



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

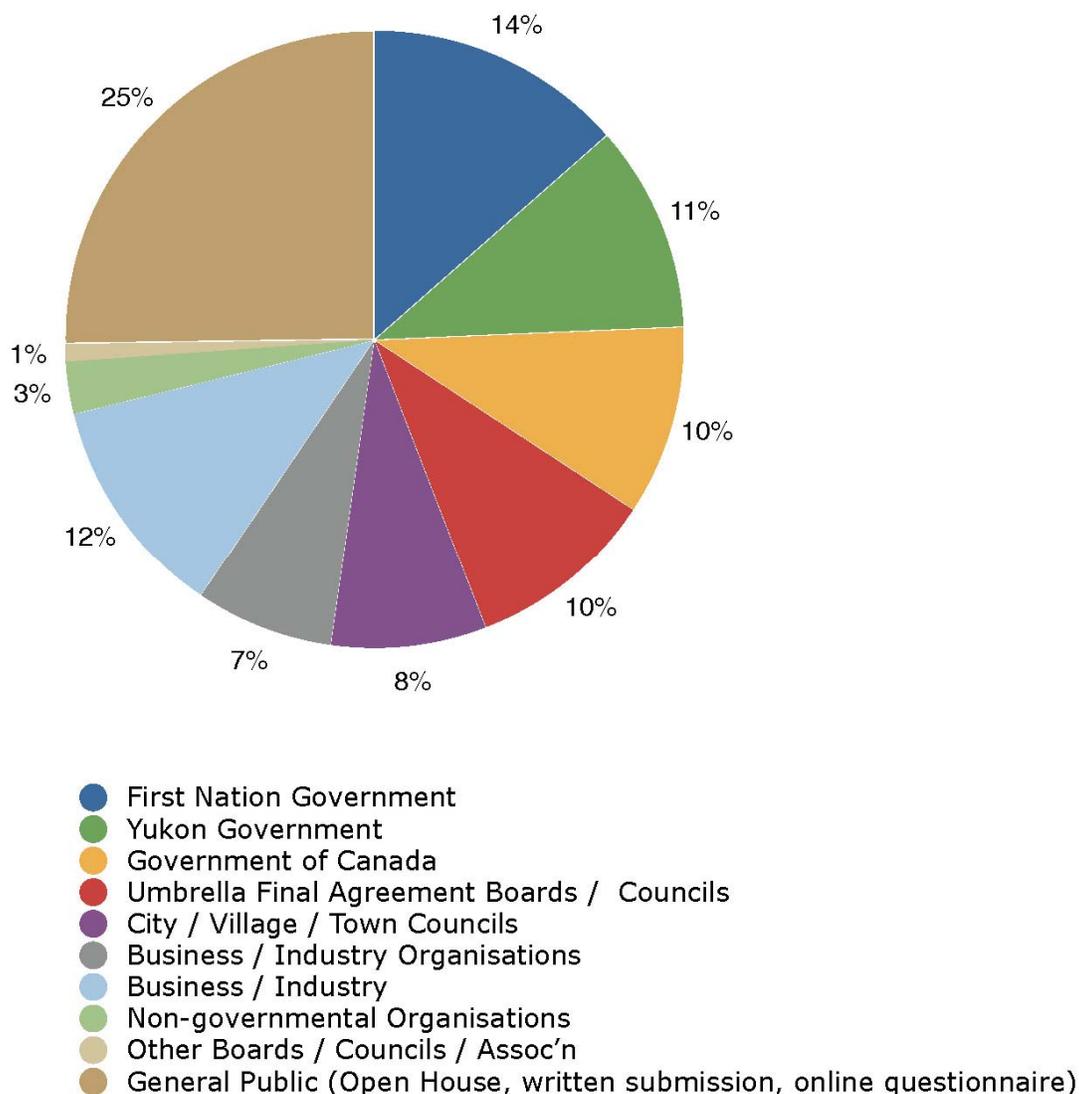
The Umbrella Final Agreement (UFA) requires the completion of a comprehensive review of the development assessment process within five years of the enactment of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA). SENES Consultants Limited (SENES) was selected through a national competition 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

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
1.0 INTRODUCTION	1
1.1 Background for the Five-year Review	1
1.2 Five-year Review Mandate	1
1.3 UFA and YESAA Context	2
1.4 Purpose of this Report	4
1.5 Report Format	4
2.0 PHASE 1 ENGAGEMENT PROCESS	5
3.0 ISSUES	8
3.1 Common Positive Remarks	8
3.1.1 Improved Assessment Process	8
3.1.2 YESAB and Designated Office Staff are Accessible	9
3.1.3 YESAB Online Registry	9
3.2 General / Broad Issues	9
3.2.1 Cumulative Effects	9
3.2.2 Development Assessment Process not Meeting Objectives of UFA / Purposes of YESAA	10
3.2.3 What gets Assessed	12
3.2.4 Balance / Interface of Assessors and Regulators	12
3.2.5 Mitigation Measures	14
3.2.6 Inconsistency Among Designated Offices	14
3.2.7 Land Use and Resource Management Plans	15
Lack of Land Use Plans	15
Lack of Certainty about Ongoing Role for Regional Land Use Planning Commissions	15
3.2.8 Funding and Capacity	16
3.2.9 First Nation Involvement in the YESAA Process	16
3.3 Development Assessment Process Issues	18
3.3.1 Project Discussion	18
Project Proposals	18
Project Scoping	20
3.3.2 Assessment Phase	21
Evaluation of Input Received	21
Weighting of Input Received	22
Timelines	22
Level of Assessment (DO, Executive Committee, Panel)	23
Paper Process	23
Determination of Significance	24

Matters to be Considered.....	25
3.3.3 Decision Phase	25
Decision Bodies	25
Treatment of Recommendations in Decision Documents.....	26
No Input into Decision Documents.....	27
3.3.4 Regulatory Phase	27
Follow-up and Monitoring	27
3.4 Administration Issues	28
3.4.1 YESAB	28
Capacity.....	28
Impartiality of Board members and YESAB staff.....	29
YESAB Online Registry	29
Geo-spatial Information/Mapping	30
Community Engagement / Public Education	30
YESAB Rules, Guidance Documents.....	31
YESAB Governance	31
YESAB as an Adaptive, Learning Institution.....	31
Public Notification of Projects.....	32
Narrow Interpretation of the Act.....	32
3.4.2 General Assessment Issues.....	33
Class Assessments	33
Strategic Assessments (Plans, Policies, Programs).....	33
Time Boundaries of Assessments	34
3.5 Substantive Issues	34
3.5.1 Traditional Knowledge	34
3.5.2 Impact on Treaty Rights.....	35
3.5.3 Socio-economic Impact Assessment	36
3.5.4 Heritage Assessments	37
3.6 Legislation and Regulation Issues	38
3.6.1 Dispute resolution	38
3.6.2 Working Outside of YESAA.....	38
3.6.3 Role of Municipalities	38
3.6.4 Definitions	39
3.6.5 Assessable Activities Regulations Difficult to Understand	39
3.7 Other Issues	39
3.7.1 Unsettled Claims.....	39
3.7.2 Need for ongoing Five-year Reviews	40
4.0 NEXT STEPS.....	40
APPENDIX A – Sample of solicitation letter sent to organisations	A-1
APPENDIX B – Listing of groups contacted, meetings held, & written comments received	A-4

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:

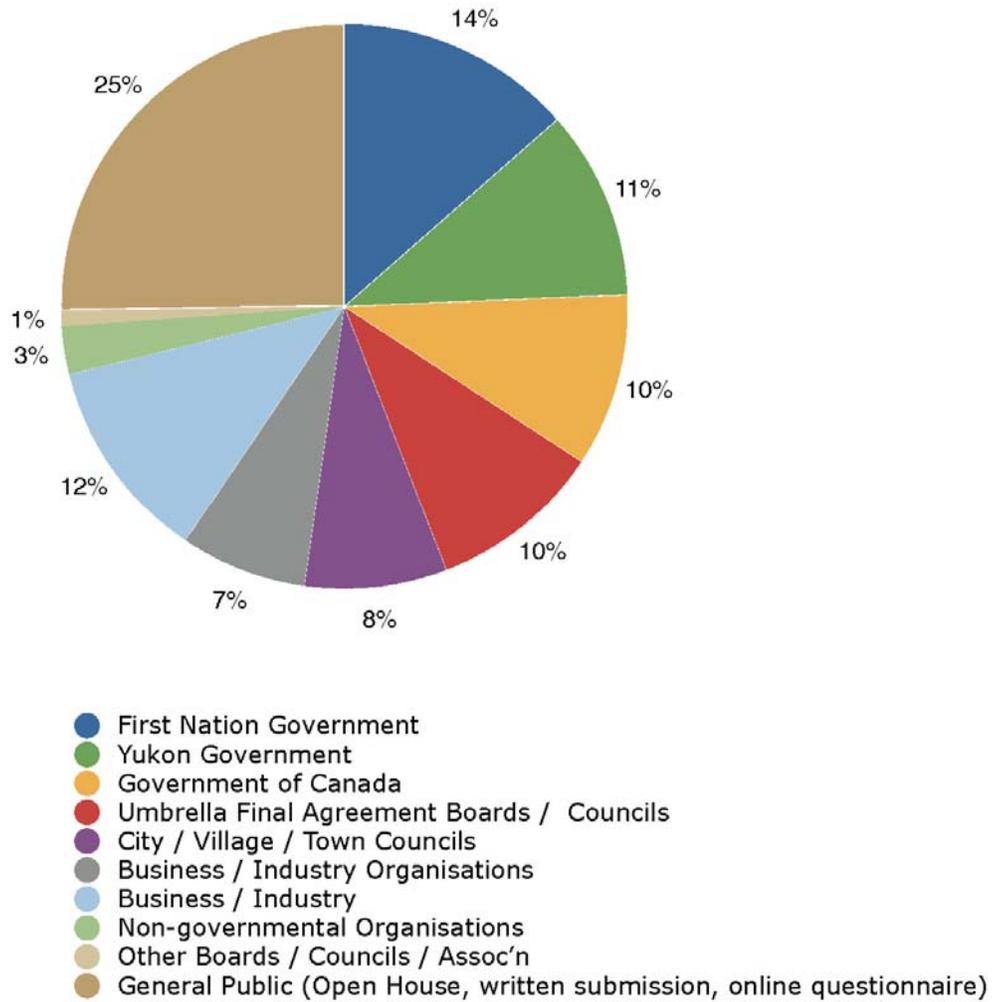
- preparation of required review plans:
 - Research and Information Gathering Plan
 - Consultation and Communications Plan
 - First Nation Participation Plan
- preparation and distribution of introductory letters soliciting input from a wide range of groups (a sample letter is located in Appendix A)
- 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.

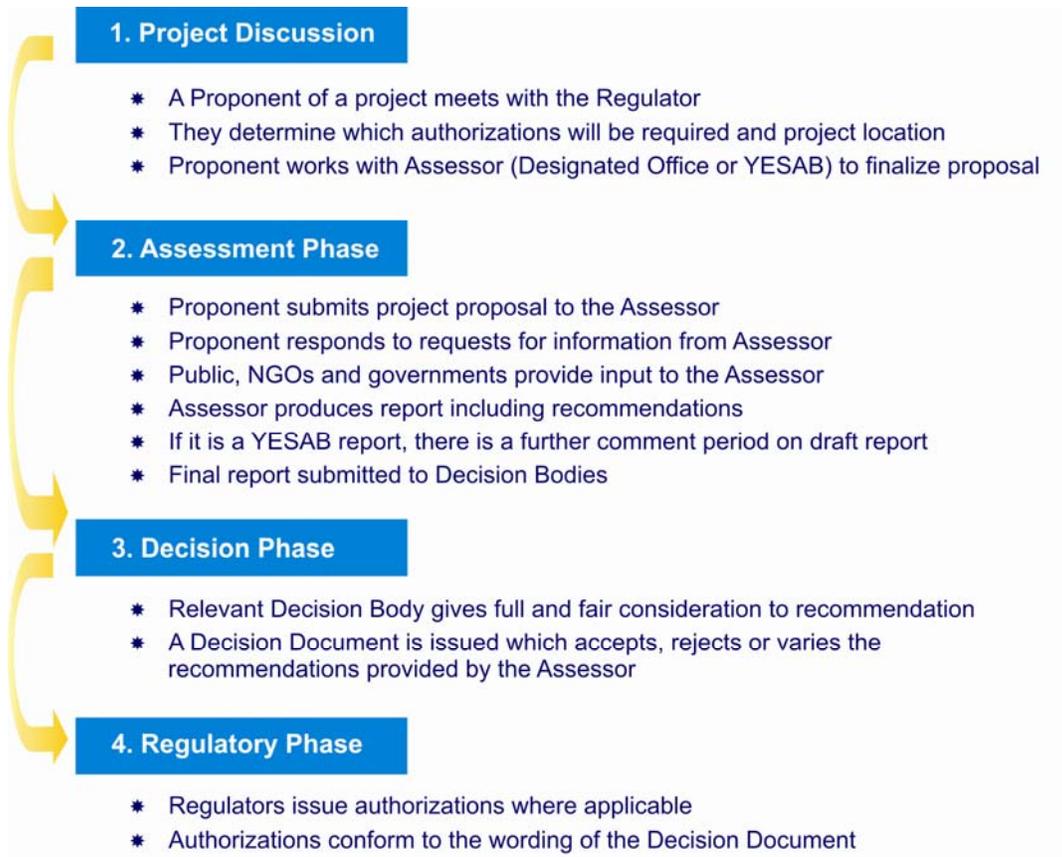
So far, First Nations argue, YESAB has failed to effectively ensure their participation in assessments, as befits an order of government in the Yukon. In their view, for most project assessments off settlement lands, they have been treated as little more than “stakeholders”, on a par with other organisations 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

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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
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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