack of comprehensive or credible data and information on socio-economic conditions and trends in the Yukon. The First Nation Caucus's joint submission is noteworthy for its identification of a variety of shortcomings and gaps in existing socio-economic baseline data, in particular:

- “*data sources are extremely varied and little data is consolidated across data sources;*
- *trend data, which is encouraged by the YESAB’s Socio-Economic Assessment Guide, are not readily available on most of the cited indicators, especially for Yukon communities and regional data;*
- *existing data from custom surveys for select communities, indicators or relevant subject areas are not readily available or publicized;*
- *indicators and supporting data to document the form, function and trends of Yukon First Nations’ traditional economies are woefully inadequate.”*

The above submission, as well as others, raise important questions about the adequacy of the information base that YESAB relies upon to identify and determine the significance of the socio-economic impacts of projects, as well as the mitigation measures it proposes to address them.

The Review Team was unable, within the period of this Review, to examine in any systematic fashion the socio-economic baseline information that currently exists in the Yukon, in terms of either its quality or accessibility, to independently validate opinions provided on this topic. We did, however, review copies of the State of the Environment Reports which the Yukon Government is required to prepare under the *Yukon Environment Act*. These reports are required, among other things, to “*present baseline information on the environment*” with the “environment” defined to include “*all social and economic conditions affecting community life...*” Our review found that between 1995, when the first full Report was prepared, and 2006, when the most recent interim Report was published, the main focus was on biophysical aspects of the environment with very little presentation or tracking of socio-economic factors like community wellness, cultural vitality, or stressors on people.

Observations

- 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.
- YESAB assessments focus on the negative socio-economic impacts of projects and their mitigation to the exclusion of consideration of positive impacts or of how projects contribute to sustainability.
- There is no legislative and policy framework that requires concerted attention be given in YESAA assessments to the need to ensure long-term durable or “sustainable” socio-economic benefits from projects.
- Decision Bodies and regulators face significant challenges in implementing measures to effectively mitigate the socio-economic impacts identified in YESAA assessments.
- There is a lack of up-to-date and accessible data on socio-economic conditions and trends in the Yukon, particularly relating to First Nation people and communities.

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

Recommendations

- The parties to the UFA and YESAA should give careful consideration to the possibilities for incorporating “sustainability” requirements into assessments being conducted under YESAA. This will likely require both legislative and policy changes, but it may well result in an assessment regime that more effectively achieves the broader objectives of the UFA and the purposes of the Act.
- Amendments are needed to the Act and new policy guidelines should be developed by YESAB, which specify how considerations of socio-economic sustainability are to be incorporated into assessments of socio-economic 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.
- 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.
- 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.
- 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.

g) Strategic Assessments (Plans, Policies, Programs)

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)).

To date, no strategic assessments of "plans" or studies have been carried out by YESAB. The 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.

Analysis

Through interviews and written submissions, both First Nation governments and Yukon government departments stated support for the use of "strategic assessments" by YESAB. They believe that by taking a more comprehensive, strategic approach to "plans", YESAB will be better placed to assess their potential impacts—including cumulative effects—before these issues arise from specific projects. Such assessments would enable YESAB, as well as Decision Bodies, to learn about the environmental and socio-economic values and interests at stake in plans, policies and programs before they are dealt with at the project level. With the results of strategic assessments in hand, YESAB should be able to undertake project-specific assessments more effectively, with more certainty, and at less cost to participants.

The Yukon Government maintains, for example, that strategic assessments could prove more effective than project-specific assessments for addressing the impacts of proposed agricultural sub-divisions, forestry projects and staged infra-structure improvements. Similarly, First Nations—notably the Ta'an Kwach'an Council—argue that such assessments of the Territorial government's agricultural and rural residential policies could help them to deal with cumulative effects of development in their traditional territories.

At the same time, the governments in the Yukon note the significant challenges they face in making use of the strategic assessment provisions of YESAA. As presently worded, the Act requires that reviews of plans be conducted by Board panels, created by the Executive Committee and only at the request of a federal or a territorial minister or of a First Nation. The establishment and undertaking of a panel could be a complex and lengthy, and this appears to be a key factor in deterring governments from making these requests. Section 104 of the Act allows for the Executive Committee to consider "*whether there is a more appropriate body by which, or process under which, the plan could be reviewed*" but provides no direction on what these alternatives might involve. The substantial costs of a panel review are also a consideration, particularly for First Nation governments which apparently—under the Act (see s. 103 (1))—

must meet these costs if they request a review and other governments are not prepared to pay. In addition, developing a policy and possibly a regulatory framework for the conduct of strategic assessments will require a significant commitment of resources from YESAB and from governments.

In considering how to deal with these challenges, YESAB and the parties to the UFA need to carefully consider the experience of other jurisdictions in Canada with strategic assessments. Strategic assessments or their equivalents are increasingly being undertaken in a variety of forms at the federal and territorial levels in Canada. One well-known approach is that taken by the Government of Canada, which has responded to the requirements for strategic assessments under the *Canadian Environmental Assessment Act* by issuing a series of policy guidelines and Cabinet Directives—most recently *The Cabinet Directive on the Environmental Assessment of Policy, Plans and Project Proposals* (last updated in 2006).

A valuable source on “best practices” can be found in the report by B.F. Noble and J. Bronson prepared for the Minister of Environment’s Regional Advisory Committee, and entitled *Models of Strategic Environmental Assessment in Canada* (Noble and Bronson 2007). A quick review of the Canadian literature suggests that strategic assessments, despite their variety, share two core purposes: 1) to ensure the integration of environmental considerations into the planning, design, approval and implementation of government policies, plans and programs, and 2) to increase the effectiveness and credibility of strategic decisions made by governments.

A particularly useful guide on the design of strategic assessment regimes is the report prepared by Benevides et al. (2008) for the Canadian Environmental Assessment Agency, entitled *Law and Policy Options for Strategic Environmental Assessment in Canada*. It analyzes 18 key process design requirements for a strategic assessment regime, ranging from “*clear statement of process purposes, centered on commitment to sustainable development or the equivalent, with appropriate evaluation and decision criteria*” to “*procedures for monitoring, review, iterative learning and identification of needs for corrective action and implementation.*” It argues convincingly that effective strategic assessment depends on an integrated legislative and policy framework, with “*core process and substantive requirements set out in legislation or regulations and additional more flexible requirements and guidelines outlined in policy.*”

Observations

- 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.
- Strategic assessments are a potentially valuable tool for addressing the cumulative effects and other broad sustainability issues that cannot be adequately dealt with at the level of project-specific assessments under YESAA.

- The implementation of the “strategic assessment” provisions of the Act face several inter-related challenges, which can only be successfully resolved through a combination of regulatory and policy changes in the Yukon.
- More flexible and streamlined mechanisms and processes must be developed as alternatives to the panel reviews currently required under the Act for undertaking strategic assessments.

Recommendations

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

3.2.3 Decision Phase

a) Decision Bodies

Summary of Issue

The 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.

Analysis

A decision body is the government or agency that has the power to issue an authorization in order for a project to be undertaken in the Yukon. While the definition provided in the Act is too long to repeat here, generally, a decision body may be a First Nation government, the territorial or federal minister designated under the Act or a federal agency, dependent on the location of the project, with powers to grant interest in the land, or who has been requested to

provide financial assistance for the project, and the respective powers to issue or grant authorizations.

Other than through the definition of decision body, the Act 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. The Act allows for more than one decision body on a project, depending on the project location and authorizations required.

There are examples where there have been disagreements between “declared” decision bodies as to whether the authority is justified. This has generally occurred where the Yukon Government does not agree that a First Nation government should be a decision body. In project 2008-0033 Erich Rauguth – Bonanza Creek and Cripple Creek, the Tr’ondëk Hwëch’in First Nation identified itself as a decision body based on the fact that the proposed project was located partially on settlement land. Two decision documents were issued for the assessment rather than one consolidated version. The Yukon Government rationale for this is expressed in its decision document:

“The First Nation determined they were a Decision Body, contrary to section 18.3.2 of the Final Agreement. Yukon government does not consider Tr’ondëk Hwëch’in a Decision Body for this project.”

S. 18.3.2 of the Final Agreement states:

“Any Person having an Existing Mineral Right on Settlement Land has a right of access, for purposes of exercising that right, to use that Parcel of Settlement Land without the consent of the affected Yukon First Nation, where provided by Laws of General Application.”

The Review Team was told by the Yukon Government that there have been conflicting views as to whether this clause means that in such cases a First Nation is or is not a decision body for such projects.

One possible consequence of disagreements regarding who is and who is not a decision body is the issuance of potentially conflicting decision documents for a project. Under s. 86 of YESAA, the Yukon Water Board may not issue a water licence or set licence terms and conditions that are contrary to a decision document. If the Yukon Water Board receives conflicting decision documents from multiple decision bodies they are bound to implement both. A second consequence is potential confusion and uncertainty for project proponents as to who are the applicable decision bodies.

The participation and coordination of decision bodies, as well as when in an assessment a decision body is identified, can affect the efficiency and effectiveness of the process. As was noted by several participants in the Review, there have been several project assessments where federal departments, especially those without offices in the Yukon, have not participated fully in the process when they clearly had a decision body role. This appears to be often the result of some federal departments not being aware they are a decision body until later in the assessment process. This has resulted in decision documents being issued at the last minute or after the legislated timelines due to the preparation of a consolidated decision document among decision bodies.

An example is provided in the Designated Office evaluation of project 2008-0019 Albert Creek Bridge Repairs and Temporary Detour. The Yukon Government Department of Highways and Public Works was the proponent and Transport Canada was the decision body who self-declared late in the process. The proposal (Form 1) prepared by the proponent identified Transport Canada as an authorizing agency and on January 24, 2008 the assessor sent a notification to organizations likely to be decision bodies. The “seeking views” stage started January 28 and participants had until February 11 to provide comments. On the last day of the comment period Transport Canada sent a letter notifying the assessor that it would have to issue an authorization pursuant to the *Navigable Waters Protection Act* and that the proponent would be required to submit an application to Transport Canada’s Navigable Waters Protection Program. On February 22, 2008 Transport Canada wrote another letter to the assessor stating:

“The NWPP [Navigable Waters Protection Program] is unable to provide their assessment until a formal application is submitted for review and determination. We recommend that YESAB not issue their Recommendations until Transport Canada has the opportunity to provide specialist advice. The project cannot lawfully proceed until an NWPA [Navigable Waters Protection Act] determination has been made.”

The Evaluation Report was issued on February 25, 2008, in keeping with the Designated Office evaluation timelines, but a consolidated decision document (Yukon Government Highways and Public Works and Transport Canada) was not issued until April 1, 2008, after the 30-day period as required in s. 2 of the *Decision Body Time Periods and Consultation Regulations*.

In the view of the Review Team the above example points to the need for decision bodies to be “declared” early on/at the beginning of an assessment. While the bridge repair project was not a large or complex project, we recognize that similar occurrences for larger projects could result in potential adverse effects being missed during an assessment or unwarranted delays in project assessments and approvals.

Observations

- 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.
- Decision bodies identifying themselves late in a project assessment can hinder the effectiveness of the process.
- Due to the YESAA process being quite new it is likely that a lack of understanding of the Act and the process is causing some of the decision body problems.

Recommendations

- 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.
- 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.
- 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.

b) Treatment of Recommendations in Decision Documents

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 YESAB was another 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.

Analysis

Mitigation Measures

During this Review, the Review Team became aware of the continuing disputes between the YESAB and decision bodies over the appropriateness of mitigation measures it recommends to address the potential environmental and socio-economic impacts of projects. These disagreements have caused past frustration for both YESAB and government regulators, as well as for industry and non-governmental organizations in the Yukon. YESAB recommendations have been criticized by government departments and by industry for being “too prescriptive” or for being “unenforceable”. Some non-governmental organizations and First Nation governments have questioned the incidence of “variance” of YESAB recommendations, arguing that this erodes public confidence in the YESAA process and hinders YESAB’s ability to put forward creative proposals to mitigate the potential impacts of projects.

The Review Team sought to verify these concerns by reviewing a large number of project files in the Online Registry, with specific attention to how YESAB recommendations were dealt with by decision bodies. A significant number of “variances” of YESAB recommendations were found in many of the decision documents that were examined. In some cases, over 50% of these recommendations were varied by the decision maker(s).

A variety of rationales have been given by the decision bodies, including: duplication, impracticality, the overly prescriptive nature of some recommendations, their unenforceability, reliance upon guidelines from other jurisdictions, and the lack of legal instruments in Yukon to implement them. Similar rationales were sometimes also offered by YESAB to justify its proposed mitigation measures—notably in an Evaluation Report by the Dawson Designated Office that observes “*there are virtually no guidelines in Yukon for constructing sumps in permafrost environments...*” and that the Yukon Government has adopted “*regulatory tools based on Alberta models, and there is concern that these may not be appropriate for the unique environmental conditions and sensitivity of the Eagle Plains area...*” (#2008-0047 Northern Cross-Summer Drilling Program). We note that instead of rejecting YESAB recommendations, decision bodies typically delete them as part of their “variances” (examples may be found in many Decision Documents).

The differences that have arisen between YESAB and decision bodies are clearly illustrated in how Decision Documents have treated recommendations from Designated Offices on local solid waste facilities. The Whitehorse Designated Office’s Evaluation Report on the Braeburn Solid Waste Facility (2008-0269) justified a prohibition on open burning of solid waste in this way:

“This mitigation is based on the recommendations from comments received to the assessment and research into other jurisdictions of Canada. It is recognized that the Yukon Government, Department of Environment has expressed that a “no open burn” recommendation cannot be

accepted at this time; however, the reasoning is based on current limitations of regulatory requirements and the lack of financial means of the proponent. It is the assessor's opinion that these rationales do not decrease the effect of air emissions on the environment and people. Therefore, the recommendation to prohibit the open burning of solid waste is the only option the assessor is aware of at this time that will adequately reduce the activity of burning solid waste that is causing a significant adverse effect."

In response, the Decision Document varied this recommendation and required instead that the proponent develop a plan to manage solid waste without open burning. Its rationale was:

"While the Yukon government supports practices that will reduce environmental impacts, we acknowledge that currently there is no legislative prohibition on burning solid waste. The application of such restriction needs to be considered in the context of an overall waste management policy and be applied consistently with appropriate enforcement mechanisms. In the absence of such it is not appropriate to apply this restriction at this time; however, the condition as rewritten will focus attention on the need to consider alternatives to open burning.

The Review Team is not able to judge the merits of these different positions on appropriate mitigation measures for waste facilities or, more generally, to evaluate other disputes that have arisen between YESAB and decision bodies. However, we note with interest that decision bodies accepted all of the dozens of recommendations made by the Executive Committee in relation to the proposed Carmacks Copper and Carmacks Stewart-Minto Spur Transmission Projects (# 2006-0050 and # 2006-0286). This is significant as both projects are of a substantial size and could have many potential environmental and socio-economic impacts. The fact that the YESAB and decision bodies could reach such substantial agreement on mitigation for these two projects is impressive, and they should be encouraged to take this cooperative approach when dealing with the requirements for other projects.

A crucial issue at stake in YESAB's past disputes with decision bodies concerns the nature and extent of the legal authority and responsibility of these bodies. In a number of instances, decision bodies have rejected or "deleted" YESAB recommendations on the grounds that they are either unenforceable or fall outside their legislative mandate. They (decision bodies) have been criticized by participants in this Review for taking an overly restrictive view of the limits of their legal authority, and thereby sometimes failing to implement effective mitigative measures where these are required for projects. Such criticisms were directed in particular at the Yukon government, which has been responsible for issuing most of the Decision Documents and project authorizations under the YESAA process.

On this matter, the Review Team agrees with the position of YESAB. Its *Guide to Socio-Economic Effects Assessment* insists that "lack of a 'regulatory home' doesn't exempt parties from responsibility to mitigate likely significant adverse effects". In our opinion, YESAA vests broad authority (and

associated requirements) in governments to implement decision documents (under subsections 82(2), 83(2) and 84(2) of the Act). In the case of Yukon Government, it is the “Decision Body” and simply delegates this authority to individual departments. As such, it has a broad authority to make use of the whole range of legal instruments at its disposal to ensure that appropriate terms and conditions—including mitigation—are included in its decision documents.

As well, subsection 83(2) of the Act requires every territorial agency or municipal government enabling a project to be undertaken to implement the decision document “*to the extent of its authority.*” We believe that in many cases this “authority” should be construed broadly rather than in a narrow sense. The Review Team is of the view that the authority of Yukon Government departments and agencies may contain a certain amount of discretionary power when it comes to implementing YESAA Decision Documents.

One example of where such discretion could have been exercised can be found in the decision body’s treatment of YESAB recommendations relating to the Game Farm Expansion – Ag. Land Application 61-3 (#2008-0118). The Decision Document issued by the Yukon Government’s Department of Environment varied a recommendation to install double game fencing, stating that “*at this time double fencing is not a regulatory requirement.*” Although the *Game Farm Regulations* (OIC 1995/015) do not currently require double game fencing, the Minister has the authority, under s. 4(5) of those *Regulations*, to “*impose different conditions for different licences*”. In our view, it was within the authority of the Minister to accept the assessor’s recommendation for double game fencing and to impose it as a condition of the proponent’s licence.

YESAB’s *Guide to Socio-Economic Effects Assessment* argues that “*Efforts by all parties should be made to ensure that those mitigation measures that don’t appear to have a regulatory home find some way to be implemented and enforced*”. The Review Team wishes to underscore the importance of this position. We encourage decision bodies and regulatory authorities in the Yukon to give serious consideration to more innovative approaches to the task of implementing effective mitigation measures for projects that go through the YESAA process. Valuable models of workable and cost-effective mitigation and monitoring programs can be found in other jurisdictions, for example in the Northwest Territories, which has made creative use of mechanisms like environmental and socio-economic agreements and environmental monitoring agencies to address the impacts of major development projects (see Galbraith et al. 2007). The merits of the regulatory approach proposed in the draft “*Permit Enforcement Legislation*” prepared by Yukon First Nations should also be examined.

Further, in this regard, s. 32 of the Act provides for YESAB to make rules on the development of “standard mitigation measures” by Designated Offices or the Executive Committee. The Review Team understands that the Board has been developing these rules in consultation with various parties, but it has not yet made them public or implemented them, nor were they

shared with the Review Team. Without any other knowledge of the results of this work, we can only encourage the Board to complete it in a timely fashion.

Assessor – Regulator Interface

The past disputes over YESAB recommendations raise larger questions about the nature of the relationship between the assessors and the regulators under YESAA. During this Review, the Review Team heard strongly divergent views on where the line should be drawn between these two sets of functions, and on how they can best be integrated.

Some companies, business organizations and government departments called attention to YESAB's perceived tendency to take on responsibilities that they felt should be left to decision bodies and regulatory authorities. They also expressed concerns about the consequences of "splitting" the assessment and regulatory functions, which has led to overly complicated and time-consuming project assessments. At the same time, many First Nation governments, non-governmental organizations, and renewable resource councils argued that the YESAA regime is an improvement over previous assessment processes in Yukon, in that impact assessments are now conducted by an independent body rather than by government departments that are often proponents or promoters of projects.

In the same vein, several companies and Yukon government departments maintain that YESAB should confine its assessments to the broad conceptual level, and focus on the potential impacts of projects, their significance, and the mitigation of significant adverse effects. Against this, various non-governmental organizations and First Nations believe that YESAB has a clear mandate to comprehensively assess the environmental and socio-economic impacts of projects, and that it must do what is necessary in order to fulfill this responsibility.

The Review Team is in no position to suggest any definitive resolution of these issues. We do note that, although there is still some uncertainty, the basic intention of the Parties who negotiated the key feature of the development assessment regime in the UFA was apparently to establish a unique assessment process, in which the assessment function was performed at arm's length from, and prior to, the work of regulatory authorities. This marked a significant departure from the CEAA regime that previously applied in the Yukon, in which regulators or "responsible authorities" played a primary role in screening project proposals. The independence of YESAB and the distinctive nature of its assessment responsibilities seem to us to be confirmed by various provisions of the Act, including its statement of purposes, perhaps most notably: "*(a) to provide a comprehensive, neutrally conducted assessment process applicable in Yukon.*"

In the final analysis though, the appropriate balance between assessors and regulators under the YESAA will not found through interpretations of the Act itself, developments in common

law, the examples of other jurisdictions, or in the theoretical literature on impact assessment. This will only be achieved at the practical level in the day-to-day interactions of the assessors and regulators. The YESAA regime is still relatively new, and its practices, policies and regulations can be expected to evolve as it gains more assessment experience—as will the relationships between YESAB and decision bodies. In the Review Team’s view, the Board and decision authorities need to continue to find ways to work together more effectively if this evolution is to be a progressive one.

Observations

- 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.
- Decision bodies are taking a very narrow interpretation of their responsibilities and authorities when it comes to the task of implementing appropriate terms and conditions to address project impacts in their decision documents.
- 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.
- A common understanding has not yet developed in the Yukon of the respective roles and responsibilities of assessors and regulators, and of how these can best be integrated under the YESAA regime. This results in continuing disagreements about the appropriate dividing line between the assessment and regulatory functions in project assessments.

Recommendations

- An ongoing forum should be created to enable YESAB and decision bodies in the 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.
- 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.
- “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.

3.2.4 Regulatory Phase

a) Follow-up and Monitoring

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 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 very 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.

Analysis

A “follow-up” program is now increasingly considered to be a crucial component of environmental assessment practice in federal, provincial and territorial jurisdictions in Canada and in other countries. The International Association of Impact Assessment refers to environmental assessment follow-up as: “*the monitoring and evaluation of the impacts of a project or plan (that has been subject to [assessment]) for management of, and communication about, the environmental performance of that project or plan*” (Morrison-Saunders et al. 2007). The literature on environmental assessment generally identifies two core objectives of follow-up—determining whether predictions about environmental and socio-economic effects of projects are confirmed by their actual results, and whether the mitigations proposed and implemented to deal with these impacts are successful. Follow-up requirements are now being taken into account in all stages of environmental assessment processes, from the initial project design and planning

stages, continuing through all the phases of the “project cycle” including closure and abandonment.

Guidelines on environmental assessment follow-up prepared for the International Association of Impact Assessment highlight four key interrelated components of an effective follow-up program (Morrison-Saunders et al. 2007):

1. *Monitoring* – the collection of activity and environmental data both before (baseline monitoring) and after activity implementation (compliance and impact monitoring);
2. *Evaluation* – the appraisal of the conformance with standards, predictions or expectations as well as the environmental performance of the activity;
3. *Management* – making decisions and taking appropriate action in response to issues arising from monitoring and evaluation activities; and,
4. *Communication* – informing the stakeholders about the results of follow-up in order to provide feedback on project/plan implementation as well as feedback on environmental assessment processes.

First Nation and municipal governments, non-governmental organizations, renewable resource councils, and members of the public all raised questions about the quality of follow-up and monitoring under the YESAA process. There is widespread concern in the Yukon that insufficient attention and resources have been devoted to its “back end” of the YESAA process; that is, what happens after an environmental assessment is completed. First Nations stressed the need for feedback from follow-up and monitoring as an essential mechanism to ensure that the YESAA regime progressively improves in its ability to meet the objectives/purposes of the UFA and the Act, and to protect values of importance to Yukon First Nations. The Yukon Government emphasized the need for regional and cumulative effects monitoring and studies as one significant means of increasing the effectiveness of the YESAA regime.

It is beyond the scope of this Review to confirm these concerns by examining all follow-up, including monitoring activities that have been or that are being carried out under YESAA, especially those for which project proponents and regulators are responsible. Instead, the Review Team focused on seeking to determine whether, and to what extent, YESAB and Designated Offices have attempted to implement the “follow-up” provisions in the Act. With this in mind, we looked at a range of project files from the YESAB online registry, giving particular attention to assessments of larger projects and to assessments that were completed before 2008 (on the assumption that monitoring and other follow-up programs would be in place by now).

Documents from the following project files were examined:

- 2005-0029 Tributaries Kluane Lake;

- 2006-0050 Carmacks Copper Mine;
- 2006-0057 Raven's Ridge Country Residential Subdivision;
- 2006-0081 Placer Mine;
- 2006-0182 Lucas/Residential Land Development-Fish Lake Road;
- 2006-0302 Agricultural Land #787-1(Shallow Bay);
- 2006-0286 Carmacks Stewart Transmission Line;
- 2007-0052 60 Mile Placer;
- 2007-0145 Wernecke Winter Road;
- 2007-0148 Ketz River Project;
- 2007-0150 Fish Lake Hydro;
- 2007-0206 Silverhart Mine Development and Production;
- 2007-0219 Northern Cross-2008 Winter Drilling;
- 2008-0039 Bellekeno Advanced Exploration;
- 2008-0070 Yukon Queen II;
- 2008-0112 Eagle Plains Resource Assessment Program (Northern Cross);
- 2008-0118 Fame Farm Expansion-Ag. Land Application 61-3; and,
- 2008-0289 Advanced Exploration at Mactung Property.

Our review of this cross-section of YESAB files came up with the following results.

In only one instance did either the Designated Office Evaluation Reports or the Executive Committee Screenings make a specific recommendation that an audit or an effects monitoring program be included among the follow-up measures for a project. This was the Evaluation Report by the Dawson Designated Office on the proposed Yukon Queen II project, which included several recommendations relating to effects monitoring. However, this project was referred to the Executive Committee for screening so the project does not yet have a completed assessment. Neither of the Screening Reports on projects issued by the Executive Committee (2006-0050 and 2006-0286) contain recommendations relating to follow-up measures.

In only one instance did a Decision Document require that the results of a monitoring program be reported to YESAB. This resulted from an Evaluation Report by the Dawson Designated Office on the Eagle Plains Resource Assessment Program (#2008-0112), which recommended the implementation of a "matting monitoring program". This recommendation was slightly varied by the Decision Body to read: "*Results of the matting monitoring program on the lease site shall be submitted to YESAB, ER-O & G Branch and EMR-CS & I in a timely manner.*" The purpose of this program however wasn't specifically identified in either the Evaluation Report or the Decision Document as being related to "effects monitoring."

Although all the project files contained copies of the Decision Document or Documents issued in response to an Evaluation Report or a Screening Report, a number had no record of

subsequent authorization(s) issued and only one file also included a copy of an actual authorization (#2007-0219 Northern Cross Winter Drilling Program). None of these files contained any reports, studies or information from a project proponent or a regulator on actual environmental or socio-economic impacts of the project or on the results of the mitigation measures put in place through authorizations for that project.

There is no evidence in any of the files to suggest that YESAB, at either the Designated Office or Executive Committee levels, has conducted an evaluation of a project after an assessment to confirm the accuracy of its predictions about environmental and socio-economic impacts or the effectiveness of the mitigation measures it had proposed.

There is nothing in these YESAB files to indicate that YESAB has taken part in efforts to communicate information to the public in the Yukon about the environmental and socio-economic impacts of projects that have been subject to assessment under YESAA.

Observations

- YESAB is making very limited use of follow-up provisions in the Act.
- 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.
- Regulatory and/or policy guidelines have not been developed to provide effective guidance to assessors, regulators and project proponents on standard requirements for the design and implementation of “follow-up” programs for projects subject to the YESAA regime.

Recommendations

- YESAB should develop regulation or policy guidelines that detail when and how follow-up programs should be designed and implemented under the YESAA regime. This work should be undertaken by the three parties in close collaboration with YESAB, with input from the public.
- 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.

3.3 TRADITIONAL KNOWLEDGE IN THE DEVELOPMENT ASSESSMENT PROCESS

Summary of Issue

We 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 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

Analysis

Specific comments on incorporation of traditional knowledge by non-aboriginal review participants were rare – and the responses of several participants only deferred to the expertise of First Nations. Conversely, First Nation responses were extensive – offering a unique opportunity to reflect upon the state of current First Nation thinking about the role of traditional knowledge in assessments. While there is more dialogue that needs to happen in order to achieve clarity and consensus on a number of the issues, First Nation contributions to the review are an important step forward. For this reason and because this field of research is rapidly evolving in theory and practice, we are including an expanded analysis of key traditional knowledge issues drawing directly from First Nation submissions, case studies and the recent literature in Appendix B of this Report.

Traditional knowledge is defined in YESAA as “*the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and the environment, that is rooted in the traditional way of life of first nations.*” However, recent literature has noted that aboriginal ways of knowing are inseparable from embodied practice, experience and social dialogue – traditional knowledge is not just “rooted in” a way of life, it *is* a way of life (Nadasdy 2003; Legat 2007; Caine 2008). The concept of knowledge as “data” abstracted from the people who produce it is a construct of Western philosophy and science. The importance of keeping traditional knowledge in context is recognized in the YESAB *Discussion Document on the Incorporation of Traditional Knowledge into Assessments* (2006).

The YESAB discussion document acknowledges that this form of knowledge is primarily oral and/or visual. The companion document, *Assessors Guide to the Incorporation of Traditional Knowledge into Assessments* (YESAB 2006), points out the need for being adaptive to regional variation in approach to traditional knowledge. However, the same document lists a standard set of criteria for traditional knowledge submissions that includes the requirement for written statements that are presented in an “*organized, understandable and systematic way*” and “*distinguish between observations and inferences*”. Critics have noted problems caused by attempts to distil aboriginal traditional knowledge and subsume it within a science-based decision-making framework (Agrawal 1995, 2002; Cruikshank 1998; Tuhiwai Smith 1999; Nadasdy 2003; Millennium Ecosystem Assessment 2005; Ellis 2005). As Ellis puts it, “*traditional knowledge that has successfully navigated the scientization process becomes, in the eyes of conventional science and its practitioners, truthful, useful, and ultimately, powerful. This knowledge, however, has also been stripped of the characteristics that make it traditional*” (Ellis 2005).

First Nation participants in this Review pointed out that documentation and compilation of traditional knowledge is a time-consuming process that does not fit within the scope of YESAB timelines. Given that so many of the elders who lived year-round on the land for much of their lives are passing away, traditional knowledge baseline research has been identified as an urgent need. Much of the research that has been done was oriented to documenting land use and occupancy as the basis for land claim agreements. While an important source, these studies mainly document the spatial aspects of people’s relationship with the land. For the most part they do not encompass the stories, place names and associated ecological knowledge about the land that have been transmitted orally over the generations. To address this gap, a number of First Nations have initiated traditional knowledge studies over the years that have the potential to be extremely useful resources in assessments. The traditional knowledge is stored in a variety of formats (primarily analogue), including maps, audio and video recordings, transcripts, and reports. However, lack of funding and capacity are cited as key constraints to completing the studies, archiving the materials so that they can be accessed as needed, and engaging in analysis and revitalization activities so that the cultural and ecological aspects of this “baseline” can be fully understood and harnessed.

First Nation participants in the Review consistently referred to the cultural sensitivity of traditional knowledge as an obstacle to its incorporation into assessments and decision documents. Traditional knowledge submitted within the assessment process is considered to be *a priori* subject to the *Access to Information Act* because of YESAB's status as a public board. According to YESAB's *Assessor's Guide to the Management of Confidential Information* (2006), the responsibility for designating information as confidential rests with the Executive Committee. The burden of justification to support such a designation rests with the citizen or organization providing the information. This is widely viewed as a deterrent to providing such information at all, especially given assessment timelines. Moreover, under the *Access to Information Act*, public access to YESAB documents can be possible even if it is designated as confidential.

There is a clear challenge both for First Nations and assessors in establishing conventions of documentation that can point to the existence and validity of confidential and orally shared traditional knowledge while not exposing its contents to the public record. MVEIRB clarifies in its traditional knowledge guidelines that sensitive traditional knowledge can be shared through presentations with site specific content omitted; summaries of traditional knowledge study methods, conclusions, and recommended mitigations; and requests to file under confidential cover (MVEIRB 2005).

One Review participant suggested that difficulties in incorporating traditional knowledge in assessments reflect a broader societal lack of understanding of traditional knowledge within the Yukon: "*The Yukon doesn't yet understand First Nations perspectives or role as stewards of the land.*" This is a factor affecting not only non-aboriginal agents in the assessment process (industry, assessors, decision bodies), but also First Nations themselves. The majority of First Nation staff responsible for responding to development proposals are non-First Nation individuals trained in Western scientific methods. One review participant spoke to the challenges faced by First Nations, assessors and decision bodies alike:

It's really difficult to communicate a FN sense of the value of the land.... I use the word "creative," painting a picture. A salmon meal, the feeling when you wake up in the morning and there's frost and no development beside you. EMR will likely ignore such presentations as spurious.... The hurdles to communicating the values and having them understood and properly considered by YESAB are numerous. Firstly, the cultures from which assessors and YTG employees come are generally not First Nations cultures. While these individuals may have taken cultural training at some point, they are likely to have, at best, a rudimentary understanding of the basic values of First Nations. More importantly, they may have little feeling for what is being described and the importance of these things to the people. This general problem inhibits the ability of an assessor to fully understand the values described in any comment submission.

Project 2007-0044 Quartz Mining, Wolf River illustrates this point. In this case, the Teslin Tlingit Council provided a written summary of traditional knowledge about the socio-cultural values

of the area. The information was not referred to in the assessment report – and was only indirectly addressed through a recommendation restricting use of ATVs/mules/snowmobiles for recreational purposes. This mitigation was removed by the Decision Body, Yukon Environment and Natural Resources, on the basis that “*we cannot regulate the use of ATV’s, mules or snow machines; they fall below the Land Use thresholds*”. The Teslin Tlingit Council submission to the Review reflected on the possibility that the inability of the assessor to fully incorporate the traditional knowledge provided may have been caused by a failure of communication on the part of the First Nation:

“The challenge my colleague faced when attempting to concisely and convincingly describe the importance of this area to TTC is made clear by this comparison. The spirit behind her comments was lost in the translation. TTC has made comment submissions mirroring the dry, “impartial” academic language of YESAB. However, I believe that more creative media and methods for submitting comments would better communicate the First Nation position and values.”

In a counter-example, the Review Team was told that Vuntut Gwitchin First Nation Heritage Branch assists elders in communicating their traditional knowledge and in codifying this knowledge – and in at least one case (2007-0152 Quarry Pit Development for Wellsite Access Road, Eagle Plains - Northern Cross (Yukon) Ltd.) traditional knowledge submitted has affected an assessment. The two page Vuntut Gwich’in submission (028-2) briefly refers to traditional knowledge and values related to concerns about impacts on caribou, a burial site, and traplines in the area. While the assessment report does not explicitly refer to the traditional knowledge submitted, it does show recognition of these First Nation values and recommends a number of associated mitigations.

The First Nation Caucus Joint submission to this Review focused on the example of project 2008-0118 Game Farm Expansion – Ag Land Disposition 61-3 in which the Champagne and Aishihik First Nations opposed the project on the basis that game farming activities would violate traditional laws with respect to keeping wildlife in captivity. In considering this concern, the assessment report concludes that “*the proposed project will not result in a significant adverse effect to cultural values*” and recommends that the project be approved with no mitigations related to cultural values. The First Nation Caucus Joint submission to this Review offers a critique of this assessment, suggesting that it demonstrates a lack of understanding of the nature and implications of the traditional knowledge shared.

Contributing to the challenge of appropriately weighting traditional knowledge is a lack of clarity about who is responsible for verifying and validating traditional knowledge and what the criteria are for validation – especially in a cross-cultural context. YESAB’s *Assessors Guide* charges assessors with this role, providing a classification drawn from Usher (2000), along with science-based criteria for verifiability, repeatability, and testability. This contrasts with the traditional knowledge guidelines issued by MVEIRB, which outline an approach that assigns

the role of validation and verification to “*the aboriginal community or traditional knowledge holders in accordance with appropriate community specific protocols*” (MVEIRB 2005).

YESAB compiled rules for the conduct of evaluations in 2005 which included several directives related to traditional knowledge. The discussion paper and a guide related to incorporation of traditional knowledge were completed in 2006. The rules provide for incorporation of “*information, including traditional knowledge, which may not be admissible in a court of law*”. Traditional knowledge is also specified as one of the sources of knowledge along with science and other sources that must be accorded “*full and fair consideration*”. The discussion paper is based on a limited literature review, presenting background information and guiding principles. The guide provides specific direction on incorporation of traditional knowledge related to assessment mandate and process. Although the document is available to all parties in the assessment process (but not listed anywhere on the YESAB website), it is specifically addressed to assessors. The discussion document and guide do include a number of elements that are consistent with current best practices in traditional knowledge – including direction about the roles of traditional knowledge sources and proponents, as well as recommended principles for proponents. However, there was a remarkably low level of awareness of the existence of these documents beyond YESAB Board and staff members. These documents are not available except by request (meaning it is necessary to know they exist) – they are not referred to or posted on the YESAB website. First Nation participants in this Review were of the opinion that they had not been adequately involved in development of the guide and thus its legitimacy is in question.

The YESAB discussion paper does make reference to the traditional knowledge guidelines issued by MVEIRB, although at time of writing the MVEIRB guidelines were in draft form. These guidelines are available on the MVEIRB website, have been widely distributed in print format, and aim to provide guidance to all environmental impact assessment participants. There appears to be general acceptance of the guidelines by aboriginal communities in the Northwest Territories. Schuh (2005) points to three challenges faced by MVEIRB in developing the guidelines:

Firstly was dealing the misconception and resulting concern that these guidelines would or could regulate traditional knowledge. Secondly the Review Board had to deal with concerns over the sufficiency of the public involvement with the guidelines’ development. The third challenge was the difficulty in dealing with confidentiality and research ethics associated with traditional knowledge.

MVEIRB addressed these challenges head-on. Its traditional knowledge guidelines include a section outlining the role and importance of community traditional knowledge policies and guidelines (and a number of these are posted to the MVEIRB website). Participation in guidelines development over a period of two and a half years included a large general

workshop and development of a first draft based on the workshop; review of the first draft by selected workshop participants; and, publication of a second draft followed by a 15-week public consultation period conducted via letters, e-mails, faxes and phone calls. Finally, there was a round of community visits in 2005 to explain and discuss the role of the guidelines. As described above, MVEIRB also highlighted several ways in which sensitive and confidential traditional knowledge could be shared both outside and within the assessment process.

A robust traditional knowledge framework for assessments requires that First Nations possess their own documented traditional knowledge protocols and guidelines. This was made quite clear in the MVEIRB guideline development process. The Yukon First Nation Heritage Group developed a *Traditional Knowledge Policy Framework* in collaboration with First Nations from across the Yukon. The framework, authored by Brian MacDonald, a Yukon-based lawyer and member of Champagne and Aishihik First Nations, and Gillian McKee, a consultant employed by Kwanlin Dun First Nation, was approved by the Heritage Group in 2005 as a resource for use by First Nations in guideline development. The Framework had two main goals – to ease the development of heritage-related traditional knowledge policies at the self-governing First Nation level (as outlined in Chapter 13 of the UFA) and to assist with the effective implementation of YESAA. In 2006 the Heritage Group began implementing use of the Framework in 7 of the 15 First Nations in the Yukon and Northern BC (Taku River Tlingit) through a community outreach and education program (Gordon Foundation nd). At least one First Nation (Nacho Nyak Dun) has completed its own traditional knowledge guidelines.

Observations

- 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.
- The *Assessors Guide to the Incorporation of Traditional Knowledge* (2006) states that "*TK that is closer to its origin maintains its context and meaning, and this makes it more valid.*" The significance of this statement for proposal development, assessments and decision-making is not well understood.
- 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*".
- The assessment process is constrained by a lack of protocols for respecting the sensitivity and confidentiality of traditional knowledge within and outside the domain governed by the *Access to Information Act*.
- 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.

Recommendations

- 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.
- A joint YESAB-First Nation traditional knowledge guidelines development process should be initiated, building on the model established by the MVEIRB traditional knowledge and socio-economic impact assessment guidelines, and MVEIRB's ongoing experience in the development of cultural impact assessment guidelines.
- Funding support should be allocated in order that each First Nation government is able to finalize and publish traditional knowledge guidelines.
- 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.
- 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 that such a body could play.

3.4 ROLE OF FIRST NATION GOVERNMENTS IN THE DEVELOPMENT ASSESSMENT PROCESS

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).

Summary of Issue

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.

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. Federal government representatives didn't speak to the issue.

Analysis

The issue of how effectively First Nations participate in the YESAA process is an important, overarching question, given that the enactment of YESAA finds its origin in Chapter 12 of the UFA and the Final Agreements. These agreements acknowledge Yukon First Nations as governments and grant them substantial rights over lands and resources in the Yukon, not only on settlement lands, but also within their traditional territories. YESAA recognizes First Nations as "decision bodies" for certain projects occurring on their settlement land. However, their role in the development assessment process for projects occurring within traditional territories is not as clear.

The issue of the role of Yukon First Nations in the development assessment process is embedded into the larger question of whether or not, and to what extent, YESAA fulfills the Crown's constitutional duty to consult and accommodate. The Crown's duty to consult and accommodate Aboriginal peoples before making decisions in relation to projects that may affect them or their traditional territories is unique. Although the Supreme Court first mentioned the duty to consult in the context of the justification of infringements of Aboriginal or treaty rights (*Sparrow* 1990), later cases suggest that it cannot be so confined. The Supreme Court has emphasized that the duty is grounded in the honour of the Crown. It applies to the interpretation of treaties and exists independent of treaties (*Mikisew* 2005).

In a recent case (*Little Salmon/Carmarcks* 2008), the Yukon Court of Appeal stated that the duty to consult and accommodate is a constitutional duty which applies to the interpretation and implementation of the terms of a Yukon Final Agreement. The terms of a Final Agreement do not necessarily satisfy the constitutional duty to consult or do not incorporate all consultative duties of government. The government "*had to be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposed to dispose of Crown lands, and, when treaty rights may be affected, Yukon must seek consultation with First Nations*" (at para. 90).

The duty differs from a mere obligation of procedural fairness in its purpose, which is to advance the process of reconciliation between the Aboriginal and settler societies in Canada. It is both procedural and substantive. The duty to accommodate is the substantive corollary of consultation.

The courts have encouraged governments to set up regulatory schemes to address the procedural requirements of consultation. However, they have clearly stated that First Nations should not be treated as any other stakeholder in public participation or environmental assessment processes (*Mikisew* 2005). A statutory environmental assessment process may be deemed to discharge the duty to consult, provided that it sets out a scheme that specifically requires consultation with affected Aboriginal peoples (*Taku River Tlingit* 2004). But it is not enough to rely on a consultation process provided in legislation, as in the case related to the *Mackenzie Valley Resource Management Act* and MVEIRB (*Ka'a Gee Tu First Nation* 2007). In that case, the procedure followed until completion of the Review Board's Environmental Assessment Report provided opportunities for meaningful consultation, but a unilateral change of the Review Board's recommendations by the federal Crown without further consultation with the affected First Nation was deemed to be a breach of the duty to consult and accommodate. In other words, the duty to consult is not exhausted by establishing an adequate consultation procedure for the assessment process. A decision-maker still owes further consultation obligations when the ultimate decision departs from the assessor's recommendations (Bankes 2009).

This last point needs to be emphasized. If consultation with First Nations during the assessment stage results in the recommendation of mitigation measures, and these measures are subsequently rejected or varied unilaterally by a decision-maker, then the entire process may be tainted. It has been suggested that the environmental assessment process only represents the first stage of consultation, that is, collecting and evaluating relevant information so that a project's potential impacts are known and possible mitigation measures are developed. Once this is done, a different and separate political process, a government-to-government process, is required to complete the consultation and accommodation duty. This may take the form of an accommodation agreement (Pearse 2009). A government-to-government process at the decision-making stage is particularly important in the context of the Yukon where First Nations are "governments".

Yukon First Nations contend that the way in which YESAA is implemented fails to give their governments or citizens the substantive role envisioned in the UFA and in the Act, at all stages of the process. First Nations suggest that they are marginalized and that their perspectives and input are overlooked or discounted in the development assessment process. For its part, the Yukon Government feels that YESAA provides adequate participation for First Nations and gives full consideration to their values.

First Nations without final agreements, notably the Liard First Nation and Ross River Dena Council feel that they are disadvantaged by the provisions of YESAA, and that their rights and interests are not being adequately addressed by YESAB and by governments. The major concern of these First Nations revolves around the fact that s. 5(2), the purposes section of the Act, and s. 42(1)(g), only refer to "Yukon Indian persons". A "Yukon Indian person" is defined in s. 2 as "*a person enrolled under a Final Agreement*", thus seemingly excluding First Nations

without a settled claim. The concerns of these First Nations are not unique to the Yukon. In the Northwest Territories, the Dehcho First Nations have expressed similar concerns about the *Mackenzie Valley Resource Management Act*, claiming that First Nations in areas without land claims are not granted the same level of protection of their environment and their Aboriginal rights as those within settlement areas (Weibe 2007).

YESAB points out that it strives to provide opportunities to First Nations to participate in all stages of assessment, and that “*the level of input in assessments varies depending on the type of project, as well as the First Nation affected*”. YESAB feels that an improved dialogue between First Nations and the Board will help facilitate the increased participation of First Nations at various stages of the development assessment process.

Observations

- 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.

Recommendations

- 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 development of rules, guidance, and assessment policy documents
 - the project discussion phase, including project scoping and proposal adequacy
 - the decision phase
 - follow-up and monitoring
- The Government of Canada, Yukon Government and First Nations without final agreements should work together to resolve concerns with respect to YESAA implementation.
- 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.

3.5 NON-PROCESS ISSUES

a) Funding

Summary of Issue

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 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.

Analysis

With devolution in 2001 the Yukon Government was to receive from Canada “...a \$1.553 Million one-time payment ... each year between the Effective Date and the date at which Development Assessment Legislation comes fully into effect.” (Minister of Public Works and Government Services Canada 2001). Information on absorbed costs provided to the Review Team by the Yukon Government indicates that over and above any funding received from Canada, they experience shortfalls on the order of \$3 Million for YESAA-related activities.

Although it was not possible for the Review Team to conduct an evaluation of the funding levels for each government's participation in the YESAA process, it is our understanding that each Yukon First Nation receives annual base funding on the order of \$100,000 from Indian and Northern Affairs Canada. While such an amount may be adequate for one staff position and associated costs, this funding is likely limiting if multiple projects are being assessed within a First Nation's traditional territory or if larger projects are being reviewed that require the hiring of specialists to evaluate proponent information. Table 4 below shows the number of project proposals listed on the YESAB online registry for each Yukon First Nation territory since assessments got underway in November 2005. While the numbers make no account for level of assessment, complexity of project, or projects that may have been withdrawn, there are clearly differences between regions.

TABLE 4
NUMBER OF YESAA ASSESSMENTS PER FIRST NATION TERRITORY
SINCE NOVEMBER 2005

<u>First Nation Territory</u>	<u>Assessments</u>
Carcross/Tagish	85
Little Salmon/Carmacks	64
Champagne & Aishihik	153
Kluane	85
Ta`an Kwach`an	140
Kwanlin Dun	187
Liard	97
Nacho Nyak Dun	139
Ross River Dena	96
Selkirk	53
Teslin Tlingit	46
Trondek Hwech`in Han	179
Vuntut Gwitchin	21
White River	86

As stated in the Liard First Nation written submission,

“The actual funding amount received annually by Liard First Nation to fund YESAA-related activities is enough for our First Nation to a) have an office location and b) staff that location with a single individual. It is not sufficient to hire the expertise required to build capacity and provide the assistance to allow us to be full participants in assessing the projects proposed in Kaska Dena Keyah.”

The *Yukon First Nation Final and Self-government Agreement Implementation Reviews* report issued by the Parties and completed in 2007 looked at broader funding issues and concluded that “*the funding levels established under the UFA IP [Implementation Plan] and FA IP [Yukon First Nation Final Agreement Implementation Plans] have been determined to be inadequate.*” An Adequacy Working Group (AWG) established for the review found the following:

“With respect to FA [Yukon First Nation Final Agreement] funding adequacy, the AWG focussed on three areas of YFN [Yukon First Nation] responsibility: heritage, economic development, and land and resources. The discussion produced a range of estimates of the funding required by YFNs, but all agreed that current funding levels provided for implementation of the FAs are not adequate.”

In addition to the issue of funding levels, some First Nations are currently funded through contribution agreements which create onerous administration and reporting requirements. That is, funds are provided only on an annual basis rather than multi-year which would provide greater flexibility. These funding arrangements are not appropriate or effective for funding First Nation government needs and responsibilities under the YESAA process.

On the issue of participant funding, s.122(g) of YESAA states that the “*Governor in Council may enact a regulation that establishes a funding program to facilitate the participation of specified classes of persons or groups in reviews of projects*”. No regulation has been enacted to date and this provision is limited to a review by a Panel of YESAB, none of which has occurred. There is no similar provision for Designated Office evaluations or Executive Committee screenings. As stated in the YESAB written submission, “*Given that there are large complex projects that have been, and will continue to be, before the Executive Committee and Designated Offices, the parties to the 5-year review should consider whether this provision should be expanded beyond funding the review of projects.*” The Review Team agrees with this position.

Observations

- 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.

Recommendation

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

b) Need for Ongoing Reviews of the YESAA Process

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 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.

Analysis

The Yukon development assessment regime is still in its infancy, with project assessments only having been conducted since November 2005. While there have been over 900 Designated Office level assessments in about 3.5 years, there have only been five Executive Committee screenings (two completed, one withdrawn, and two in the adequacy review stage), and no Panel reviews during this period. As such, several aspects of the Act have yet to be fully tested. Additionally, the associated regulations have only been in existence since November 2005 so they too have not been fully tested.

From the Review Team’s perspective there was one major gap in the scope of the Review; that is, the review scope did not include the regulatory regime. While our mandate touched on the regulatory component we were directed to stop at the issuance of the Decision Document stage. In so far as the follow-up and monitoring requirements set by regulators may be very important for assessing assumptions of impact and whether mitigation measures are effective, the lack of review of this aspect of the process makes it difficult to adequately evaluate whether the development assessment process is in fact “*protect[ing] and maintain[ing] environmental quality and heritage resources*” (s.5(2)(c) of the Act) and “*protect[ing] and promot[ing] the well-being of Yukon Indian persons and their societies and Yukon residents generally, as well as the interests of other Canadians*” (s.5(2)(d) of the Act).

Observations

- The YESAA process is relatively new with numerous components of the Act not having been tested yet.
- There is a broad recognition that various aspects of the process need ongoing evolution (see YESAB rules changes).
- 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.

Recommendation

- 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.

4.0 Recommendations

Below is a summary recap list of the Review Team’s recommendations presented in the order in which they appear in the Report. Following this is a table (Table 5) which, for each recommendation, identifies what mechanism(s) will likely require review or change in order to respond to the recommendation (i.e., policy, guidance, legislation, etc.). While many of the recommendations throughout the Report suggest “leads” for responding to the issue, Table 5 does not provide guidance on this as, ultimately, it is up to the Parties to make these determinations during Phase 3 of this Review.

3.1 YESAB Administration

a) Community Engagement and Outreach

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

b) YESAB Rules, Guidance Documents

6. The YESAB should develop rules relating to project evaluations by Designated Offices that provide for “different types of evaluations for different categories of projects”.
7. The Board should make best efforts to finalize and make public any rules and guidelines that are still currently in draft form.
8. 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.

c) YESAB Capacity

9. 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.
10. 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.

3.2.1 Project Discussion

a) What Gets Assessed

11. 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.
12. Amendments should be made to revise the relationship with the *Canadian Environmental Assessment Act*.

b) Project Proposals

13. 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.

c) Project Scoping

14. YESAB should improve its scoping guidance to allow for more inclusive project scoping
15. YESAB should develop project scoping as part of the initial training program for assessors and the Board.

d) Heritage Assessments

16. 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.
17. 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.
18. 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.
19. 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.

3.2.2 Assessment Phase

a) Cumulative Effects

20. YESAB should organize research and participatory forums related to cumulative effects assessment for the purpose of educating assessment practitioners (YESAB, governments, proponents, non-governmental organizations, etc.) in best practices.
21. YESAB should adopt “best practice” in terms of application of the approach to “future projects” to bring YESAA practice in line with other jurisdictions.
22. The development and approval of regional LUPs should be made a priority.
23. 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.

24. 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.

b) Timelines

25. 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.
26. 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).
27. 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.

c) Level of Assessment

28. 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).
29. 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.
30. 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.

d) Determination of Significance of Environmental and Socio-economic Effects

31. 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.
32. YESAB should develop training programs and information opportunities to its assessors on significance determination.

e) Impact on Treaty Rights

33. 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.
34. 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.

f) Socio-economic Impact Assessment

35. The parties to the UFA and YESAA should give careful consideration to the possibilities for incorporating “sustainability” requirements into assessments being conducted under the YESAA process. This will likely require both legislative and policy changes, but it may well result in an assessment regime that more effectively achieves the broader objectives of the UFA and the purposes of the Act.
36. Amendments are needed to the Act and new policy guidelines should be developed by YESAB, which specify how considerations of socio-economic sustainability are to be incorporated into assessments of socio-economic 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.
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.
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.
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 Nations governments.

g) Strategic Assessments (Plans, Policies, Programs)

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.

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

3.2.3 Decision Phase

a) Decision Bodies

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.
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.
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.

b) Treatment of Recommendations in Decision Documents

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.
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.
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.

3.2.4 Regulatory Phase

a) Follow-up and Monitoring

50. YESAB should develop regulation or policy guidelines that detail when and how follow-up programs should be designed and implemented under the YESAA regime. This work should be undertaken by the three parties in close collaboration with YESAB, with input from the public.
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.

3.3 Traditional Knowledge in the Development Assessment Process

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.
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.
54. Funding support should be allocated in order that each First Nation government is able to finalize and publish traditional knowledge guidelines.
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.
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 that such a body could play.

3.4 Role of First Nation Governments in the Development Assessment Process

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
 - d. follow-up and monitoring
58. The Government of Canada, Yukon Government and First Nations without final agreements should work together to resolve concerns with respect to YESAA implementation.
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.

3.5 Non-process Issues

a) Funding

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

b) Need for Ongoing Reviews of the YESAA Process

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.

**TABLE 5
SUMMARY OF PROPOSED ACTION OR CHANGE REQUIRED
IN ORDER TO RESPOND TO THE RECOMMENDATIONS**

Recommendation Number (prefixed by Report Section number)	Type of Action/Change Required					
	Legislation	Regulations	Gov't. Mandate	Policy	Guidance and Rules	Education
3.1 (a)-1						•
3.1 (a)-2						•
3.1 (a)-3					•	
3.1 (a)-4				•	•	•
3.1 (a)-5					•	
3.1 (b)-6					•	
3.1 (b)-7						•
3.1 (b)-8						•
3.1 (c)-9						•
3.1 (c)-10	•					
3.2.1 (a)-11		•				
3.2.1 (a)-12	•					
3.2.1 (b)-13	•				•	
3.2.1 (c)-14					•	
3.2.1 (c)-15						•
3.2.1 (d)-16				•	•	•
3.2.1 (d)-17				•	•	
3.2.1 (d)-18				•	•	•
3.2.1 (d)-19						•
3.2.2 (a)-20						•
3.2.2 (a)-21				•	•	
3.2.2 (a)-22			•			
3.2.2 (a)-23	•					•
3.2.2 (a)-24			•			
3.2.2 (b)-25					•	
3.2.2 (b)-26					•	
3.2.2 (b)-27				•	•	
3.2.2 (c)-28					•	
3.2.2 (c)-29		•				
3.2.2 (c)-30	•					

TABLE 5 (cont'd)
SUMMARY OF PROPOSED ACTION OR CHANGE REQUIRED
IN ORDER TO RESPOND TO THE RECOMMENDATIONS

Recommendation Number (prefixed by Report Section number)	Type of Action/Change Required					
	Legislation	Regulations	Gov't. Mandate	Policy	Guidance and Rules	Education
3.2.2 (d)-31					•	
3.2.2 (d)-32						•
3.2.2 (e)-33			•	•		•
3.2.2 (e)-34				•	•	•
3.2.2 (f)-35	•			•	•	
3.2.2 (f)-36	•				•	•
3.2.2 (f)-37				•		•
3.2.2 (f)-38			•			•
3.2.2 (f)-39						•
3.2.2 (g)-40		•				
3.2.2 (g)-41				•	•	
3.2.2 (g)-42	•			•		
3.2.2 (g)-43			•			
3.2.3 (a)-44				•	•	•
3.2.3 (a)-45				•		•
3.2.3 (a)-46					•	•
3.2.3 (b)-47						•
3.2.3 (b)-48				•		•
3.2.3 (b)-49					•	
3.2.4 (a)-50				•	•	
3.2.4 (a)-51					•	
3.3-52			•		•	•
3.3-53					•	•
3.3-54			•			
3.3-55						•
3.3-56				•	•	•
3.4-57				•		•
3.4-58			•			
3.4-59				•		•
3.5 (a)-60			•	•		
3.5 (a)-61		•				
3.5 (a)-62	•					
3.5 (b)-63			•			•

5.0 Concluding Remarks

General Comments

SENES is pleased to have conducted Phase 1 and Phase 2 of the YESAA Five-year Review. The Review scope encompassed a vast land area and a broad spectrum of organizations and cultures. The Review occurred at a time when processes, organizations and governments were at varying stages of evolution and maturity both within the overall governance framework as well as with respect to the YESAA process. Control over land and resource development devolved to the Yukon Government on April 1 2003, YESAA came into force in May 2003, YESAB only began conducting assessments in late 2005, and several Yukon First Nations remain without final agreements.

In the context of this setting, SENES strived to establish a review framework and methodology that could be implemented in a manner respectful of all organizations and groups. Our work plan also needed to be consistent with the Terms of Reference and fiscal and time limitations of the project. To this end, the Review Team notes that the level of effort required to complete the Review to the expectations of the Parties was not commensurate with the labour budget allocated. Should similar reviews be conducted in the future we recommend a closer alignment of the Terms of Reference and the budget.

The fact that the scope of the Review did not include the regulatory regime is seen as a shortcoming by the Review Team. While our mandate touched on the regulatory component, we were directed to stop at the issuance of the Decision Document stage. In so far as the follow-up and monitoring requirements set by regulators are important for assessing assumptions of impact and whether mitigation measures are effective, the lack of review of this aspect of the process makes it difficult to adequately evaluate whether the purposes in the Act related to protecting and maintaining environmental, socio-economic and cultural aspects, and heritage resources are being met.

Another shortcoming the Review Team identified early on was the decision by YESAB, which was supported by the Steering Committee, to limit our access to YESAB assessment staff. We were directed to not contact Designated Office staff directly, rather YESAB's input to the Review Team was through a meeting with the Executive Director, Board representatives, and two Designated Office staff representing the six district offices. Given that nearly all assessments are conducted by Designated Offices, these staff are truly the frontline workers whose first hand insight into the functioning of the YESAA process would likely have been valuable to the Review Team.

The Review Team recognizes that not all of the issues presented to us during the issues scoping and information gathering phase are addressed in this Report. However, it is our view that the

issues presented, and accompanying recommendations, address the substantive aspects requiring improvement. It is our hope that the results of this Review will provide constructive information to the three Parties and those involved in the challenge of managing and protecting the biophysical and socio-economic environment of the Yukon within the commitments made in the UFA, First Nation Final Agreements, and YESAA.

Summary of Findings

Generally, the Review Team found that in conducting YESAA reviews for proposed projects: opportunities for public participation are provided; timelines for assessments have been established, with reasonable adjustments applied as necessary; and, a reasonable level of certainty about the assessment process is set out. While YESAA assessments were found to cover a broad range of environmental and socio-economic issues to differing degrees, in general, additional focus is required to ensure comprehensive assessments of the full scope of applicable heritage, cultural and socio-economic issues are completed, and to ensure that beneficial environmental and socio-economic aspects of projects are fully considered. Further, due to regulatory and institutional gaps, it is not clear that the YESAA process is fully managing potentially adverse impacts to all environmental components in an integrated manner.

Given the unique attribute of the YESAA process in including a broad consideration of socio-economic effects in addition to environmental effects, one of the most significant shortcomings identified is the absence of clear regulatory tools to assess and mitigate social, economic and cultural impacts from development. While a variety of non-regulatory approaches exist that could help address these potential impacts, they were generally not being used. We heard from many interested parties that such impacts are not being addressed to the same extent as biophysical impacts. While we agree, we were unable to determine if this has resulted in significant adverse impacts that can reasonably be addressed by the YESAA process. Nonetheless, there is a clear need for action to better consider a wide array of social and cultural issues within the YESAA process.

In addition to the management of socio-economic and cultural effects, other important limitations noted in the YESAA process included unresolved issues about the role of First Nation governments in the process, inadequate follow-up and monitoring to determine the accuracy of the conclusions of assessments and the effectiveness of mitigation measures, and the absence of land use plans and regional monitoring which are critical to adequate cumulative effects assessments.

Given the significant progress made since implementation of the YESAA process, we feel that many of the initial challenges, frustrations and uncertainty of process expressed throughout this Review can be overcome by continued evaluation of the process and commitment to improvement on the part of all parties.

6.0 References

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APPENDIX A

Final Issues Scoping Report



ISSUES SCOPING REPORT



Prepared For:
YESAA Five-year Review Steering Committee

Prepared By:
SENES Consultants Limited

May 2009



FINAL REPORT:

INFORMATION GATHERING AND ISSUES SCOPING

Prepared for:

YESAA Five-year Review Steering Committee

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May 2009



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EXECUTIVE SUMMARY

YESAA Five-year Review and Information Gathering

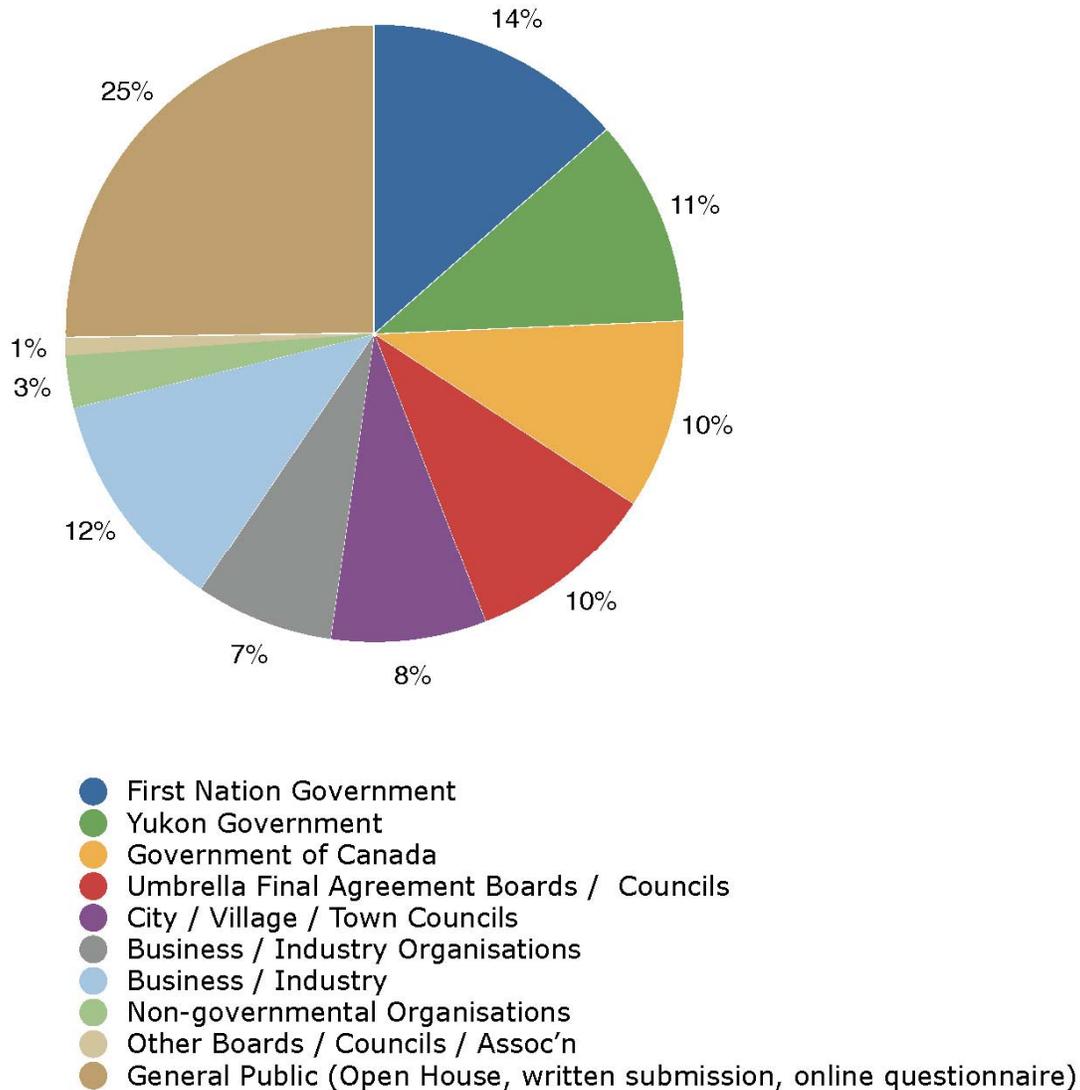
The Umbrella Final Agreement (UFA) requires the completion of a comprehensive review of the development assessment process within five years of the enactment of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). SENES Consultants Limited (SENES) was selected through a national competition by a Steering Committee made up of representatives of the Council of Yukon First Nations, Government of Yukon, and Government of Canada to conduct the YESAA Five-year Review. The purpose of the review is to examine Yukon's development assessment process in its entirety and in the context of the objectives of Chapter 12 of the UFA.

The YESAA Five-year Review consists of three phases: (1) information gathering and issues scoping; (2) issues analysis; and (3) response. This report presents the findings of Phase 1, during which the review team sought and compiled views on the development assessment process from a broad range of groups, including representatives of First Nation governments and citizens, Yukon Government, Government of Canada, UFA boards and councils, city/village/town councils, business/industry organisations, businesses/industry, non-governmental organisations, other boards, councils and associations, and the general public. Between January and March 2009 we conducted 78 meetings and received 71 written submissions. Figure ES-1 on the following page provides a summary of the groups who provided the review team with input (through meetings or written submissions) during the information gathering phase.

Report Purpose

The purpose of this report is to present issues identified to us through interviews and meetings with, and written submissions from, Yukon, Federal, and First Nation governments, business organisations, industry, non-governmental organisations, boards, councils, and the general public. It is not an analysis of the feedback provided, nor is it a validation of the issues presented to us. For the purpose of creating a manageable report, the review team did have to do some consolidation of concerns raised. The issues presented do not represent the opinions of the review team, but instead are a summary of perspectives voiced by the participants in the YESAA Five-year Review.

FIGURE ES-1
SUMMARY OF SOURCES OF INPUT RECEIVED DURING THE INFORMATION GATHERING PHASE



Summary of Issues

The review team heard from people that they have many concerns about the Yukon development assessment process and YESAA. However, we also heard from nearly all interviewees that there are some very good things about the new process. There was general support for the YESAA process as the means for assessing development projects in the Yukon, recognising it as an improvement over processes previously in place. Additionally, most participants noted that YESAB staff are helpful and responsive when approached, and that the YESAB online registry is a useful tool for enhancing public participation.

A summary of the issues heard is presented in Table 1.

**TABLE 1
SUMMARY OF THE ISSUES RAISED**

Issue	Summary of Issue
General / Broad Issues	
Cumulative Effects	<ul style="list-style-type: none"> • inadequate environmental and socio-economic cumulative effects assessment
What gets Assessed	<ul style="list-style-type: none"> • assessment triggers too high and too low
Balance / Interface of Assessors and Regulators	<ul style="list-style-type: none"> • roles and responsibilities of assessors and regulators in YESAA process • need for real “one window” approach
Mitigation Measures	<ul style="list-style-type: none"> • appropriateness of mitigation measures • variance and rejection of mitigation measures • socio-economic measures not covered • need for standard mitigation measures
Inconsistency Among Designated Offices	<ul style="list-style-type: none"> • similar projects assessed differently • public notices and mapping completely differently
Land Use Plans	<ul style="list-style-type: none"> • lack of land use plans compromises cumulative effects assessment • other resource guidance plans not being considered by assessors • no ongoing role for land use planning commission once a plan is approved
Development Assessment Process not Meeting Objectives of UFA / Purposes of YESAA	<ul style="list-style-type: none"> • YESAA process has failed to recognise First Nations’ special relationship with the land • Lack of substantive role for First Nations
Funding and Capacity	<ul style="list-style-type: none"> • inadequate funding for and capacity within First Nations • need for participant funding
First Nation Involvement in the YESAA Process	<ul style="list-style-type: none"> • inadequate role for First Nations
Development Assessment Process Issues	
Project Proposals	<ul style="list-style-type: none"> • inadequate project proposals being accepted • lack of mandatory information requirements • too much/too little detail being requested • heritage assessments lacking
Project Scoping	<ul style="list-style-type: none"> • projects scoped too narrowly
Evaluation of Input Received	<ul style="list-style-type: none"> • inadequate evaluation of information by YESAB staff • need for YESAB to hire specialists
Weighting of Input Received	<ul style="list-style-type: none"> • too much weight given to quantitative data and to scientific experts

TABLE 1 (cont'd)
SUMMARY OF THE ISSUES RAISED

Issue	Summary of Issue
Development Assessment Process Issues (cont'd)	
Timelines	<ul style="list-style-type: none"> • “seeking views” timeline too short • “seeking views” timeline begins before proposal is complete • established timelines are good, although sometimes too long
Level of Assessment	<ul style="list-style-type: none"> • need improved means for dealing with complex projects at Designated Office level
Paper Process	<ul style="list-style-type: none"> • process too reliant on the written word and internet submissions
Determination of Significance	<ul style="list-style-type: none"> • uncertainty how significance determinations are made • consideration of First Nation values
Matters to be Considered	<ul style="list-style-type: none"> • inconsistency and inadequacy of matters considered
Decision Bodies	<ul style="list-style-type: none"> • determinations by decision bodies • participation of Federal decision bodies • when decision bodies are identified
Treatment of Recommendations in Decision Documents	<ul style="list-style-type: none"> • too many varied or rejected • socio-economic recommendations lost
No Input into Decision Documents	<ul style="list-style-type: none"> • no opportunity for review of Decision Documents
Follow-up and Monitoring	<ul style="list-style-type: none"> • no evaluation of the results of assessments or tracking of effectiveness of mitigation measures
Administration Issues	
YESAB Capacity	<ul style="list-style-type: none"> • concern about qualifications of YESAB members and staff
Impartiality of YESAB members and staff	<ul style="list-style-type: none"> • concern about Board appointment process and “southern” staff
YESAB Online Registry	<ul style="list-style-type: none"> • concerns about inadequate verification of postings
Geo-spatial Information/Mapping	<ul style="list-style-type: none"> • instances of inaccurate coordinates for projects • not showing First Nation traditional territory or settlement land on maps
Community Engagement / Public Education	<ul style="list-style-type: none"> • need for ongoing public education about YESAA process and YESAB operations • YESAB members and staff unknown
YESAB Rules, Guidance Documents	<ul style="list-style-type: none"> • not enough detail • need for project-specific guidance
YESAB Governance	<ul style="list-style-type: none"> • lack of documented policy or operational procedures on internal governance
YESAB as an Adaptive, Learning Institution	<ul style="list-style-type: none"> • YESAB not evolving with experience

TABLE 1 (cont'd)
SUMMARY OF THE ISSUES RAISED

Issue	Summary of Issue
Administration Issues (cont'd)	
Public Notification of Projects	<ul style="list-style-type: none"> • need for improved, more detailed advertising, including maps • challenge for trappers and RRCs to be notified on timely basis when on the land
Narrow Interpretation of the Act	<ul style="list-style-type: none"> • application of YESAA too cautious • losing potential value-added of YESAA
General Assessment Issues	
Class Assessments	<ul style="list-style-type: none"> • projects should / should not be grouped • standard mitigative measures not being used
Strategic Assessments (Plans, Policies, Programs)	<ul style="list-style-type: none"> • need for a broader, more comprehensive approach to plans and policies • none have been requested or completed • onerous and expensive Panel process
Temporal Scoping of Assessments	<ul style="list-style-type: none"> • temporal scope of assessments shouldn't be linked to temporal scope of regulatory instruments
Substantive Issues	
Traditional Knowledge	<ul style="list-style-type: none"> • YESAA process falling short on integration and consideration of Traditional Knowledge • concern about confidentiality
Impact on Treaty Rights	<ul style="list-style-type: none"> • inconsistencies with respect to how treaty rights are addressed in Evaluation Reports
Socio-economic Impact Assessment	<ul style="list-style-type: none"> • dissatisfaction with the quality of socio-economic impact assessments • weighing positive and negative effects
Heritage Assessments	<ul style="list-style-type: none"> • adequacy of YESAB's treatment of impacts on heritage resources • lack of First Nation capacity to do heritage assessments
Legislation and Regulation Issues	
Dispute resolution	<ul style="list-style-type: none"> • Act provides inadequate means of addressing differences of opinion
Non-compliance with YESAA	<ul style="list-style-type: none"> • Act provides no means of dealing with proponents who begin a project without an assessment
Role of Municipalities	<ul style="list-style-type: none"> • municipalities not directly involved in permitting processes for their own developments
Definitions	<ul style="list-style-type: none"> • a variety of definitions in the Act and Regulations need to be reviewed (e.g., Plan, Proponent)
Assessable Activities Regulations Difficult to Understand	<ul style="list-style-type: none"> • Schedules 1 and 2 difficult to interpret • Triggers and exclusions may not be appropriate

TABLE 1 (cont'd)
SUMMARY OF THE ISSUES RAISED

Issue	Summary of Issue
Other Issues	
Unsettled Claims	<ul style="list-style-type: none">• failure of YESAA to recognise unsettled First Nations• lack of consultation on ways to protect interests in development assessments
Need for ongoing Five-year Reviews	<ul style="list-style-type: none">• need for further reviews of the YESAA process

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1.0 INTRODUCTION

1.1 Background for the Five-year Review

In 1993 a framework agreement, the Umbrella Final Agreement (UFA), for negotiating land claim agreements with Yukon First Nations was signed by the Government of Canada, the Council of Yukon First Nations, and the Government of the Yukon (the Parties). Chapter 12 of the UFA provides for the creation and implementation of a legislated development assessment process. On May 13, 2003 this provision was addressed when the *Yukon Environmental and Socio-economic Assessment Act* (YESAA) received Royal Assent.

The UFA requires the completion of a comprehensive review of the development assessment process within five years of the legislation's enactment – the YESAA Five-year Review. SENES Consultants Limited (SENES) was selected through a national competition by a Steering Committee made up of representatives of the Council of Yukon First Nations, Government of Yukon, and Government of Canada to conduct the YESAA Five-year Review.

1.2 Five-year Review Mandate

The purpose of the review is to examine Yukon's development assessment process in its entirety and in the context of the objectives of the UFA. The review has a broad scope and examines all aspects of the development assessment process including, but not limited to:

- YESAA and its regulations
- The implementation, assessment and decision-making processes
- The implementation plan
- Funding
- Opportunities for public participation in the process
- Phases and timelines
- Process performance expectations
- Process documents such as rules, guides, forms
- The responsibilities, duties and functions of decision bodies, YESAB and other participants and their timelines and supporting documentation

The review includes three main phases with the following objectives and outputs:

Phase 1 – Information gathering and issues scoping

Phase 1 of the review is the primary opportunity for seeking and compiling views on the development assessment process and identifying issues that require further research and consideration. The output of Phase 1 is this Issues Scoping Report.

Phase 2 – Issues analysis

Phase 2 of the review will include additional research and analysis to evaluate the issues identified in Phase 1. This phase will include the development of observations, conclusions and/or recommendations. The output of this phase will be an Observations and Conclusions Report, the first draft of which is expected to be available for public distribution in late June 2009.

Phase 3 – Response

During Phase 3 of the review, the designated representatives, First Nations and YESAB will consider the Observations and Conclusions Report. They will develop a joint response that describes the outcome of the review in a draft Review Report. The designated representatives will then prepare a final Review Report that will include an implementation and follow-up schedule.

It should be noted that the review focus is limited to the development assessment process as established by YESAA, and does not include a comprehensive review of the regulatory / permitting aspects of a project. While linkages to these aspects are being considered by the review, the evaluation of regulatory and permitting processes is outside the mandate of the YESAA Five-year Review.

1.3 UFA and YESAA Context

The UFA, signed by the Parties in 1993, provides a framework for Yukon First Nations and Governments in their negotiations to conclude Yukon First Nation Final Agreements. Through twenty-eight chapters it sets out general provisions to be included in Final Agreements such as establishing Special Management Areas, Land Use Plans, and a Development Assessment Process. The YESAA regime had its origins in the negotiations around the UFA and the individual Final Agreements, in which First Nations, Canada and the Yukon Government worked out its principal features as part of a broader, integrated development assessment regime. To set the context for the UFA the “whereas” clauses at the beginning of the Agreement state the general purposes and values for the entire agreement. For example:

“the parties to the Umbrella Final Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Yukon Indian People and the land”

“ the parties to the Umbrella Final Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Yukon Indian People”

“ the parties to the Umbrella Final Agreement wish to enhance the ability of Yukon First Nations and Yukon Indian People to participate fully in all aspects of the economy of the Yukon”

Applying specifically to the development assessment chapter (Chapter 12) and the subsequent YESAA, these statements and values are captured in the Chapter 12 objectives and the purposes of the Act. The Chapter 12 objectives and the Act purposes are shown in Table 1.

TABLE 1
UFA CHAPTER 12 OBJECTIVES AND THE YESAA PURPOSES

Objectives of Chapter 12 of the UFA	Purposes of YESAA
12.1.1.1 recognises and enhances, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness Environment	a) Provide a comprehensive, neutrally conducted assessment process applicable in Yukon. b) Require that, before projects are undertaken, their environmental and socio-economic effects are considered.
12.1.1.2 provides for guaranteed participation by Yukon Indian People and utilises the knowledge and experience of Yukon Indian People in the development assessment process	c) Protect and maintain environmental quality and heritage resources. d) Protect and promote the well-being of Yukon Indian persons, their societies and Yukon residents generally, as well as the interests of other Canadians.
12.1.1.3 protects and promotes the well-being of Yukon Indian People and of their communities and of other Yukon residents and the interests of other Canadians	e) Ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities, their residents, and societies in general, depend.
12.1.1.4 protects and maintains environmental quality and ensures that Projects are undertaken consistent with the principle of Sustainable Development	f) Recognise and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment.
12.1.1.5 protects and maintains Heritage Resources	g) Guarantee opportunities for the participation of Yukon Indian persons and make use of their knowledge and experience in the assessment process.
12.1.1.6 provides for a comprehensive and timely review of the environmental and socio-economic effects of any Project before the approval of the Project	h) Provide opportunities for public participation in the assessment process. i) Ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication.
12.1.1.7 avoids duplication in the review process for Projects and, to the greatest extent practicable, provides certainty to all affected parties and Project proponents with respect to procedures, information requirements, time requirements and costs	j) Provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.
12.1.1.8 requires Project proponents to consider the environmental and socio-economic effects of Projects and Project alternatives and to incorporate appropriate mitigative measures in the design of Projects	

Chapter 12 is explicit in the purpose of a Yukon development assessment process with regards to the benefits meant to accrue to First Nations, and the First Nation values to be protected and

enhanced through development. The development assessment process was intended to: (1) improve opportunities for First Nation participation in assessments, and (2) value and utilise First Nation contributions to assessments.

1.4 Purpose of this Report

This draft Issues Scoping Report provides the initial attempt at presenting the input received by the review team during the information gathering phase. The report is a compilation of view points from a diversity of organisations, groups, and individuals through interviews, public open houses, or written submissions.

The purpose of this report is to present issues identified to us through interviews and meetings with, and written submissions from, Yukon, Federal, and First Nation governments, business organisations, industry, non-governmental organisations, municipal/hamlet councils, boards, land management councils, and the general public. It is not an analysis of the feedback provided, nor is it a validation of the issues presented to us. For the purpose of creating a manageable report, the review team did have to do some consolidation of concerns raised. The issues presented do not represent the opinions of the review team, but instead are a summary of perspectives voiced by the participants in the YESAA Five-year Review.

1.5 Report Format

The report is presented in four main sections:

- Section 1: Background and description of the YESAA Five-year Review, and purpose of the Issues Scoping Report.
- Section 2: Description of activities undertaken to prepare for the information gathering and issues scoping phase of the review and efforts made to solicit input from wide array of interests.
- Section 3: Presentation of the issues and perspectives heard.
- Section 4: Overview of next steps in the review; moving into Phase 2, the issues analysis phase.

2.0 PHASE 1 ENGAGEMENT PROCESS

Phase 1 of the Five-year Review, the information gathering and issues scoping phase, required the preparation of three different plans for the successful implementation of the Review, as well as organising meetings and interviews. The principal means of gathering views from a wide range of stakeholders was through community visits conducted during the last three weeks of January, early February, and one in early March. In preparation for the community visits the following activities were undertaken from mid-November 2008 through early March 2009:

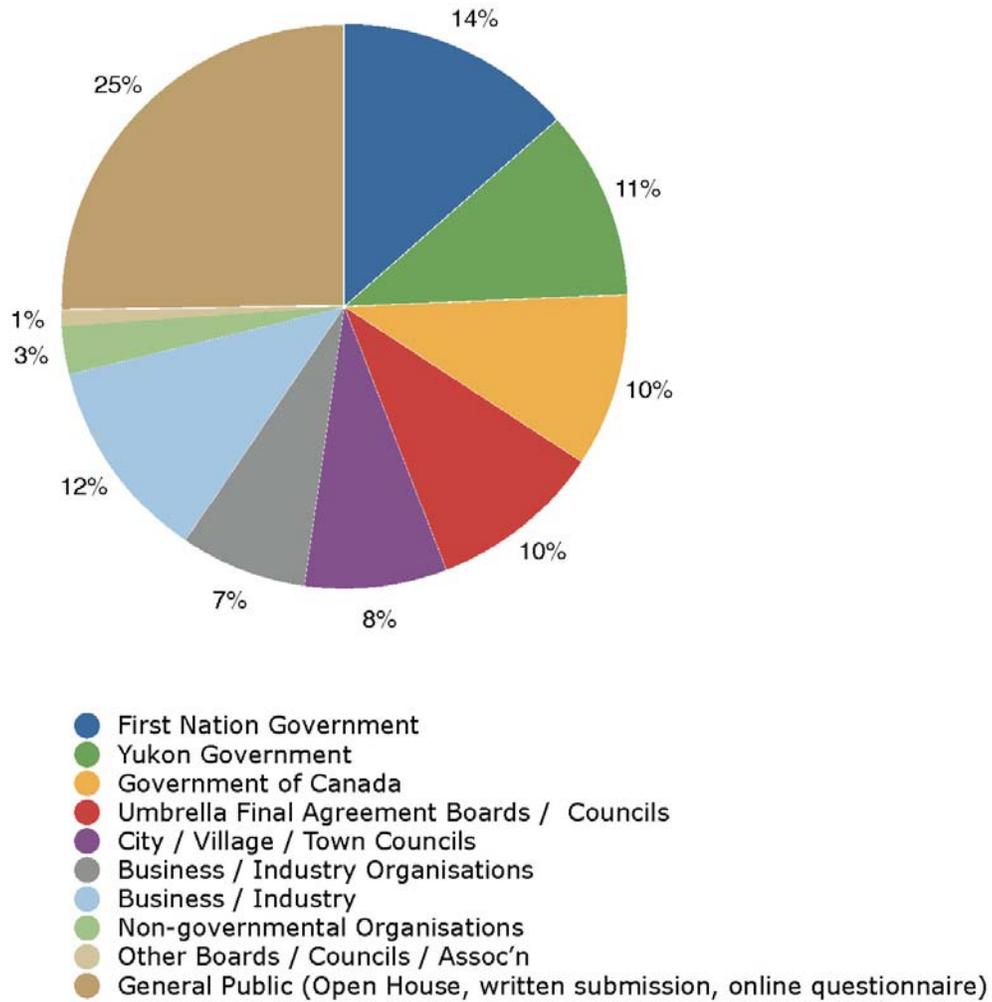
- preparation of required review plans:
 - Research and Information Gathering Plan
 - Consultation and Communications Plan
 - First Nation Participation Plan
- preparation and distribution of introductory letters soliciting input from a wide range of groups (a sample letter is located in Appendix A)
- development of logistics plans and schedules for travel across the Yukon for meetings from January 12 to 31, and additional interviews/meetings in February and March.

Table 1 on the next page summarises the review team's engagement activities between January and March 2009. During the engagement phase we initially contacted 143 groups, conducted 78 meetings, and received 71 written submissions. Figure 1 presents a summary of the groups who provided the review team with input (through meetings or written submissions) during the information gathering phase. A complete listing of groups initially contacted, meetings conducted, and written submissions received is presented in Table A-1 in Appendix B.

TABLE 1
SUMMARY OF THE REVIEW TEAM'S ENGAGEMENT ACTIVITIES
CONDUCTED BETWEEN JANUARY AND MARCH 2009

LOCATION	DATES	TEAM MEMBERS
Whitehorse	January 12-16	Jim Edmondson, Jennifer Ellis, Brian Miller, Shelagh Montgomery, Deborah Simmons, Gerd Wiatzka
Ross River	January 16	Brian Miller, Gerd Wiatzka
Faro	January 19-20	Brian Miller, Gerd Wiatzka
Old Crow	January 19-21	Jim Edmondson, Shelagh Montgomery
Burwash Landing	January 20	Jennifer Ellis, Deborah Simmons
Haines Junction	January 21-22	Jennifer Ellis, Deborah Simmons
Dawson City	January 21-23	Jim Edmondson, Shelagh Montgomery
Carmacks	January 26-27	Jim Edmondson, Shelagh Montgomery
Watson Lake	January 26-28	Jennifer Ellis, Deborah Simmons
Pelly Crossing	January 27	Jim Edmondson, Shelagh Montgomery
Mayo	January 27-29	Jim Edmondson, Shelagh Montgomery
Teslin	January 29	Jennifer Ellis, Deborah Simmons
Carcross	February 4	Jennifer Ellis
Inuvik (NWT)	March 9-11	Jim Edmondson, Shelagh Montgomery
Various Telephone Interviews	January 27 – March 12	Brian Miller, Shelagh Montgomery, Jennifer Ellis

FIGURE 1
SUMMARY OF SOURCES OF INPUT RECEIVED DURING THE INFORMATION GATHERING PHASE



3.0 ISSUES

During our many meetings, open houses, and through written responses, the review team heard a great deal about YESAA and the development assessment process in the Yukon. A large number of the issues that were brought forward to us are common to many of the organisations and people we spoke to or heard from. While there was a diversity of opinion regarding many aspects of the process, there was also a significant degree of “common ground” with respect to perspectives shared about the “new” development assessment process.

The issues identified in the following sections represent the general themes of feedback provided by the various participants in the process. However, this does not imply there is consensus on each issue. Similarly, it is not possible to present in this report every concern brought forward to us. Instead, we have grouped the issues under eight broad headings:

1. Common Positive Remarks
2. General / Broad Issues
3. Development Assessment Process Issues
4. Administration Issues
5. General Assessment Issues
6. Substantive Issues
7. Legislation and Regulation Issues
8. Other Issues

3.1 Common Positive Remarks

As evidenced by this report, the review team heard from people that they have many concerns about the Yukon development assessment process and YESAA. However, we also heard from nearly all interviewees that there are some very good things about the new process. Many expressed the view that the YESAA process as the means for assessing development projects in the Yukon is an improvement over processes previously in place. The most often heard common, positive points are highlighted below.

3.1.1 *Improved Assessment Process*

We heard near unanimous support for the observation that the YESAA process is better than what was previously in place in the Yukon. The primary reasons for this were: (i) it’s a public process to which anyone can provide input; (ii) there is a level of certainty provided to proponents; and, (3) the assessors are independent from governments and proponents.

3.1.2 YESAB and Designated Office Staff are Accessible

Many of the people and organisations we spoke to who have participated in numerous project evaluations told us that on an individual level YESAB and Designated Office staff are very helpful when approached for clarification of issues or additional assessment information. We were told that they provide requested hardcopies of documents and are willing and able to answer questions about the legislation and process.

3.1.3 YESAB Online Registry

We heard that the YESAB online registry (YOR) is a good tool for public engagement in the assessment process. In the relatively short time that it has been up and running there have been several improvements made. People appreciate the e-mail notifications, the way a registered user can specify a geographic scope or development activity for notifications, and it was generally felt that the YOR was easy to navigate. However, as discussed below, concerns were also raised.

3.2 General / Broad Issues

The issues presented in this section represent those that were common to nearly all participants, or those that were conveyed to us as being of significant concern to at least one of the broad groups of participants (e.g., First Nations, business, public).

3.2.1 Cumulative Effects

Concerns about inadequate cumulative effects assessment (environmental and socio-economic) was probably one of the issues we heard the most about, with it being raised by all governments, non-governmental organisations, UFA and other boards and councils, the general public and a few business organisations. The following quote summarises the concern of those who identified it as an issue, "For the most part, project assessments under YESAA have been ineffective at addressing the combined or cumulative effects of multiple projects and activities." It was recognised that cumulative effects are difficult to address in project level assessments, particularly in the absence of land use plans that would otherwise provide a context for project-specific assessment. First Nations, in particular, spoke to the UFA Chapter 12 objectives of protecting and maintaining environmental quality and heritage resources and protecting and promoting the well-being of First Nation people, and identified that these cannot be met unless cumulative effects assessment is done well and the resulting mitigation implemented.

We heard from many of the groups and individuals that cumulative effects assessment requires implementation of good project-level assessments that consider combined impacts, where the assessments are supported by a framework of broader assessment and planning processes. The perception of those who saw cumulative effects as a gap is that the assessors are lacking

guidance from regional or other plans upon which to base cumulative effects assessments, and that YESAB has no methodology to determine what constitutes a “significant” or unacceptable cumulative effect. We were told Evaluation reports demonstrate no systematic cumulative effects methodology being used, that no clear data are used, nor thresholds of what may be considered to be an acceptable or unacceptable impact.

Specific to cumulative socio-economic effects, one written submission states, “...considerable development/improvement is needed on the socio-economic side. There needs to be better consideration of a project’s impact on a series of factors such as social and economic components/conditions and the resultant cumulative impact on broad socio-economic values. YESAB Designated Office Evaluations tend not to analyse socio-economic questions such as whether a particular project is in the (Yukon) public’s interest. Often, the decision maker, particularly when it comes to land disposition, is looking for that sort of input and analysis to inform its decisions.”

3.2.2 Development Assessment Process not Meeting Objectives of UFA / Purposes of YESAA

A consistent message heard from First Nation governments and some of the UFA bodies and non-governmental organisations is that they do not feel that the development assessment process is living up to the objectives laid out in Chapter 12 of the UFA, and reiterated as the purposes of YESAA. As identified in section 1.3 of this report, Chapter 12 is explicit in the purpose of a Yukon development assessment process with regards to the benefits meant to accrue to First Nations, and the First Nation values to be protected and enhanced through development. As we were told, “One of the purposes of the land claim regimes is to bring First Nation values and perspectives into Yukon’s resource management regime, whether this is in the area of wildlife management, forest management, land use planning or project assessment...”.

We heard from many of the First Nation governments that the process, designed to recognise their “special relationship with the wilderness environment:” has failed to accommodate the values they hold. Specifically, we heard concern that the rules developed for YESAB do not “protect the special relationship between Yukon Indian people and the Yukon wilderness environment”. As identified by one First Nation, “...First Nation values and knowledge are not being effectively brought into the assessment process at key stages including:

- The development of rules, procedures and guidance documents that relate to how the process works and how it is interpreted;
- The development of proponent submissions;
- The determination of adequacy of proposals;
- The determination of scoping;
- The assessment of effects and how significant these are;
- The recommendations for mitigation and monitoring;

- The decisions that are made by decision bodies; and
- How these decisions are implemented.”

Generally, many First Nation people and governments have been dissatisfied with the effectiveness of YESAA in living up to their original vision for the development assessment process. As stated in a written submission, and endorsed by 13 of the 15 First Nations that are part of the review, “Overall, the Final Agreements speak strongly to the creation of a substantive role for First Nation governments and people in the development assessment process.In implementing YESAA, decision bodies, assessment bodies and proponents have not generally been proactive in creating the substantive role envisioned for First Nations people or governments – either in the assessment process or the decision-making process.... As the process currently operates, First Nations do not have a substantive role. They continue to be marginalised and their perspectives and input overlooked or discounted.”

Similarly, we heard from another First Nation that, “...YESAB is a product of the First Nations’ Final Agreements, yet the assessment process that resulted is very “un-First Nation-like”. Traditionally the First Nations’ methods of problem-solving and decision-making were based on dialogue and consensus-building to come to a reasonable and sensible outcome. The opposite has happened with the YESAB process, where we are faced with a non-personal, restrictive, and almost judicial-like system...”.

Conversely, the review team also heard from the Yukon Government that the UFA objectives are generally being met as agreed to by all the parties. As stated to us, “...the UFA and the individual First Nation Final Agreements were negotiated and agreed to by all parties. Further, the development of the YESAA legislation, regulations and its implementation, based on Chapter 12, was an inclusive process involving all parties.”

Another issue presented to us with respect to the Chapter 12 objectives and the purposes of the Act came from First Nations with unsettled claims; in particular, Ross River Dena Council and Liard First Nation. The point of concern being that several of the Chapter 12 objectives speak to protecting, recognising, and guaranteeing the participation of “Yukon Indian persons”. However, the term “Yukon Indian person” is defined to mean “a person enrolled under a Final Agreement”. Therefore, these non-Final Agreement First Nations feel unrepresented by the YESAA process.

The review team heard several other concerns from First Nation governments that relate to this overarching issue (e.g., incorporation of traditional knowledge and heritage values, First Nation involvement in the process, information evaluation, and unsettled claims). These are addressed in later sections of this report.

3.2.3 *What gets Assessed*

What activities get captured for assessment under YESAA was a common issue for many of the groups we met with. There were also divergent views on the subject with some government departments, business organisations and industry identifying the assessment triggers as being too low, while several First Nations non-governmental organisations, and members of the public identified triggers that they felt were too high. 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
- need more certainty around project triggers and what warrants an Executive Committee review
- renewals and amendments to existing water uses licences should be exempt

Several of the organisations we met with or received written submissions from identified specific concerns with the YESAA regulations for assessable projects. A sampling of the examples provided to the review team is listed below:

- 1000 m³ trigger for logging too high
- exploration activities should be exempt
- construction/installation of a power line and extension/expansion of a power line should be considered the same
- the trigger for hydroelectric and other electricity generation projects are too low
- routine maintenance of public services such as sewer and water is inappropriate
- YESAA trigger based on funding often inappropriate
- installation of septic tanks trigger needs to be reviewed

3.2.4 *Balance / Interface of Assessors and Regulators*

A common issue in this review relates to the respective roles and responsibilities of the assessors and regulators in the YESAA process. The review team encountered a significant division of opinions from those we heard from over where the dividing line should exist between these two sets of functions, and how they can best be integrated. Although there is some uncertainty about this, the initial intention of the Parties who negotiated the outlines of the YESAA in the UFA was apparently to create a unique assessment process in which the assessment function was performed at arm's length from, and prior to, the work of regulatory authorities. This marked a departure from the CEAA regime, in which regulators or "responsible authorities" play a primary role in screening project proposals.

Several companies, business organisations and government departments raised questions about what they call the “regulatory creep” of the YESAA assessment function. On the one hand, they have concerns about YESAB’s perceived tendency to take on responsibilities that should be better left to decision bodies and regulatory authorities. On the other hand, they call attention to the consequences of “splitting” the assessment and regulatory functions, which has led to overly complicated and time-consuming assessment processes for a number of projects. Several organisations felt that YESAA assessors and regulators should be conducting their work concurrently as much as possible rather than consecutively, and that this requires a closer integration of the two sets of functions.

Not all participants in the five-year review agreed with these positions. Some non-governmental organisations believe that YESAA marks an improvement over previous regimes in the Yukon because assessments are conducted by an independent body rather than by departments that are often the proponents or promoters of projects. We heard from some renewable resource and municipal councils that they want to see a genuine “one-window” approach to Yukon assessments, in which YESAB screens all potential proposals, possible activities and decides whether they should go through the YESAA process.

Interviews and written submissions raised two key ongoing points of contention over YESAB’s current approach to its assessment responsibilities. It is argued by some parties that the information requirements YESAB imposes on proponents are too excessive, and that often this level of detail about projects is more effectively addressed later in the process by the regulatory authorities. Several companies and Yukon government departments, in particular, maintain that YESAB should confine its assessments to the conceptual level, and focus on the potential effects of projects, their significance, and the possibility of mitigating significant adverse impacts. Against this, various non-governmental organisations and First Nation governments believe that YESAB has a clear responsibility to comprehensively assess the environmental and socio-economic impacts of projects, and that its information requirements have to reflect this broad mandate. First Nation governments told us that all necessary detail needs to be presented at the assessment phase otherwise, they feel, it won’t get captured at the regulatory phase.

There were also significant concerns raised about the overly “prescriptive nature” of YESAB’s Evaluation Reports, which sometimes contain recommendations that are felt by the regulatory authorities to be either unenforceable or inconsistent with the present legislative framework in the Yukon. In numerous instances, decision bodies have varied or rejected these recommendations, on the grounds that they were inappropriate or that they restricted the authority of the regulators. This high incidence of “variances” of YESAB recommendations is criticised by non-governmental organisations who feel that it erodes public confidence in the YESAA process, and that it hinders YESAB’s ability to put forward creative proposals for mitigating or enhancing the potential impacts of projects.

3.2.5 *Mitigation Measures*

A key concern raised in many interviews and submissions relates to the mitigation measures proposed by the Designated Offices in their Evaluation Reports. There have been ongoing disagreements between YESAB and decision bodies about the appropriateness of mitigation measures it recommends to address the environmental and socio-economic impacts of projects. In a number of instances, decision bodies have rejected or varied these recommendations on the grounds that they are either unenforceable or have no basis in Yukon law or regulations. These disputes are a source of frustration for both YESAB and government regulators, as well as for industry and non-governmental organisations in the Yukon.

Companies and business organisations, in particular, would like to see YESAB develop standard mitigation measures that can be applied to classes of projects or activities. It is felt that establishing such measures will help to increase the efficiency of YESAA assessments, especially by reducing their timelines. Section 32 of the YESAA provides for the Board to make rules on the development of “standard mitigation measures” by Designated Offices or the Executive Committee. We were told that the Board has been preparing these rules in consultation with various parties, but it has not yet made them public or implemented them, nor were they shared with the review team.

First Nation governments and some non-governmental organisations also have concerns about the extent to which decision bodies vary or reject innovative mitigation measures recommended by YESAB. They argue that this hinders YESAB’s ability to effectively deal with project impacts, and to meet the objectives of YESAA. In their view, it is essential for decision bodies to find creative ways to implement recommendations that fall outside their direct regulatory mandates.

3.2.6 *Inconsistency Among Designated Offices*

Several business organisations, companies and government departments expressed concerns about perceived inconsistencies among Designated Offices and their officials in how they treat project proposals. They feel strongly that differences in expectations exist among the Designated Offices, and that this results in differential treatment of the proposals that are submitted to them. In their opinion, similar projects are subject to differing information requirements, assessment processes and recommendations, depending on which Designated Office assesses them.

One department points to: “a lack of consistency between YESAB Designated Offices with respect to information requirements, temporal scoping, classification of input into the assessment, use of discretionary language, and recommended terms and conditions for the same sector.” Several participants in the review believe that this raises questions about the

procedural fairness of the YESAA regime and highlights the need for greater quality control to ensure consistency among the Designated Offices as they conduct their assessments.

3.2.7 Land Use and Resource Management Plans

The review team heard from many groups about land use plans; primarily identifying the absence of regional plans as an issue, but also from some, that the lack of certainty about an ongoing role for Regional Land Use Planning Commissions is a concern. With respect to resource management plans (e.g., Fish and Wildlife Management Plans, Official Community Plans, Access Management Plans) several renewable resource councils, First Nation governments, and non-governmental organisations expressed concern that where these exist they are not being adequately considered during assessments.

Lack of Land Use Plans

Many of the First Nation, Yukon and federal governments, non-governmental organisations, boards and councils, and some business organisations identified the lack of regional land use plans in the Yukon as having a serious impact on guiding responsible development and providing an assessor with a tool for assessing cumulative effects and making informed decisions. We heard that YESAA is premised on land use plans being in place and that their absence poses a serious hindrance to effective and balanced value judgements with regards to cumulative effects. From a written submission, "...plans should play an important role, in informing the assessment about the appropriateness of a particular project in a particular area. The information contained in these plans will be of particular value to the assessors in determining the significance of environmental and socio-economic effects." Additionally, we heard their absence reduces certainty for project proponents.

Lack of Certainty about Ongoing Role for Regional Land Use Planning Commissions

The Yukon Government, Land Use Planning Commissions, YESAB, and some First Nation governments told us that the lack of certainty about an established role for Regional Land Use Planning Commissions once a plan is approved is a real concern. The processes contemplated in S. 44 of YESAA and S. 12.17.0 of the UFA are premised on the continued existence of Regional Land Use Planning Commissions after approval of land use plans. However, it is not clear that Chapter 11 does in fact require or establish an ongoing role for the Commissions once they have recommended a land use plan for approval. Consequently, it is felt, S. 44 of YESAA may not be operable as written. If a Commission is no longer in existence it is unclear who an assessor is expected to approach in order to solicit advice with respect to project conformity to a plan. Finally, we were told that land use plans, once approved, must remain "living documents", therefore they must be updated on a regular basis. Again, it is unclear who will be responsible for this important task if the Commission that created the plan no longer exists.

3.2.8 *Funding and Capacity*

Issues of funding and capacity were identified by all First Nation governments we heard from, as well as some non-governmental organisations, municipal governments, and UFA and other boards and councils. Generally, we heard that the amount of information to digest and submissions to prepare during a project assessment place a human resource and financial burden on organisations that are not specifically funded for YESAA activities. The non-First Nation respondents who spoke to the funding issue identified the lack of participant funding as their primary concern. The First Nation issues are unique to the fact that First Nations are explicitly included in the Act, and are outlined below.

Funding and capacity are ongoing challenges for most First Nation governments in fulfilling responsibilities and roles in the development assessment process. Initial funding allocations considered likely involvement of First Nations in the YESAA process. However, according to First Nation governments heard from during the review, if the objectives of Chapter 12 are to be met, First Nation roles should be substantially greater in all phases of the YESAA process than they were in previous assessment processes, and funding allocations need to address these differences. As presented to the review team, additional unfunded costs to First Nation governments that have arisen through implementation of YESAA are the following:

- legal and technical review costs
- proponent information requests
- completion of heritage assessments by First Nations
- compilation of traditional knowledge
- costs for Executive Committee Screenings
- funding mechanisms to make various YESAA components more accessible to First Nations (studies and research (s. 112), audits and effects monitoring (s. 110) and review of plans (s. 102)
- permanent First Nations' YESAA forum where First Nation issues could be discussed, researched and addressed, and capacity could be improved

Several groups we heard from, including non-governmental organisations and YESAB, identified the need for some level of funding (participant funding) to be made available for non-First Nation organisations participating in the YESAA process. This was particularly felt to be needed for Executive Committee screenings.

3.2.9 *First Nation Involvement in the YESAA Process*

One of the very central issues in this review is the role of Yukon First Nation governments in development assessments in the Yukon. The YESAA regime had its origins in the negotiations around the UFA and the individual Final Agreements, in which First Nations, Canada and the

Yukon Government worked out its principal features as part of a broader, integrated development assessment regime. The review team heard from First Nations that at the time of these negotiations, they envisioned a substantial role for their governments and people in all stages of the assessment process, from pre-assessment to actual project reviews and right through to decision making and project mitigation.

When the YESAA regime came into effect, First Nations therefore expected to be significant participants in it, and recognised as such by project proponents, assessors and regulatory authorities. However, as detailed in their interviews and submissions, virtually all First Nation governments are frustrated and disappointed by some aspects of their experience to date with the new YESAA process. Conversely, as mentioned in Section 3.2.2, the review team also heard from the Yukon Government that YESAA and the development assessment process, as negotiated and developed by the parties, provide adequate participation for First Nation governments and give full consideration to their values.

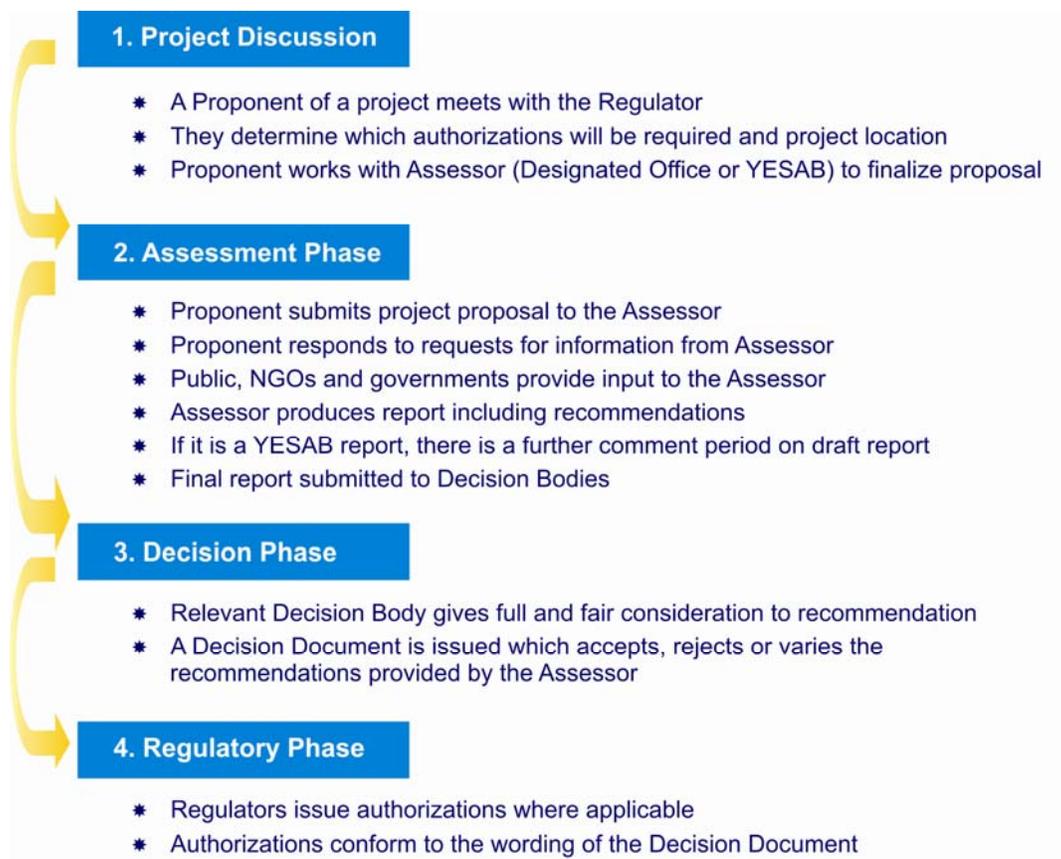
So far, First Nations argue, YESAB has failed to effectively ensure their participation in assessments, as befits an order of government in the Yukon. In their view, for most project assessments off settlement lands, they have been treated as little more than “stakeholders”, on a par with other organisations and communities in the Yukon. Similarly, they feel First Nations’ perspectives and knowledge have often been discounted in project assessments and that First Nations have been largely relegated to a minor role by regulatory authorities when it comes to decision-making and the issuance of authorisations for projects. Frustration has also been voiced over difficulties in gaining recognition of First Nations’ interests and rights from government departments and proponents, even for projects on Category B settlement lands.

Several other specific aspects and concerns relating to First Nation involvement in various stages of the assessment process are set out in subsequent sections of this report.

3.3 Development Assessment Process Issues

In this section we present issues that we heard about that relate specifically to the four phases of the development assessment process, as shown in Figure 2.

FIGURE 2
GENERAL PHASES OF A YESAA PROJECT ASSESSMENT



3.3.1 Project Discussion

Project Proposals

We heard from First Nation, Yukon and federal governments, business organisations, industry, and non-governmental organisations, 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. These are summarised separately below.

- Adequacy of Project Proposals

We heard from several of the organisations, First Nation and Yukon government staff that project proposals were being deemed adequate when they saw them to be lacking information. The concern cited was that project proposals circulated for public review are often incomplete (e.g., incomplete project descriptions, no description of alternatives, effects not described, inadequate maps). In addition, they were said to frequently contain inaccurate information and inconsistencies as well as information unrelated to the project and evaluation. Thus it is difficult for interested parties to understand the full impact a project may have and to make informed comments when the proponent's proposal does not contain all of the pertinent project information. There is also a concern that, at times, there is a lack of due diligence by proponents and Designated Office level projects are accepted prematurely. This is seen to be especially problematic when the seeking views "clock" starts ticking and people participating in the evaluation are required to submit information requests for basic details. This often leads to assessment delays due to extensions to the comment period being requested.

We were told that there are currently no specific requirements for mandatory information that must be contained in a project proposal for it to be declared adequate. As a result, some key information is frequently absent from project proposals. Information that should be considered mandatory for project proposals includes detailed descriptions of proposed activities, stages of the project, significance of effects, alternatives, mitigative measures, meetings/consultation with affected First Nations, and measures taken to address concerns raised by First Nations. Detailed maps should also be considered a mandatory component. Additionally, some First Nations told us that a heritage assessment should be included in project proposals.

Finally, it was also noted, especially by First Nation governments and citizens and Yukon Government, that an early dialogue with communities and regulators would greatly assist proponents in preparing adequate project proposals.

- Information Requests and Requirements

Government and industry representatives cited many instances where they felt the assessors made unnecessary requests for detailed information which can unnecessarily limit the proponent's operational flexibility without providing any added benefit or value to the assessment. It was felt that valuable time is lost because of back and forth between proponents and the assessors as they finalise project descriptions. We were told that assessors should not expect proponents

to have every project detail defined and documented at the assessment stage. Furthermore, it was indicated that the subsequent permitting stages of a project will often require additional and more detailed information regarding the project activities.

Project Scoping

We heard from many of the groups we met with that project scoping is an issue; the general consensus is that YESAB is scoping projects too narrowly. However, in some instances concern was raised related to the inclusion of already assessed components of a project being “re-assessed”.

We were told that “assessment bodies currently rely primarily on the principal project / accessory test for determining which project components to include in assessment. This test guides project scope decisions primarily from a project and activity perspective. Other assessment processes, notably the process for project scoping of major development proposals under the Canadian Environmental Assessment Act, are moving towards making project scope decisions based on potential effects – if a component or activity may affect an environmental or socio-economic value, then it should be included within the project scope.”

Federal, Yukon and First Nation governments, non-governmental organisations, some business organisations and members of the public told us that Designated Offices often scope projects narrowly such that key activities are excluded from assessment. This results in the Designated Office being unable to make recommendations for mitigation of adverse effects resulting from those activities that are not “scoped in” to the assessment. Some common examples of projects where this is felt to occur include residential and commercial subdivision projects– where only road construction and lot clearing is scoped in, and timber harvest plans– where only road construction, and not the anticipated timber harvest is assessed. Most First Nation governments we heard from feel if assessments are going to be effective for achieving the objectives of Chapter 12, consideration of all activities that could cause environmental and/or socio-economic effects is needed. This was particularly highlighted in the case of what some First Nations feel is the “permanent alienation of land” through privatising public land (e.g., via land or agricultural applications). The review team heard that the temporal scope is not adequately considered in these instances since the outcome is considered to be a permanent land withdrawal compared with possible waste management practices or exploration activities.

With respect to project scoping, we also heard there are some concerns with the draft project scope issued by the YESAB assessor at the beginning of the seeking views and information phase. There are concerns people are not aware the draft scope is available for comment or, when comments are made, that the scope is not changed to reflect those comments (if warranted). There is concern YESAB assessors do not consistently update scoping documents

when projects evolve through the assessment process. There is also concern that the scoping statements provided by assessors are often overly prescriptive and narrow, thereby potentially unnecessarily limiting the proponent's operational flexibility without providing any added benefit or value to the assessment. Narrow scoping also does not allow projects to evolve through the regulatory process and limits which aspects of projects get assessed. Finally, there is also concern that scoping statements do not include all activities proposed by proponents in their proposal, as required under S. 51 of the Act.

3.3.2 Assessment Phase

Evaluation of Input Received

Industry, non-governmental organisation, and First Nations and Yukon government representatives raised concerns about how information provided by technical experts and other interested parties during the seeking views and information phase of the assessment is analysed by the YESAB assessor. This issue as presented to us relates to the need for YESAB staff to evaluate input such as information requests prior to passing them on to proponents, as well as the need for the assessor to use his/her own expertise to assess information.

In the first instance we were told that, "The Designated Offices are not questioning the applicability or authenticity of information submitted to the YOR. There needs to be some sort of standard with respect to input received and assessment of it." Similarly, we heard that, "Often the assessor will require the proponent to provide any information requested without providing a rationale or justification for the request. It is requested from the proponent simply because an individual (technical expert or not) has asked for it. There is no analysis to examine whether the information request is warranted or valid. The inadequate analysis of information provided in an assessment can result in terms and conditions that appear to be out of context of the project or are not factually correct. This can result in an incomplete or inadequate recommendation and creates difficulty during the decision-making process when decision bodies and regulators have to address terms and conditions that are not sufficiently researched, supported or justified."

Where it is felt that the evaluation of input should also be done by the assessor, we heard that "the general assessment attitude [within YESAB] is to say 'we know nothing' and then rely only on input received. This is not appropriate; there needs to be some expertise and analysis conducted." Another person indicated that in some instances YESAB should endeavour to implement a quick-response process to provide expert, impartial, third party technical support to the assessment for challenging technical issues it may face. Such a quick-response strategy may include the development of standing offers with a variety of qualified experts or firms for such work if and when the need should arise. It was felt that strategies for rapid contracting (e.g., scope of work, fees, schedule), issue analysis, and reporting by external experts could also

be developed to increase the likelihood of success in such endeavours for challenging Designated Office evaluations.

Weighting of Input Received

Nearly all First Nation governments, some of the boards and councils, non-governmental organisations, and members of the general public told us that they are not confident that some of the input they provide to an assessment is given as much weight as that received from government agencies. It is felt that the assessors put more emphasis on quantitative information than qualitative information. This is especially the case for traditional knowledge input. We heard many times cultural issues and traditional knowledge are not being adequately integrated into the assessments.

Another point that came up relates to how the assessor “classifies” the input received when preparing the summary table for an evaluation report. Those who raised this as an issue felt that their input was too often identified as “policy or position” while government input is very often seen as “expert opinion”.

Timelines

Many of the organisations we heard from identified that it’s necessary for the process to have set timelines for development assessments; however, many people had concerns about the tight timelines involved for getting comments in during the standard 14-day window for Designated Office evaluations. This was particularly true of organisations such as Renewable Resource Councils that often only meet once a month. Therefore, we were told, the seeking views period can easily be entirely missed unless it is possible to arrange a special meetings (which then raises capacity/funding issues). We did learn that requests for extensions are often accommodated by the assessor. That said, it was also conveyed to us that while extensions may be worthwhile much of the time, there needs to be some guidance in place such that both the individual/organisation requesting the extension and the assessor have to provide adequate rationale and substantiation for why they need more time. It is felt that unwarranted extensions unnecessarily delay project assessments.

We heard from the Yukon Government that they have specific concerns related to: the timing of proposals being submitted to YESAB; how limited timelines affect the ability for proponents and technical experts to respond to information requests during the seeking views and information phase; and the lack of rationale Designated Offices provide for timelines set at the beginning of the seeking views and information phase. There is also a general concern with the potential for extended assessment timelines even when proponents are well-prepared to proceed through the assessment process.

Several respondents said when projects are submitted by proponents at the beginning of long weekends or during the holidays it can limit the time available for an effective review of the proposal. This also occurs when responses to additional information requests are submitted at the end of the seeking views and information timeline, and technical experts and interested parties have insufficient time to respond. This can result in inadequate or incomplete assessments and decision-making. The YESAB Rules for Evaluations Conducted by Designated Offices are rather constrained when new information is requested or received as part of the seeking views and information phase. The Yukon Government identified if the timelines have run out and the proponent has not provided the required information, the assessor is left with no option other than to complete the assessment (with incomplete information) or find that they are not able to determine significance and refer the project to the Executive Committee.

Generally, we heard from proponents that they are satisfied with the defined timelines.

Level of Assessment (DO, Executive Committee, Panel)

There is concern from First Nation and Yukon governments, YESAB, and some non-governmental organisations 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, some Designated Office projects are complex, but do not warrant an Executive Committee screening, or should go to an Executive Committee screening, but without having to go through an entire Designated Office evaluation first. With respect to the first point, we were told that “there is no flexibility in the process to adjust timelines for more complex Designated Office projects”. Section 31(1)(b) of YESAA allows YESAB to set rules for “different types of evaluations for different categories of projects” but they have not done so to date.” There is also concern with the lack of ability for a Designated Office to refer projects to the Executive Committee level unless the Designated Office assessment is completed and the assessor has not been able to determine significance under S. 56(1)(d) of the Act. This leads to extended timelines and duplication of effort.

Paper Process

We heard from several First Nations, other organisations, and some members of the public that they have concerns about the assessment process being much too reliant on written input and distance/internet communication. We were told that “more creative media and methods for submitting comments would better communicate the First Nation position and values” (e.g., video). It was suggested that YESAB and the Yukon Government need to be more receptive to alternative means of receiving information, especially as relates to First Nations’ claims of traditional lifestyle and heritage values. The fact that some communities don’t have reliable internet access was also raised.

We heard that prior to the YESAA process there used to be more face-to-face discussions. This allowed for cultural stories to be shared and was more of a government-to-government approach. There are no venues to discuss application issues any more. It was also felt that issues or disagreements that arise during a project assessment could be much more efficiently dealt with if there were some opportunities for interested parties to sit together in a meeting or hearing to discuss the various concerns.

Determination of Significance

Issues raised about how assessors determine significance included concerns that the criteria are too high, as well as too low, and generally unclear.

From First Nation governments we heard there are concerns with respect to how First Nation values and interests are considered in the assessment process when decisions are being made regarding how significant adverse effects are on these values. The challenge with determining significance is that it can be very subjective and there is a need for participants to the process to understand whether criteria are being applied in making these determinations and, if so, what are these criteria. We heard that it would be helpful to develop more objective and transparent criteria for determining what is significant and what isn't for use in assessments wherever possible. We also heard that "there is a lack of clarity surrounding how YESAA assessors use the provisions of the Act to determine significance of project effects and the rules for weighing and evaluating trade-offs between positive and negative socio-economic effects. In the absence of a clear framework for making these judgments, the reasons for a Designated Office or Executive Committee (or Panel) determination on whether or not a project will leave a people, a community or a region better off are vague, discretionary and uncertain."

We also heard concerns from Yukon government representatives and proponents that there have been very few recommendations that a project "be allowed to proceed, if it determines that the project will not have significant adverse environmental or socio-economic effects...". The majority of recommendations have been that the project will have significant adverse effects but they can be mitigated. It is felt that "If every project is determined to be 'significant' it raises doubt as to the legitimacy of the assessment."

Another issue that arose was the use by assessors of terms such as "potentially", "significantly" and "adverse." We were told that some of YESAB's determinations appear to come out of the blue, with no chain of reasoning behind them. Also, YESAB's use of wording varies among Evaluation Reports, ranging from "potentially significant" to "potentially adverse." Their determinations and recommendations sometimes seem to be made without any consideration of the mitigation measures provided by the proponent or of Yukon's laws of general application.

Matters to be Considered

Section 42 of YESAA provides direction on which matters are to be considered when projects are being assessed. We heard from a number of Yukon, federal and First Nations government departments, and non-governmental organisations that they have some concerns about inconsistency or inadequacy of the consideration given to certain matters. We also heard of matters not in the Section 42 that were felt to be important. Generally, issues with the matters to be considered in assessments were:

- socio-economic effects
- economic effects
- cumulative effects
- rights of Yukon First Nations
- project alternatives
- climate change

The first four are covered elsewhere in this report. The last two are summarised below.

- Project Alternatives

There is concern that alternatives are not receiving adequate consideration or emphasis in evaluation reports. We were told that there have been projects where alternative methods or technologies have been provided as technical expertise in a project assessment, and the assessor determined that information to be outside the scope of the assessment. It is felt that greater importance should be given to alternatives in project proposals and assessments.

- Climate Change

Several representatives of non-governmental organisations, First Nations, and wildlife management boards identified the lack of consideration given to potential climate change impacts. We heard that YESAB isn't dealing with longer-term climate change issues and that the trends are not being integrated into assessments.

3.3.3 Decision Phase

Decision Bodies

The review team heard concerns about three main issues related to decision bodies. One relates to how a decision body is determined, the second to the participation of Federal decision bodies, and the third to when in the process a decision body is identified.

Firstly, the lack of clarity in the Act about determining who's a decision body was raised by the Yukon Government. We were told of a few examples where it was felt that confusion and uncertainty were the result. Decision bodies "self-declare" whether they will be acting on a project undergoing a YESAA assessment. There can be more than one decision body on a project depending on the project location and authorisations required. There have been several projects where the decision bodies have disagreed as to whether one of the parties to the project is, in fact, a decision body. One consequence of having decision bodies "self declare" their status when they have no jurisdiction is the issuance of potentially conflicting decision documents for a project. This can result in confusion and uncertainty for project proponents. "Self-declaration" of decision bodies, who may not have legal jurisdiction, also has implications for other governments and creates potential for precedent setting expansion of rights. On this last point, we heard from First Nation governments that in their view a decision body comes forward only if they feel they have jurisdiction, and not without reason.

With respect to the participation of federal decision bodies, we heard that there have been several project assessments where federal departments, especially those without offices in the Yukon, have not participated fully in the process when they clearly had a decision body role. It was suggested some federal departments do not become aware that they are a decision body until later in the assessment process and in some instances do not participate at all. This has resulted in decision documents being issued at the last minute or after the legislated timelines due to attempts to consolidate decision documents with federal departments. It also results in uncertainty and creates difficulties for Yukon government and YESAB during the assessment process. And, when there is more than one federal decision body for a project assessment, there has been insufficient or no coordination between the departments during the assessment. This creates uncertainty for all parties involved.

Another point that was raised was that decision bodies should be identified before the project assessment gets underway, or at least very early in the assessment. This, it was felt, would provide greater certainty in the process.

Treatment of Recommendations in Decision Documents

We heard from many participants in the review that they are concerned about the extent to which Designated Office recommendations get varied or rejected by decision bodies in their preparation of decision documents. From the standpoint of socio-economic effects, and to a lesser extent environmental effects, the narrow interpretation of the regulator's mandate is particularly highlighted as an issue of concern – from those who provide input to the assessment process to the assessors themselves. It is felt that decision bodies frequently reject or vary innovative recommendations from assessors, arguing that they fall outside the mandate of the regulatory agency. In the particular case of socio-economic recommendations, we heard from First Nation governments, non-governmental organisations and the public that their

removal ultimately undermines the intent of the Act. Similar concern was heard about environmental recommendations, but to a lesser extent. The implementation of mitigation measures is critical to avoiding significant adverse environmental and socio-economic effects and to meeting the spirit and intent of the development assessment process. Unless these mitigation measures can be implemented, many participants feel YESAA will be unable to live up to the objectives of the development assessment process to protect and maintain environmental quality, protect and maintain heritage resources and protect and promote the well being of First Nation people and their communities.

No Input into Decision Documents

We heard principally from First Nation governments that there should be some opportunity for providing input into decision documents. While the assessment bodies are obligated to seek input from First Nations during the assessment process, YESAA does not direct decision bodies to make decisions with the participation of First Nations even though projects may occur in their traditional territories. It is felt that, as with the assessment component of the YESAA process, the decision-making component would benefit from the perspectives provided by First Nations for all projects occurring in their traditional territories, regardless of whether the projects occur on settlement land. As indicated in a written submission, “The participation of First Nations in all components of the process appears to be consistent with the objectives of Chapter 12: i.e. “provide for the guaranteed participation of Yukon Indian People ... in the development assessment process.””

We heard that “without input from First Nations prior to a final decision being made, there is a risk that recommendations and mitigation measures arising from First Nations’ concerns and submissions will not be given adequate consideration. This can be especially problematic if information supporting assessment recommendations is confidential traditional knowledge or is information that cannot be provided in the context of a paper-based process.”

Issues related to participation in the YESAA decision making phase are particularly critical for instances where non-First Nation decision bodies are making decisions on settlement land. This arises for decisions related to encumbering rights and for mining activities on category B settlement land. In these instances, it is felt that there are even stronger reasons for direct participation of First Nations in the development of decision documents.

3.3.4 Regulatory Phase

Follow-up and Monitoring

While the YESAA Five-year Review doesn’t cover the complete regulatory regime, YESAA references potential follow-up and monitoring requirements and has specific provisions related

to these. To this end, we heard from many participants, in particular, First Nation and municipal governments, non-governmental organisations, renewable resource councils, and members of the public, that they have concerns related to follow-up and monitoring. That is, being able to know if mitigation measures are being followed and are effective. We heard that little attention has been given to the “back end” of the YESAA process (mitigation and monitoring measures). Much attention and effort is placed on the front end of the assessment process when the assessment is being conducted, but it is felt an important element of the YESAA process is to evaluate the results of assessments and to track whether mitigation measures that were prescribed and implemented are working. We heard that more attention needs to be paid to this aspect of the process in order to learn from experience and utilise what is learned in the assessment of future projects. First Nations told us that the feedback from follow-up and monitoring programs would be the most reliable mechanism for ensuring that the YESAA process continually improves in its ability to meet its objectives and protect and enhance important values. As envisioned in the Final Agreements, YESAA includes provisions for audits and effects monitoring, whereby decision bodies can be required to provide follow-up monitoring information to assessment bodies for their consideration. Yukon Government identified the lack of a mechanism in the UFA for regional or cumulative effects monitoring of land and water uses as a gap that results in not being able to evaluate the effectiveness of the YESAA process.

We also heard that S. 89 of the Act that addresses the need for notifying YESAB of any project authorisations that have been issued following the issuance of a decision document, is rarely followed. We were told that it is difficult for an assessor to understand how mitigations have been applied through terms and conditions of an authorisation without any feedback after a decision document. Conversely, we did hear from the Yukon Government that this requirement is routinely followed where they are the regulator.

3.4 Administration Issues

3.4.1 YESAB

Capacity

There is fairly widespread concern in the Yukon about the capacity of Board members and YESAB staff to effectively carry out their responsibilities under YESAA. Some companies, business organisations and government department officials question the technical expertise and experience of staff as well as of Board members. These concerns are particularly directed toward the staff of Designated Offices, those who conduct the vast majority of assessments, and their ability to adequately address the issues raised by complex development projects. A number of those we interviewed emphasised the need for more training and ongoing

professional development for both YESAB staff and Board members. It is felt knowledge of the land and the types of projects routinely being assessed is a critical qualification for an assessor.

Impartiality of Board members and YESAB staff

Participants who raised this as an issue said there is a perception that some Board members were selected due to “political considerations” and, for this reason, various individuals and organisations question their impartiality. We also heard concerns about the capacity of individual appointments at the Executive level and to the Board. Participants who identified this as an issue felt board members don’t have the educational background and experience required to review large scale projects and to deal with developments in a “forward looking” manner. There were a variety of calls for changes to the current method of appointing Board members. Several business and non-governmental organisations want to see “patronage” appointments to the Board replaced by individuals selected based on qualifications, with broader and more flexible skill sets.

With respect to staff, some participants feel staff are hired from down south and are inexperienced in northern realities and interests; they can tend to take a textbook approach to assessments, and this leads to a perception of bias because it may not account for local reality.

YESAB Online Registry

There is broad agreement on the value of the YESAB Online Registry (YOR). Many interviews and written submissions stressed the Registry’s effectiveness as a public mechanism for disseminating information on project assessments, and for allowing the public to track and to provide input into assessment processes. It appears to be widely felt that the YOR contributes to greater transparency in the YESAA process than was available in previous Yukon assessment regimes.

However, some individuals and organisations still consider the YOR difficult to navigate and highlighted their problems in locating information. Several business organisations have concerns about “slanderous” and personal attacks that appear on the Registry during specific assessments, and call for YESAB to better control these. A variety of First Nations maintain that the YOR is inaccessible to elders and other local people, and want to see YESAB make greater use of audio and visual technologies so their submissions can be made more effectively. Several non-governmental organisations feel that, for completeness, the Registry should show how decision bodies responded to YESAB recommendations for each project proposal as well as the authorisations issued in conformance with decision documents.

Geo-spatial Information/Mapping

Recognition was given in written submissions and interviews to the efforts of Designated Offices to provide maps in public notices and on the Registry. However, several First Nation and Yukon government departments expressed concerns about the quality of the geo-spatial information coming from Designated Offices. It was felt that, in some instances, project proponents aren't being adequately informed about the boundaries of First Nations' traditional territories or their settlement lands, or about overlap areas across these territories. Designated Offices have also apparently provided inaccurate information about the geographical coordinates of certain project proposals, and about First Nations whose interests will be impacted by certain projects. A couple of First Nations land staff felt that the lack of ongoing digital mapping showing such things as current projects, activities being assessed, traditional territories, and settlement lands is an important oversight that, if in place, would benefit the YESAA process by enabling YESAB to progressively build a knowledge base as new projects come on stream.

Community Engagement / Public Education

A significant number of Yukon communities and First Nation governments are dissatisfied with the quality of their interactions with Designated Offices and the YESAB Board. In interviews and written submissions, they stressed the inadequacy of YESAB's efforts to engage community members and to educate them about the YESAA process. When this new process first came into effect, both the Board and Designated Offices held extensive public meetings and educational workshops to introduce local people to the YESAA regime. But, since then, the YESAB bodies have primarily engaged with communities through the internet and the Online Registry. We heard that it is primarily only in the case of major project proposals when YESAB officials are available for face-to-face meetings or telephone conversations, as well as the organisation of public meetings.

According to various sources, many individuals and community organisations are still inadequately informed about the purposes and the details of the YESAA process. It is therefore widely felt that YESAB needs to devote additional resources to more public meetings in Yukon communities, and to do so on a regular basis. One business organisation we spoke to suggested that "YESAB should be making sure that the public is aware that the process is about making things better for the future and not about hindering projects or getting to the point where we regret decisions that were made." The input received at our numerous public sessions identified the need for more education and information about the process. More explanation is needed about the goals of the YESAA process and YESAB operations. We heard from people that they perceive the Designated Office staff and YESAB, more generally, to operate too much "under the radar."

YESAB Rules, Guidance Documents

A variety of concerns were raised about YESAB's Rules for Assessors and its various Guides for Proponents, particularly by companies, business organisations and government departments. It is felt that the wording of these Rules and Guidelines allows too much leeway for differences in interpretation among project proponents and assessors at the Designated Office level. These differences particularly relate to the information requirements for project proposals, and the tendency for these to be expanded during the course of assessments. Proponents are apparently often requested to provide additional information on their proposals, even when they believe they have already met the requirements as set out in the Guidelines.

In addition, some government departments argue that these Guides are too generic, and don't include sufficiently detailed information requirements for the various types of projects that come under assessment. They also believe that YESAB should provide more project-specific guidance on the information requirements for larger, complex development projects. More specifically, they would like to see clearer direction on how YESAB will address input from interested parties, technical experts and regulatory bodies during the information gathering phase of assessments.

YESAB Governance

We heard that there is a lack of documented policy or operational procedures on internal governance within YESAB. A written submission identified that the relationship between the Board, centralised Board staff in Whitehorse, and the Designated Offices is not clear and that the lack of governance is leading to concerns about project assessment consistency between Designated Offices and the ability of the central YESAB office to provide administrative direction to Designated Offices. It is felt that the lack of clear and open reporting relationships, uncertainty surrounding accountability within YESAB, and the fact that there is no mechanism in the Act that allows the Parties administrative oversight of YESAB, creates a problem for decision bodies and proponents.

YESAB as an Adaptive, Learning Institution

There is widespread recognition that the YESAA regime is still relatively new, and that YESAB is making efforts to address key issues and problems that have already arisen during its initial years of operations. However, a number of participants in this five-year review question whether YESAB has yet shown itself to be an adaptive, "learning" institution, capable of revising its structures and policies to accommodate the lessons it has already learned in project assessments.

It was suggested that one way to develop this corporate capacity is for YESAB assessors to visit project sites during construction, operations and closure phases, in order to review the actual impacts of projects or activities as well as the effectiveness of the mitigation measures that have been put in place. Another, suggested by business organisations and government departments, is for YESAB to draw on existing experience in Yukon to establish standard mitigative measures for similar groups of projects and activities, rather than simply assessing each project proposal as if it was unique.

Several First Nation governments feel YESAB does not have an adequate information management system that enables the ongoing development and improvement of its assessment capacity by regularly integrating feedback about project impacts from monitoring and mitigation programs.

Public Notification of Projects

Some of the UFA councils, business organisations, members of the public and Yukon Government identified an issue with the current project notification process used by YESAB. We heard, "YESAB's advertising is not detailed enough. Public announcements [in newspapers] are much smaller than what gets sent to organisations via e-mail." It was felt that ads in papers should include more detail about the nature of the project and its location. One written submission stated, "The YESAB Designated Offices, Executive Committee and panel of the Board are required to provide opportunities for interested persons and the public to participate in any assessment they conduct. The advertising of assessments in local papers is an important practice but it is unfortunately not formally required in the Designated Office or Executive Committee Rules. [We feel] that it is an important vehicle for interested parties and those with existing rights to find out about projects being assessed. Despite the success of the local newspaper notification, individuals with existing land rights [e.g., trappers] frequently are not aware of proposed projects and assessments that might impact on their rights.direct notification of neighbours is necessary to ensure adequate assessment of socio-economic factors."

Narrow Interpretation of the Act

Several of the government departments, First Nations, and non-governmental organisations we spoke to raised the issue of YESAB's interpretation of the Act being too narrow. We heard that the assessors narrowly interpret their mandate, that they are not proactive, are over-reliant on Yukon Government staff and proponents for expertise, and that they are not exercising their mandate to do research, assess plans, or assess cumulative and socio-economic impacts. One interviewee who has had extensive experience with YESAB suggested that "the conservative and cautious application of YESAA by the Board seems to be hampering YESAA ever reaching its potential...it is delivering a tight and narrowly interpreted process which simplifies things,

particularly for the proponents and regulators, and mitigates the fear of the process. However, it is also frustrating others, particularly First Nations, who had higher expectations of the process.” The perception is that YESAB’s narrow interpretation of its mandate means that much of the potential value added in the assessment process is not being realised. Specifically, a government submission stated that, “YESAB has interpreted s.42(1)(d)(ii) narrowly and generally only considers cumulative effects of projects or proposals that have been assessed or submitted to YESAB for assessment...”. It is felt that this narrow interpretation “...can result in an inadequate assessment of potentially significant cumulative effects due to incremental development in an area.”

3.4.2 General Assessment Issues

Class Assessments

Some Yukon government departments would like to see YESAB make greater use of its power to address similar projects within one combined or “class” assessment. They point to section 52 of the YESAA which provides for Designated Offices or the Executive Committee to assess as one project “two or more projects for which it has received proposals where it considers that the projects are so closely related as to be part of the same activity or where all the decision bodies of each of the projects have advised it that they consider the projects to be so related.” In their view, similar projects at multiple sites in the Yukon should be grouped together and assessed in the context of one overall assessment by YESAB. Apparently, YESAB was urged to do this in the case of government and municipal land-fills, but it decided to assess each one individually; it has also done this with minerals projects located in the same area. This approach by YESAB, the departments believe, has resulted in inconsistent recommendations among Designated Offices for very similar project proposals. It has also led to a significant increase in the amount of project proposals, Evaluation Reports and decision documents.

Strategic Assessments (Plans, Policies, Programs)

Several First Nation governments and some Yukon government departments want to see a greater use of “strategic assessments” by YESAB, particularly in relation to policies, plans and programs in Yukon. In their submissions, they note that the YESAA explicitly provides for the assessment of plans, policies and programs (sections 102-109) and for “studies and research” in regard to cumulative effects (sections 112-113). They believe that the YESAA regime would benefit considerably from the greater use of such strategic assessments.

By taking a broader, comprehensive approach to plans and policies, YESAB would be able to more effectively assess their potential impacts before these result from specific projects. YESAB would become familiar with the environmental and socio-economic values at stake in plans or policies before it addresses them at the level of individual projects. With the results of these

assessments in hand, YESAB would be in a better position to conduct project-specific assessments in a timely and efficient manner, and the costs to participants in individual project assessments would also be reduced.

YESAB itself recognises the potential value of undertaking strategic assessments. However, it feels hindered in doing so by the present provisions of the YESAA. As currently worded, the Act requires that reviews of plans be undertaken by panels of the Board, established by the Executive Committee for that purpose, and, under various circumstances, only at the request of the federal minister, territorial minister, or First Nation government. So far, no requests have been made and the potential timelines and costs of conducting such a panel review are seen as a deterrent.

Time Boundaries of Assessments

The review team heard from the Yukon Government that there are concerns with YESAB's recent (within the last six months) policy decision to scope projects for the duration of the regulatory instrument (e.g., permit or license) associated with the project. While it was recognised that there are merits to establishing time boundaries for assessments where appropriate, we heard that linking the duration of assessments to the temporal scope of regulatory instruments may not be the most appropriate way of identifying a stale date for an assessment. It is felt that in some cases this will decrease the efficiency of the process by requiring repeated assessments with little value added. The temporal periods for regulatory instruments are not always governed by the ability to mitigate adverse effects for the period. Regulatory instrument time periods may be predicated on other factors such as insurance renewals (for wilderness tourism licences for instance), and some permits may not be drawn on by proponents for some period after an assessment is complete (land use permits) so a temporal scope for an assessment may run out before the permit does unless the proponent draws down the permit immediately. It is felt that this is counterproductive to encouraging early planning of projects. Finally, we heard that the application of this new temporal scoping policy has potential to significantly increase the volume of assessments without any perceived benefit.

3.5 Substantive Issues

3.5.1 Traditional Knowledge

We heard from many respondents that a central unresolved challenge for the YESAA regime is how to include First Nations' traditional knowledge in project assessments. One of the stated purposes of the Act (section 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.*" Yet, virtually every First Nation participating in the five-year review feels strongly that the YESAA regime has fallen short in achieving this purpose. In interviews and submissions, they have

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 Evaluation Reports and decision documents.

First Nation governments also have concerns about how the confidentiality and sensitivity of traditional knowledge is being protected by YESAB in particular assessments. They believe that YESAB is failing to recognise the unique cultural and historical aspects of traditional knowledge, which require that it be considered on its own terms and as distinct from scientific knowledge. They also question YESAB's ability to accommodate traditional knowledge holders and traditional knowledge information with their roots in oral traditions, when its primary focus is on written and electronic submissions. Gathering and then providing traditional knowledge in an effective form is a time-consuming task for First Nations, and they are hampered in this both by the YESAA timelines for assessments and by their own limited resources.

Of equal concern to First Nations is their perception that, once submitted to YESAB, their traditional knowledge is not given the same level of consideration by assessors as is scientific knowledge. They are aware of few Evaluation Reports or decision documents that make substantial use of the traditional knowledge they have submitted.

In addition, there appears to be widespread uncertainty among companies, Yukon government departments and YESAB itself about how to make meaningful use of traditional knowledge in the YESAA process. Several participants in this review emphasised the urgent need for clearer guidelines, from both YESAB and First Nations, on how traditional knowledge should be gathered and included in project assessments. Some government officials underscored the difficulties involved in balancing the need for confidentiality with the requirement to integrate traditional knowledge into assessments. They also raised questions about how to validate the reliability and authoritativeness of traditional knowledge information.

3.5.2 Impact on Treaty Rights

The issue of how YESAB deals with Yukon Indians' treaty rights was raised in various interviews and submissions. Section 42.(1)(g) of the *Act* requires that, when conducting assessments, Designated Offices, the Executive Committee and Board panels shall take into consideration "*the need to protect the rights of Yukon Indian persons under final agreements... etc.*" A number of participants in the review interpret this provision to mean that YESAB is required to consider project impacts on treaty rights during each assessment it undertakes. Some First Nation, federal and territorial government departments believe that YESAB has so far failed to adequately implement this requirement in its assessments. They argue that Designated Offices, in particular, have been inconsistent in how they approach treaty rights in their Evaluation Reports, in some cases overlooking them and in others not effectively addressing concerns

raised by First Nations. As indicated in a written submission, “YESAA is assessment legislation that is pursuant to a land claim agreement. The spirit and intent of the legislation includes explicit recognition of the rights of Yukon Indian persons under Final agreements. This subsection is a means to ensure that there are no adverse effects on the rights of Yukon Indian persons under Final agreements. Early identification of Yukon Indian persons’ concerns assists in ensuring that they are considered in a manner beneficial to the Yukon Indian persons and the assessment/regulatory process, and in a manner aligned with requirements of recent court cases.” We were told that not addressing this creates considerable uncertainty among First Nations, departments and companies in the Yukon about the potential impacts of proposed projects on treaty rights. Additionally, in the absence of recommendations on how potential impacts on rights of Yukon Indian persons have been considered, decision makers are challenged to discharge their consultation obligations within the YESAA timelines. It is widely felt that YESAB needs to be clearer in its Evaluation Reports on whether it has taken into account Yukon Indians’ treaty rights and whether the projects under assessment will impact on these rights.

This issue is complicated by the fact that widespread uncertainty also appears to exist in the Yukon over the exact nature and extent of Yukon Indians’ treaty rights. Interviews revealed significant differences over the correct interpretation of “treaty rights.” There doesn’t seem to be any clear cut consensus, in particular, over which provisions in First Nations Agreements contain treaty rights and which do not.

3.5.3 Socio-economic Impact Assessment

There is considerable dissatisfaction with the quality of the socio-economic impact assessments being conducted by YESAB. Many participants in the review regard this as a key issue, considering that the YESAA (section 5(2)) explicitly requires that both the environmental and the socio-economic effects of projects be considered in assessments. This marks a significant difference from the federal CEAA regime, which provides for the assessment of socio-economic impacts only insofar as they are related to environmental impacts of projects.

YESAB has prepared a *Guide to Socio-economic Effects Assessments* for general use that encourages an integrated and comprehensive approach to assessing the social and economic impacts of projects on individuals and communities. However, interviews and submissions revealed a widely shared perception that YESAB assessments are not adequately advancing the purposes set out in the *Act* and the *Guide*.

First Nations are concerned that YESAB assessments focus primarily on the mitigation of adverse effects with little encouragement or direction for considering and evaluating the enhancements of positive socio-economic effects. We also heard, “there is no obligation to require that the most beneficial alternative be selected or even that projects should result in net

positive contributions as a reasonable expectation. Without such attention, neither the legislation nor the general guidance documents of YESAB facilitate serious attention to maximizing the full range of desirable long-term benefits". First Nations are uncertain about how YESAB assessors determine the socio-economic "significance" of impacts, and how they weigh the positive and negative impacts of projects in their assessments. Similar concerns are held by companies and some government departments, who would like to see assessors consider the full range of positive along with negative impacts in Evaluation Reports.

Government departments also questioned the limited methodology employed by YESAB in determining potential socio-economic impacts and their significance. They further called attention to the shortcomings in existing socio-economic data and information on baseline conditions relied on by both assessors and regulators in the Yukon. This lack of good data, they believe, limits the effectiveness of assessments and of the terms and conditions applied to projects by regulatory authorities. There is a shared sense of frustration as well at the limited ability of decision bodies and regulators to include appropriate socio-economic terms and conditions in project authorisations, given the current legislative framework in the Yukon.

3.5.4 Heritage Assessments

Several First Nation governments called into question the adequacy of YESAB's current treatment of impacts on heritage resources as part of its project assessments. They criticised the lack of clarity in the existing YESAB guidelines on heritage impact assessment, as well as the inconsistencies in how different Designated Offices deal with heritage resource impacts. In their view, a broader approach is required for socio-economic impact assessments in the Yukon, one that gives more attention to impacts on cultural/spiritual values. They believe that heritage impact assessments can only be done effectively by YESAB with substantial input from First Nations.

The information which is required can only come from detailed "on the ground" research and surveys, and First Nations faced with increasing resource pressures are finding that they lack sufficient capacity to do this necessary field work. Adding to their difficulties is the fact that heritage assessments must be conducted in snow- and frost-free conditions, which sometimes can't be accommodated within YESAB's timelines for assessments. First Nations feel strongly that creative ways must be found to accommodate the unique requirements of heritage assessments within the YESAA regime.

3.6 Legislation and Regulation Issues

3.6.1 *Dispute resolution*

We heard from First Nations, Yukon Government, industry and some business organisations that the Act provides inadequate means for addressing differences of opinion. Apart from a judicial review process (s.115 and s.116 of YESAA) there are no dispute resolution mechanisms to resolve conflicting interpretations of the Act between the Parties and/or with YESAB, or to resolve concerns one party might have about a decision body's compliance with the Act, YESAB decisions, or decision documents. The judicial review mechanism is viewed to be cumbersome and inappropriate for ensuring effective compliance with the Act.

3.6.2 *Working Outside of YESAA*

We heard from a number of participants on specific issues that we have grouped as being related to working outside of YESAA. That is, several First Nation governments raised concern about cases where proponents have started projects without going through an assessment or before an assessment is complete. Similarly, we heard concerns about decision bodies issuing authorisations in the absence of an assessment, or prior to an assessment being complete. Overall, the issue raised is that there are no measures in place to deter non-compliance with the Act and no mechanism for easy oversight.

3.6.3 *Role of Municipalities*

Municipalities are not decision bodies under YESAA; instead, the Yukon government is the decision body on the municipality's behalf. This was identified as a concern by one municipality which felt they should be a decision body in some instances. Additionally, concern was raised that municipalities are not directly involved in permitting developments where they are the proponent. This creates a situation where a government that has had no involvement in planning a development is being asked to issue a Decision Document in response to a YESAB recommendation that should be directed at the municipality as the approving authority.

From another perspective, the Yukon Government also identified the role of municipalities as an issue, but more so along the lines that municipalities do not adequately participate in assessments. That is, when a project is being assessed which requires a municipal authorisation and Yukon government is the decision body, it frequently must vary the YESAB recommendation and terms and conditions so as to comply with municipal bylaws as the assessor is not always properly considering the values that the municipal bylaw protects. The assessment in many situations does not address or take into consideration the Official Community Plan mandated under the Municipal Act or land use and zoning bylaws, including

subdivision design standards relevant to the application receiving review. It is felt this issue is compounded by inadequate information provided into the assessment and the fact that many municipalities do not participate in YESAA assessments. Lack of dialogue between YESAB assessors and municipal staff was identified as a factor.

3.6.4 Definitions

Several participants to the review identified specific definitions in the Act and Regulations that they feel need to be reviewed. These are:

- Plan
- Proponent
- Significance
- Contaminated site
- Territorial Agency

3.6.5 Assessable Activities Regulations Difficult to Understand

We heard from government and some industry representatives that it can be difficult to determine whether some proposed projects require an assessment under YESAA. Schedules 1 and 2 of the Regulations can be difficult to interpret without extensive experience with the Act.

3.7 Other Issues

3.7.1 Unsettled Claims

The status of the three Yukon First Nations without Final Agreements—Ross River Dena Council, White River First Nation, and Liard First Nation—is a significant unresolved issue for the YESAA and for the land and resource management system in the Yukon. In interviews and written submissions, two of the First Nations stressed that their rights and interests are not being adequately addressed by YESAB and by Government. As presently worded, YESAA fails to recognise these First Nations, by virtue of its definition of “Yukon Indian persons” as individuals that are “enrolled under a final agreement” (s. 5(2)). They therefore apparently fall outside the guiding purposes relating to Yukon Indian persons set out in sections 42.(1) (d) (f) and (g) of the Act.

Provision is made in the UFA (section 12.19.1.2) for Government to consult with First Nations on “a detailed plan...providing for the application of the Development Assessment Legislation until Yukon First Nation Final Agreements have been negotiated.” But these “plans” have never been developed. In the First Nations’ view, this leaves them without effective means of protecting

their rights in relation to developments in their traditional territories or of participating in project assessments, until their claims are settled.

We heard from Ross River Dena Council that they are concerned about the failure of YESAB and Government to consult with them on ways to protect their interests in Yukon development assessments. They noted, in particular, that Section 74.(2) of the *Act* requires decision bodies to consult with First Nations without settled Final Agreements on projects that are located wholly or partly within their traditional territories or that might have significant adverse environmental or socio-economic effects. However, they maintain that to date this requirement has not been adequately fulfilled by departments of the Yukon Government.

3.7.2 Need for ongoing Five-year Reviews

Based on interviews and submissions, there seems to be broad recognition of the necessity of the five-year review now underway in the Yukon. Numerous participants in this review expressed their hope that recommendations from the review team will be acted on by the Parties to the UFA, and that some of the current shortcomings in the YESAA process will be effectively addressed as a result. It is understood, at the same time, that the Yukon assessment regime is still in its infancy, and that it will continue to evolve and mature in response to the challenges posed by future project assessments. In light of this, a variety of government departments, First Nations and non-governmental organisations stress the need for further reviews down the road.

4.0 NEXT STEPS

This final Issues Scoping Report is the first of several reporting requirements as part of the YESAA Five-year Review. As previously presented, the review is made of the following three phases.

Phase 1 – Information gathering and issues scoping

Phase 1 of the review is the primary opportunity for seeking and compiling views on the development assessment process and identifying issues that require further research and consideration. The output of Phase 1 is this Issues Scoping Report.

Phase 2 – Issues analysis

Phase 2 of the review will include additional research and analysis to evaluate the issues identified in Phase 1. This phase will include the development of observations, conclusions and/or recommendations. The output of this phase

will be an Observations and Conclusions Report, the first draft of which is expected to be available for public distribution in late June 2009.

Phase 3 – Response

During Phase 3 of the review, the designated representatives, First Nations and YESAB will consider the Observations and Conclusions Report. They will develop a joint response that describes the outcome of the review in a draft Review Report. The designated representatives will then prepare a final Review Report that will include an implementation and follow-up schedule.

The draft Issues Scoping report was available for review to those who provided input during the information gathering phase. In addition, a two-day workshop was held with First Nation representatives in mid-April, followed by a day-long meeting with the Steering Committee, to discuss the draft report and identify any gaps.

The final Issues Scoping Report sets the stage for moving into Phase 2; the development of observations, conclusions and/or recommendations related to the YESAA process. The review team will begin to look at case studies and conduct literature research to formulate suggestions for effectively addressing the primary issues raised during Phase 1.

Prior to a draft Observations and Conclusions Report being prepared, a workshop will be held with the Parties, First Nation governments, and YESAB representatives to discuss the preliminary analysis of issues and the development of conclusions, observations and/or recommendations. The draft Observations and Conclusions Report will be available for public comment and is expected to be released in late June 2009. A three-week comment period for the draft report will be provided, and the final report will be due two weeks later.

The work of SENES will be completed with the submission of the final Observations and Conclusions Report. Phase 3 of the YESAA Five-year Review will be undertaken by the designated representatives, First Nations and YESAB, who will prepare a joint response that describes the outcome of the review in a draft Review Report. The designated representatives will then prepare a final Review Report that will include an implementation and follow-up schedule.

APPENDIX A

Sample of solicitation letter sent to organisations



SENE Consultants Limited

Specialists in Energy, Nuclear, and Environmental Sciences

Mailing Address

4915-48th Street, Unit 23
YELLOWKNIFE, NT
Canada X1A 3S4

3rd Floor – NWT Commerce Place
4921 - 49th Street,
Yellowknife, NT X1A 3S5

Tel: (867) 669-2092 - ext. 226

Fax: (867) 669-2093

Email: smontgomery@senes.ca

Independent contractor for the YESAA Five-year Review

December 7 2008

Sent via e-mail to

Dear

I am writing to let you and your organization know that SENES Consultants Ltd. (SENE) has been hired by a Steering Committee made up of representatives of the Council of Yukon First Nations (CYFN), Government of Yukon, and Government of Canada, to conduct an independent and comprehensive review of the Yukon Environmental and Socio-economic Assessment Act and the Yukon development assessment process (YESAA Five-year Review). As the Project Manager for the Review I would like to let you know that our work is underway and that we're looking for input from interested parties. Please see the appended 2-pager for an overview of the work.

Our review team is scheduled to be travelling to Yukon communities during the last three weeks of January 2009. The following list provides our tentative schedule:

- Whitehorse – January 12 through 16
- Ross River – January 16 (alternatively, January 20)
- Faro – January 15 (alternatively, January 19)
- Old Crow – afternoon January 19 through morning January 21
- Dawson – later afternoon January 21 through mid-afternoon January 23
- Beaver Creek – morning of January 20
- Burwash Landing – afternoon January 20 and morning January 21
- Haines Junction - afternoon January 21 through morning January 23
- Carmacks – January 26 through morning January 27
- Mayo – all day and evening of January 28
- Pelly Crossing – morning January 29
- Carcross – all day and evening of January 26
- Watson Lake – morning till later afternoon of January 28
- Teslin – all day and evening of January 29



The Yukon Environmental and Socio-economic Assessment Act

YESAA Five-year Review

Contact Shelagh Montgomery (SENE) for more information about the Review or to provide input.
E-mail: yesaa@senes.ca Toll free tel.: 1-877-299-3722 (29-YESAA) Web: in preparation

To ensure an effective review, we are looking for input from a diversity of organizations during the community tour. If you or someone in your organization would like to have input into the YESAA Five-year Review, we would like to schedule individual or group interviews during the above dates. If an in-person meeting is not possible during the January trip, we can schedule a telephone interview. Written submissions will also be accepted until February 11 2009 for the information gathering and issues scoping phase.

We look forward to hearing from a diversity of groups and individuals about any concerns or comments relating to the Yukon development assessment process. The more input we receive on the YESAA process, the stronger the review will be.

At this time, I would greatly appreciate that if you or your organization is interested in participating in the Review that you let me know no later than December 23. Please send me names and contact information for people who we should meet with in your organization during our community tour.

Alternatively, if you wish to arrange for a telephone interview, please let me know no later than January 7. These telephone interviews will take place in early February 2009.

Please note that we expect our website to launch December 20 (www.yesaa-senes.ca). The website will provide updates about the Review, draft reports, our interview guide, an online survey about the development assessment process, as well as a comment submission function.

If you have any general questions about this review or our consultations please do not hesitate to contact me via one of the following means:

Mailing address:

SENES Consultants Ltd.
4915-48th Street, Unit 23
Yellowknife, NT X1A 3S4

Toll free tel.:

1-877-299-3722 ext. 226
(1-877-29-YESAA)

E-mail:

yesaa@senes.ca

Yours truly,

SENES Consultants Limited



Shelagh Montgomery, Ph.D.
Project Manager

Enclosure: YESAA Five-year Review summary

APPENDIX B

Listing of groups contacted, meetings held, and written comments received

**TABLE A-1
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED**

GROUP	INITIALLY CONTACTED	MET WITH	WRITTEN SUBMISSION
<u>First Nation Government</u>			
1 Kwanlin Dun First Nation	✓	✓	✓
2 Ta'an Kwäch'an Council	✓	✓	✓
3 Ross River Dena Council	✓	✓	✓
4 Vuntut Gwitchin First Nation	✓	✓	✓
5 Tr'ondëk Hwëch'in First Nation	✓	✓	✓
6 White River First Nation	✓	✓	
7 Kluane First Nation	✓	✓	✓
8 Champagne and Aishihik First Nation	✓	✓	✓
9 Little Salmon/Carmacks First Nation	✓	✓	✓
10 First Nation of Na-Cho Nyak Dun	✓	✓	✓
11 Selkirk First Nation	✓	✓	✓
12 Carcross/Tagish First Nation	✓	✓	✓
13 Teslin Tlingit Council	✓	✓	✓
14 Liard First Nation	✓		✓
15 Gwich'in Tribal Council	✓	✓	✓
16 First Nation Caucus			✓
<u>Yukon Government</u>			
17 Health and Social Services – Environmental Health	✓	✓	
18 Health and Social Services – Policy	✓	✓	
19 Energy, Mines and Resources – Sustainable Resources	✓	✓	
20 Energy, Mines and Resources – Oil and Gas	✓	✓	
21 Energy, Mines and Resources – Client Services and Inspections	✓	✓	
22 Energy, Mines and Resources – Policy	✓		
23 Development Assessment Branch	✓	✓	✓ ¹
24 Community Services	✓	✓	
25 Economic Development	✓		
26 Education	✓		
27 Environment	✓	✓	
28 Highways and Public Works	✓	✓	

¹ Represents the Yukon Government Corporate Submission

TABLE A-1 (Cont'd)
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED

GROUP	INITIALLY CONTACTED	MET WITH	WRITTEN SUBMISSION
29 Land Claims and Implementation Secretariat	✓	✓	
30 Tourism and Culture – Tourism Branch	✓	✓	
31 Tourism and Culture – Heritage – Archaeology	✓	✓	
32 Women’s Directorate	✓		
33 Justice	✓		
34 Yukon Workers’ Compensation Health & Safety Board	✓		
<u>Government of Canada</u>			
35 Fisheries and Oceans	✓	✓	
36 Transport Canada	✓	✓	✓
37 Environment Canada – Environmental Protection	✓	✓	✓
38 Environment Canada – Canadian Wildlife Service	✓	✓	
39 Indian and Northern Affairs Canada – Northern Affairs Program (Waste and Contaminants)	✓	✓	
40 Indian and Northern Affairs Canada – Northern Affairs Program (Type II Mines)	✓	✓	
41 Indian and Northern Affairs Canada – Strategic Investments Directorate	✓	✓	
42 Indian and Northern Affairs Canada – Environment Directorate	✓	✓	✓
43 Canadian Environmental Assessment Agency	✓	✓	
44 National Defence	✓		
45 Health Canada	✓		
46 Parks Canada		✓	✓
47 National Energy Board	✓		
48 Agriculture and Agri-Food Canada	✓		
49 Canada Border Service Agency	✓		
50 Canadian Heritage	✓		
51 Justice	✓		
52 Industry Canada	✓		
53 Natural Resources Canada	✓		
54 RCMP	✓		

TABLE A-1 (Cont'd)
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED

GROUP	INITIALLY CONTACTED	MET WITH	WRITTEN SUBMISSION
<u>Umbrella Final Agreement Board or Council</u>			
55	YESAB	✓	✓
56	Kluane National Park Management Board	✓	
57	Yukon Land Use Planning Council	✓	✓
58	North Yukon RLUPC	✓	
59	Peel Watershed Planning Commission	✓	
60	Surface Rights Board	✓	
61	Yukon Heritage Resources Board	✓	✓
62	Yukon Geographical Place Names Board	✓	
63	Yukon Territory Water Board	✓	✓
64	Yukon Fish and Wildlife Management Board	✓	✓
65	Salmon Sub-Committee	✓	
66	Alsek Renewable Resources Council	✓	✓
67	Carmacks Renewable Resources Council	✓	
68	Dän Keyi Renewable Resources Council	✓	✓
69	Dawson District Renewable Resources Council	✓	✓
70	Laberge Renewable Resources Council	✓	✓
71	Mayo District Renewable Resources Council	✓	
72	North Yukon Renewable Resources Council	✓	✓
73	Selkirk Renewable Resources Council	✓	
74	Teslin Renewable Resources Council	✓	✓
75	Dispute Resolution Board	✓	
76	Training Policy Committee	✓	
<u>City/Village/Town Councils</u>			
77	City of Whitehorse	✓	✓
78	Town of Faro	✓	✓
79	Village of Carmacks	✓	✓
80	Village of Mayo	✓	✓
81	City of Dawson	✓	✓
82	Village of Haines Junction	✓	✓
83	Village of Teslin	✓	✓
84	Town of Watson Lake	✓	✓

TABLE A-1 (Cont'd)
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED

GROUP	INITIALLY CONTACTED	MET WITH	WRITTEN SUBMISSION
85 Hamlet of Ibex Valley	✓		
86 Hamlet of Mount Lorne	✓		
87 Tagish Local Advisory Council	✓		
88 Marsh Lake Local Advisory Council	✓		✓
89 South Klondike Local Advisory Council	✓		
<u>Business / Industry Organisation</u>			
90 Yukon Chamber of Mines	✓	✓	✓
91 Klondike Placer Miners' Association	✓		✓
92 Yukon Prospectors' Association	✓		✓
93 Yukon Trappers' Association	✓		
94 Yukon Outfitters' Association	✓		
95 Wilderness Tourism Association Yukon	✓		✓
96 Yukon Chamber of Commerce	✓		✓
97 Watson Lake Chamber of Commerce	✓	✓	
98 Dawson City Chamber of Commerce	✓		
99 Faro Chamber of Commerce	✓		
100 Mayo Chamber of Commerce	✓		
101 Tourism Industry Association of the Yukon	✓	✓	
102 Yukon First Nations Tourism Association	✓		
103 Klondike Visitors Association	✓	✓	
<u>Business / Industry</u>			
104 Cash Minerals Ltd.	✓		
105 Western Copper Corporation	✓	✓	✓
106 Equity Exploration Consultants Ltd.		✓	✓
107 North American Tungsten Corporation	✓	✓	
108 Minto Explorations Ltd.			✓
109 Northern Cross (Yukon) Ltd.			✓
110 Duncan Creek Golddusters Ltd.			✓
111 Yukon Energy		✓	✓
112 Yukon Indian Development Corporation	✓	✓	
113 Carcross Tagish Development Corporation	✓		
114 Dakwakada Development Corporation	✓		

TABLE A-1 (Cont'd)
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED

GROUP	INITIALLY CONTACTED	MET WITH	WRITTEN SUBMISSION
115 Mundessa Development Corporation	✓		
116 EBA Engineering Consultants Ltd.			✓
117 Access Consulting Group			✓
118 Private consultant 1		✓	
119 Private consultant 2		✓	
120 Private consultant 3		✓	✓
<u>Non-governmental Organisations</u>			
121 Yukon Conservation Society	✓	✓	✓
122 Canadian Parks and Wilderness Society (Yukon Chapter)	✓	✓	✓
123 Ducks Unlimited	✓	✓	✓
124 Yukon River Inter-Tribal Watershed Council	✓		
125 South East Yukon Proper Land Use Society	✓		
126 Kaushee's Place / Yukon Women's Transition Home	✓		
127 Help and Hope For Families (Watson Lake)	✓		
128 Victoria Faulkner Women's Centre	✓		
129 Les EssentiElles	✓		
130 Many Rivers	✓		
131 Bringing Youth Towards Equality	✓		
132 Crime Prevention Yukon	✓		
133 Skookum Jim Friendship Centre	✓		
134 Liard Aboriginal Women's Society	✓		
135 Yukon Status of Women Council	✓		
136 Yukon Aboriginal Women's Council	✓		
137 Association Franco-Yukonnaise	✓		
138 Yukon Fish and Game Association	✓		
139 Arctic Borderlands Ecological Knowledge Co-op	✓		
<u>Other Boards/Councils/Associations</u>			
140 Wildlife Management Advisory Council (North Slope)	✓		
141 Porcupine Caribou Management Board	✓		✓
142 Yukon Council on the Economy and the Environment	✓		
143 Health and Social Services Council	✓		

TABLE A-1 (Cont'd)
SUMMARY OF GROUPS INITIALLY CONTACTED, MEETINGS CONDUCTED,
AND WRITTEN SUBMISSIONS RECEIVED

GROUP	INITIALLY CONTACTED	MET WITH WRITTEN SUBMISSION
144 Yukon Advisory Council on Women's Issues	✓	
145 Yukon Utilities Board	✓	
<u>General Public</u>		
146 Dawson Open House		✓
147 Carmacks Open House		✓
148 Mayo Open House		✓
149 Teslin Open House		✓
150 Carcross Open House		✓
151 Haines Junction Open House		✓
152 Champagne and Aishihik First Nation Open House		✓
153 Whitehorse Open House		✓
154 Faro Open House		✓
155 Individual submissions		11
156 Online questionnaire responses		11
Totals:	143	78 71

APPENDIX B

Traditional Knowledge in Theory and Practice

Traditional Knowledge in Theory and Practice

This essay explores submissions to the Five Year Review process, case studies, and key messages from recent traditional knowledge literature that can be useful in future processes addressing the YESAA purpose “to guarantee opportunities for the participation of Yukon Indian persons—and to make use of their knowledge and experience—in the assessment process” 5.(2)(g). The focus here is on methodological issues related to research, analysis, communication and decision-making in assessment processes, with particular attention to the challenges of working with oral and culturally sensitive or confidential traditional knowledge.

Many oral and written submissions to the Five Year Review noted the emphasis on documented and quantifiable data in assessments that undermine the oral, qualitative and contextual nature of traditional knowledge at its source: “They’re not considering the spirit of the trapline, the culture, the way of life – it’s just numbers.” The one exception noted was project 2008-0070 Operation of Holland America Line’s *mv Yukon Queen II*, in which a video submission was accepted (2008-0070-140-2 and 2008-0070-141-1). Pointing to the intangible heritage values of the Yukon River, the evaluation report for 2008-0070 draws upon qualitative traditional knowledge, in particular the documented story of the Beaver-Man in the Tr’ondek Hwech’in First Nation’s written submission (2008-0070-107). Traditional knowledge shared in written submissions from Tr’ondek Hwech’in First Nation and Teslin Tlingit First Nation about the values associated with salmon are extensively quoted in the assessment. However, the assessment makes no reference to the video.

The joint First Nation submission to the Five Year Review focused on the example of project 2008-0118 Game Farm Expansion – Ag Land Disposition 61–3 where Champagne and Aishihik First Nations opposition to the project was dismissed in the evaluation report on the basis that

It is difficult to assess the concept of effects to cultural values as the effect is neither *measurable nor quantitative* [emphasis added]. An activity occurring that is contrary to a First Nation value or values held by any culture does not immediately result in a significant adverse effect The identified cultural value is not reflected within the current regulatory regime for game farming. As such there is currently opposing views as to acceptability of game farming. If this project does proceed it is unlikely that the cultural value of CAFN will be diminished, only that an activity has been approved goes against that value. Those people that hold that view will not be forced to change their view. The land is already removed from public use for private agriculture development; therefore no cultural activities can be directly practiced on that parcel. It is the determination of this assessment that the proposed project will not result in a significant adverse effect to cultural values.

The joint First Nation submission offers a critique of this assessment, suggesting that it demonstrates a lack of understanding of the nature and implications of the traditional knowledge shared:

The conclusion about significance appears to establish a hierarchy of laws, which places more value on other governments' laws than on First Nations' laws, and fails to recognize that the cultural effects in question are not location related, but are founded in First Nations values and principles. While CAFN submitted input from a traditional knowledge perspective, the assessment agencies and decision bodies did not involve them directly in interpreting and utilizing the information to support the assessment and decision making activities. YESAA would better fulfill its objectives if participants utilized a more interactive approach to seeking, respecting, understanding, interpreting and using this information.

The general lack of First Nation confidence in the ability of assessors to address traditional knowledge inputs in an appropriate way is crystallized in the comment by a review participant that they're "not sure if they take our input to heart." The current assessment system for coding submissions often weights traditional knowledge as "policy or position" in contrast to science-based submissions which are consistently coded as "expert opinion." This would appear to contradict Rule 94 of YESAB's current *Rules for Evaluations* (2005) according to which

A Designated Office shall determine the relevance and weight to be given to any information provided to it or obtained by it in the course of conducting an evaluation of a project, and there shall be no presumption that scientific information or traditional knowledge, as the case may be, should be accorded greater weight based solely on the fact that the information is, respectively, scientific information or traditional knowledge.

Based upon preliminary information from YESAB we understand that the ongoing Designated Office rules review is considering no longer coding submissions for the type of information they represent. However, this would not address the broader issue of quantitative or science-based information being given more weight than traditional knowledge in the assessment process. This is based on the observation that few assessment reports make substantial use of traditional knowledge submitted. One exception is project 2006-0302 Agriculture Application #787-1 at Shallow Bay, where the Ta'an Kwäch'an Council felt that "the designated office did a good job of reviewing all the information, explaining how each piece was used (or not)..."

Ellis (2005) notes that in order to give it more legitimacy, traditional knowledge is often subjected to a process of "scientization." As a corollary to this, non-aboriginal traditional knowledge "experts" are often privileged in environmental management processes (Nadasdy 2003; Ellis 2005). The YESAB discussion document on traditional knowledge recognizes that non-First Nation or Yukon Indian persons may be sources of traditional knowledge. Non-First Nation resource people do play a supporting role in traditional knowledge processes. However, it must be emphasized that when it comes to traditional knowledge and First Nation heritage, which stretches back long before the era of scientific research in the Yukon and involves distinct

methodologies, land-based First Nation people are unquestionably the experts. This is recognized in the YESAB assessors guide: “the role of TK is directly connected to FN [First Nation] and Yukon Indian persons” and moreover “as self-governing bodies representative of their people, FN governments will play a key role as the original source for TK.”

Several First Nation responses to the Five Year Review spoke to distinct methodology required for working with traditional knowledge:

Traditional knowledge includes a cultural dimension. It is informed by the long-term interrelationship between First Nation people and the environment and a holistic, integrated world view. The knowledge cannot simply be considered as data that can be extracted from the First Nation and inserted into an assessment in the way scientific data might be used. As a result, First Nation input for assessments, especially traditional knowledge cannot function effectively within the context of a reductionist approach to understanding and interpreting effects. For the development assessment process to be effective at incorporating traditional knowledge, methods have to be used that respect the differences between traditional knowledge and scientific knowledge in their acquisition, documentation, dissemination, and interpretation.

First Nations have always had a holistic view of the world. In terms of the effects created by a human activity, this involves viewing them as a whole and making a judgment of the effects on a watershed, a trapline, or a traditional use area. The YESAB approach of breaking an activity down into individual components and looking at their effects in isolation from each other is foreign to First Nations.

Stories are considered to be an important vehicle for sharing the full meaning of traditional knowledge. One First Nation respondent referred to a positive example drawn from the LARC era where a story of the importance of a hill was told at a face-to-face meeting and this “made all the difference” in having that information considered. The findings of the YESAA Five Year Review consultations are consistent with Tuhiwai Smith’s point that specific “indigenous methodologies” as distinct from standard social science approaches are required in an indigenous knowledge context (1999), as well as the arguments advanced by Cruikshank (1999), Nadasdy (2003), Legat (2007), Caine (2008) and others about the importance of story and language as a vehicle for meaning in a traditional knowledge context.

The importance of keeping traditional knowledge in context is recognized in the YESAB *Discussion Document on the Incorporation of Traditional Knowledge into Assessments* (2006). Critics have noted problems caused by attempts to distil aboriginal traditional knowledge and

subsume it within a science-based decision-making framework (Cruikshank 1998; Tuhiwai Smith 1999; Nadasdy 2003). The Millennium Ecosystem Assessment (2005) identifies this as a problem as well: “Local and indigenous knowledge evolves in specific contexts, and good care should be indigenous knowledge taken to not de-contextualize it. Conventional ‘best-practices’ methods focusing on content may not be appropriate to deal with local or indigenous knowledge (2005, R 14). Indigenous theorists such as Maori author Linda Tuhiwai Smith (1999) and Kanienkehaka author Taiaiake Alfred (2005) have argued that the general concept of traditional knowledge needs to be enhanced with a more nuanced understanding of regional and local cosmologies. For example, the Government of Nunavut has formally adopted a distinct conception of Inuit knowledge drawn from Inuit perspectives and language, *Qaujimagatuqangit* (Wenzel 2004).

Precisely because of its contextual nature, there is much in traditional knowledge that people consider to be culturally sensitive or confidential. Certain spiritual areas are not to be known about except by the First Nations or individuals who are stewards of those areas. There is concern about corporations, tourists, sport hunters and others who may inappropriately use information – this applies to both confidential and non-confidential traditional knowledge. First Nations have argued that there should be an option for even non-confidential traditional knowledge to be kept out of the online registry and thus rendered less accessible to the public. First Nation concerns are also related to the way in which documented or disembodied traditional knowledge becomes separated from the knowledge holders and thus loses context and meaning – so it is considered to be more easily misunderstood and misused. When traditional knowledge is designated confidential, there are concerns that it will not be adequately accommodated at the Decision Document phase. In the case of 2007-0009AMGCS - Hiking in Kluane National Park, the Kluane First Nation felt compelled to go around the assessment process and work directly with the proponent (Kluane National Park) to identify a solution.

Traditional knowledge holders often consider that trust and accountability can be established through face-to-face oral knowledge sharing in a way that is not possible in reading a document. Such engagement is also an important mechanism for the kind of verification that’s required to ensure that traditional knowledge is accurately transmitted and understood:

Environmental assessments involve a number of steps along the way, and each step crosses a cultural boundary, a boundary in which the meaning of what people say gets lost in translation. There needs to be a verification process: “Are you really hearing what I’m saying?”

The First Nation emphasis on the value of oral engagement runs contrary to Western legal traditions privileging the validity of documented evidence. In the words of one written submission to this Review, “*The strict legal framework requiring display and retention of hard copy materials and illustrations is not consistent with the knowledge sharing, use and retention principles of traditional knowledge systems that often retain and transmit information by other mechanisms that*

include oral traditions.” There are now a number of precedents establishing the evidential validity of oral traditions in law, notably the groundbreaking *Delgamuukw v. British Columbia* (1997). The decision rendered by Justice David Vickers in *Tsilhqot'in Nation v. British Columbia* (2007) has provided an important assessment of the evidentiary role of oral traditions, and the challenge in applying these traditions:

Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the ‘truth’ which lies at the heart of the oral history and oral tradition evidence can be much more elusive.”

Uneven access to detailed confidential or sensitive information is arguably a basis for some Decision Body variances or rejections of assessor recommendations. In one such case, the Ta'an Kwäch'än Council provided traditional knowledge information to the assessor in relation to project 2006-0302 Agriculture Application # 787-1 at Shallow Bay. According to the Ta'an Kwäch'än First Nation written submission to the Five Year Review, “a positive working relationship developed between the First Nation and the designated office as meetings were held to elaborate on traditional knowledge submitted and the importance of the site.” The input from the Ta'an Kwäch'än Council influenced the outcome of the assessment as presented in the evaluation report, resulting in a recommendation that the project not proceed. However, the Decision Body for the project (Yukon Energy, Mines and Resources) overturned the recommendation, approving the project with mitigation measures including buffers and access trails aimed to “significantly reduce and control the adverse effect on heritage or cultural values.”

The Ta'an Kwäch'än submission to the review points to the limits of a decision-making process that does not engage concerned First Nations:

This mitigation was completely unacceptable for TKC as it disregards the notion that cultural landscapes are vulnerable to fragmentation. Most of the cultural values at this site are intangible; they don't have to do with physical items or specific sites, but rather the accumulation of memories, stories and history of the place as a whole, and the relationship between the area and Ta'an Kwäch'än people. In this case, the decision body did not lack the regulatory framework to abide by the recommendation of the Evaluation Report. Instead, they chose to reinterpret facts in a way that reduced the significance of the adverse effects to culture and traditional use. This demonstrates a lack of understanding of traditional knowledge and First Nation views and values.

In a contrary example also involving Yukon Energy, Mines and Resources as the Decision Body, the Tr'ondek Hwech'in First Nation was able to provide the necessary traditional knowledge to the Decision Body under protection of a formal confidentiality agreement (2007-0205 Wernecke Winter Road Access Project in the Wind River watershed). However, the First Nation did not have a similar agreement with YESAB, and so was constrained in provision of traditional knowledge to the assessor. Yukon Energy, Mines and Resources varied the assessor's recommendation and denied permission to construct an aerodrome. The First Nation was confident that their concern had been adequately addressed.

The *Guide to the British Columbia Environmental Assessment Process* (2003) establishes principles addressing First Nation concerns about appropriate use of traditional knowledge, as follows:

The First Nations are often concerned about how their knowledge will be used or put into practice. They may present the following principles to guide discussions and practices, or as preconditions for imparting their traditional or community knowledge:

- respect for the rights of the holders of the knowledge;
- confidentiality (except for mutually agreed upon purposes);
- involvement of the holders of knowledge; and
- beneficial use to the interests of the holders of the knowledge.

The British Columbia guide does not specify how these principles affect the application of the *Freedom of Information and Protection of Privacy Act* in that province.

The Mackenzie Valley Environmental Review Board (MVEIRB) addresses concerns about sensitive and confidential information in its traditional knowledge guidelines by highlighting the option for the proponent and community to work together before and outside of the assessment process. This is because the proponent is not subject to the *Access to Information Act*. There is also a secondary benefit in the value gained by proponents in working directly with traditional knowledge holders. (Schuh 2005). MVEIRB also recognizes the protocol of informed consent established in standard research protocols as an important mechanism in protecting traditional knowledge holders and building confidence that traditional knowledge will be respectfully used.

Examples such as these from other jurisdictions are instructional. However, development of solutions for traditional knowledge issues in the Yukon assessment process will need to be adapted to the specific needs and conditions of the Yukon Territory – and will emerge from more of the kind of dialogue among the parties that has been stimulated by the Five Year Review.