



Environment
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ENVIRONMENT CANADA POLICY ON PUBLIC PARTICIPATION AND ABORIGINAL CONSULTATION

May 2010

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1 Context

A fundamental responsibility...

Inviting citizens to participate in decisions that affect their lives is a basic principle of responsible government in a parliamentary democracy. It is Government of Canada policy to listen to and consider people's interests and concerns when establishing priorities, developing policies and regulations, and planning and implementing programs and services.¹

To achieve this policy objective, Government of Canada departments are responsible for identifying those interested in and affected by an issue, and for providing them with open, meaningful, and reasonable opportunities for public participation at all stages of policy, program, and regulatory development and delivery. This includes informing and engaging Canadians on the nature and implications of the public policy issue at hand based on available evidence, science, or knowledge. Departments are required to set out clearly the process and timelines for public participation so that those potentially affected by government decisions are aware of the process and can provide input. As well, departments are expected to provide timely feedback to Canadians on the outcome of a process and on the priorities considered in the decisions that were made.²

A legal requirement...

Beyond the need to comply with Government of Canada policy, Environment Canada has specific legal responsibilities to notify, consult, and otherwise engage Canadians as outlined in legislation (such as the *Canadian Environmental Protection Act* and the *Species at Risk Act*), in comprehensive land claim and self-government agreements with Aboriginal groups, and in contractual agreements with our partners.

Furthermore, Supreme Court of Canada decisions³ have described a common law duty on the part of the Crown to consult Aboriginal groups with respect to potential adverse impacts stemming from Crown activities on established or potential Aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982*. The duty to consult stems from the government's unique legal requirement to maintain the honour of the Crown in its dealings with Aboriginal peoples. Government departments must undertake meaningful consultation with Aboriginal groups when contemplated Crown conduct might adversely impact established or potential Aboriginal and treaty rights, and, if appropriate, accommodate affected Aboriginal groups (see section 7: *Aboriginal Consultation and Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011⁴).

These legal responsibilities ensure that those who are interested in and affected by government decisions have a chance to voice their opinions before decisions are made, so that government can act in the best interests of Canadians and our shared environment.

Providing many benefits ...

Public participation in government decision-making is also a key element of good governance. Effective public participation allows government to benefit from the experience and expertise of society at large, leading to more informed decisions, better design of our policies, programs and regulations, and greater legitimacy in the decision-making process. Of equal importance, listening to and addressing the thoughts and concerns of those interested in and affected by an issue can help to manage conflict, resulting in fewer costs and delays in implementing policies and initiatives.

Public participation also helps to build a closer and more productive relationship between government and the people it serves. Public participation encourages Canadians to be more engaged in the life of their communities and their country and, ultimately, strengthens our democracy.

2 Purpose of the Policy

The purpose of this policy is to foster and support a culture of public participation in decision-making throughout Environment Canada. The policy establishes guidelines in key areas of public participation, and outlines the criteria to consider when planning and implementing public participation processes. By promoting a good governance approach, the policy enables all parts of the Department to maintain effective, well-managed public participation processes, and helps ensure that Environment Canada will meet its responsibilities to consult Aboriginal peoples on the issues that affect them.

This policy applies to all Environment Canada staff involved in planning or undertaking structured means of public participation for policy, program and regulatory development and delivery. This includes but is not limited to formal meetings, workshops, written submissions on public discussion papers, public hearings, targeted briefings, and departmental advisory bodies. Staff should make appropriate efforts to apply this policy throughout the planning, implementation and evaluation of public participation activities and processes, and promote the policy when working with other federal government departments, recognizing that effective public participation is a mutual responsibility between all parties.

This policy reflects Environment Canada's commitment to involve Canadians in decision-making processes in a consistent, reasonable and meaningful way, and encourages the Department to plan accordingly to have the appropriate mechanisms and resources in place to respect this commitment. The responsibility for meaningful public participation is shared, however, between participants and decision-makers, and all parties involved have a responsibility to work towards an effective process.

This policy recognizes that the application of these essential considerations in public participation will be influenced by factors that may be outside the control of managers who are planning and carrying out a process. These factors can include limits imposed by the human and financial resources available, urgent timelines, and the need to balance listening with action in order to meet all government priorities in a reasonable and effective manner.

3 Definitions

General Definitions

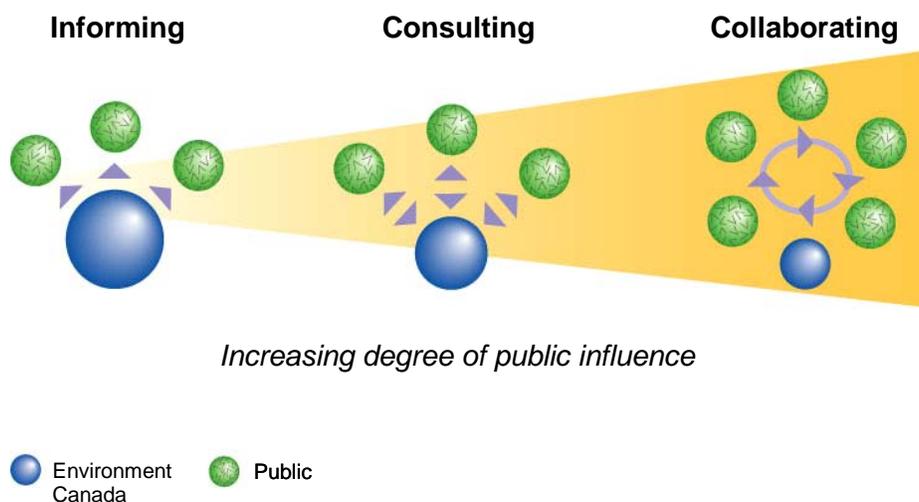
Public participation is the umbrella term used to describe a spectrum of activities and processes the Department can employ to engage those interested in and affected by government actions and decisions.

The **public**, in this context, is broadly defined to include all Canadian citizens, provincial, territorial, municipal, and Aboriginal governments, Aboriginal peoples, civil society organizations, business and industry, other federal government departments, and other stakeholders who are interested in and affected by a particular issue. While the opinions and concerns of all members of the public are important to consider in decision-making, some parts of society may be entitled to greater consideration due to the severity of potential impacts or the rights that they hold (e.g., established or potential Aboriginal and treaty rights, shared decision-making authority with other orders of government).

A **public participation manager**, in the context of this policy, refers to anyone who is responsible for planning and coordinating a public participation process regardless of position or job classification. Depending on the size, scope or sensitivity of the process, a manager could range from a subject matter expert to a senior manager.

A **public participation process** includes the entire process of planning, implementing, reporting back on, and evaluating public participation within a particular decision-making process. A public participation process may consist of one public participation activity or a series of activities of varying forms and levels of involvement.

A **public participation activity** is the particular method used to involve the public in a decision-making process. Different public participation activities fall along a spectrum of increasing levels of public influence, from informing to consulting to collaborating⁵:



It is important to understand that while the level of involvement in the decision-making process increases from one end of the spectrum to the other, this does not mean that one form of public

participation is necessarily better than another. Different individuals and groups will require different levels of involvement depending on a number of factors, including the type of issue under consideration, the nature of their interest in the issue, and the stage of the decision-making process. The spectrum is a guide to help determine what form of public participation is most appropriate in a particular situation.

To ensure consistency in how Departmental public participation activities are represented, the following definitions should be used:

Informing involves providing balanced and objective information to help people understand the issues, alternatives, opportunities and/or solutions.

Consulting involves obtaining feedback on analysis, alternatives, and/or decisions. Consulting includes informing participants, listening to and acknowledging concerns and aspirations, and providing feedback on how input was used.

Collaborating involves working directly with those interested in and affected by an issue to seek advice and innovation in formulating solutions⁶.

Aboriginal-Specific Definitions

Aboriginal consultation is unique from other forms of public participation due to historic, cultural and legal considerations (see Section 7: Aboriginal Consultation). In keeping with the language used by the Supreme Court of Canada⁷ outlining a spectrum of possible levels of Aboriginal participation in meeting the Crown's duty to consult depending on the circumstances, the term Aboriginal consultation reflects the entire spectrum of public participation activities as outlined above in the "General Definitions" section.

Aboriginal peoples include all First Nation, Inuit and Métis peoples and the communities, governments and organizations representing their interests and concerns.

Aboriginal groups consist of Indian, Inuit and Métis communities that hold or may hold Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*.

The term **First Nation** came into common usage in the 1970s to replace the word Indian, which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. In this policy, the term First Nation is used as a synonym for the term Indian.

Aboriginal rights consist of the practices, traditions and customs integral to the distinctive culture of an Aboriginal group claiming the right that existed prior to contact with the Europeans. In the context of Métis groups, Aboriginal rights consist of the practices, traditions and customs integral to the distinctive culture of the Métis group that existed prior to effective European control (i.e. prior to the time when Europeans effectively established political and legal control in the claimed area). Existing Aboriginal rights, including Aboriginal title to land and treaty rights, are recognized and affirmed under section 35 of the *Constitution Act, 1982*. They are collective rights, and are generally fact and site specific⁸.

Aboriginal title is an Aboriginal right to the exclusive use and occupation of land. It is possible that two or more Aboriginal groups may be able to establish Aboriginal title to the same land.

Treaty rights are rights that are defined by the terms of an historic treaty, rights set out in a modern land claims agreement, or certain aspects of some self-government agreements.

Aboriginal Traditional Knowledge (ATK) – also referred to as Traditional Ecological Knowledge (TEK), Inuit Qaujimagatuqangit (IQ), Indigenous Knowledge (IK) and Naturalized Knowledge Systems –

includes, but is not limited to, the knowledge Aboriginal peoples have accumulated over generations about their environment. ATK is a complex process incorporating aspects of culture, spirituality and history, therefore peoples with different backgrounds (i.e., First Nations, Inuit and Métis) may define ATK in different ways⁹.

Accommodation refers to the mitigation measures that may be required in response to the concerns raised during Aboriginal consultation. Accommodation measures could include minor or major changes to a project plan, land transactions or exchanges, compensation packages or impact-benefit agreements with Aboriginal communities, or some other form of mitigation.

4 Roles and Responsibilities

The Director of the Aboriginal and Stakeholder Affairs Division is responsible for monitoring the implementation of this policy, and promoting the continuous improvement of Environment Canada's public participation and Aboriginal consultation activities and processes through the provision of information, tools, training, and advice.

Legal Services provides legal advice to Environment Canada officials on public participation activities and Aboriginal consultation including whether there is a legal duty to consult Aboriginal groups, the extent of the duty, and any accommodation that may be necessary. Environment Canada employees should obtain advice from Legal Services prior to engaging in public participation activities and Aboriginal consultations whenever there is risk or uncertainty.

Public Participation Managers are responsible for following the principles and guidelines set out in this policy through effective planning, implementation, and follow-up. To enable the effective monitoring and evaluation of departmental public participation processes, managers are responsible for documenting all communications with participants throughout the planning, implementation, and follow-up of public participation and Aboriginal consultation activities. Managers are responsible for contacting the appropriate functional specialists within headquarters and the regions (e.g., consultations advisors, communications, legal services, audit and evaluation, finance) for advice and support, as needed.

Directors are responsible for budgetary decisions related to enabling effective participation in the public participation and Aboriginal consultation processes under their jurisdiction, such as the use of reimbursements and other financial mechanisms. Directors may delegate some of these responsibilities to managers with equivalent signing authority, as needed.

Directors General are responsible for the effective planning, implementation and evaluation of public participation and Aboriginal consultation processes under their authority, including the allocation of sufficient financial and human resources. Director General approval is required for final discussion documents and for the development of consultation protocols or agreements with Aboriginal groups. Directors General are responsible for ensuring that the relevant Regional Director General, Assistant Deputy Minister, the Deputy Minister and/or the Minister are appropriately involved for complex, sensitive and/or high profile issues.

Regional Directors General are responsible for public participation and Aboriginal consultation processes under their authority. They are also responsible for providing support for regional consultations, and ensuring that the relevant Assistant Deputy Minister, the Deputy Minister and/or the Minister are appropriately involved for complex, sensitive and/or high profile issues in their regions. Regional Director General approval is required for the development of consultation protocols or agreements with Aboriginal groups in their Regions. Regional Directors General are responsible for approval of the use of honoraria to support consultations under their authority.

Assistant Deputy Ministers are responsible for ensuring that their staff adheres to the policy and for approving consultation activities for complex, sensitive and/or high profile issues under their authority. Assistant Deputy Ministers are responsible for approval of the use of honoraria to support consultations under their authority.

The Deputy Minister is responsible for approving this policy. The Deputy Minister is ultimately accountable for all Environment Canada consultation activities.

For general inquiries regarding public participation and Aboriginal consultation at Environment Canada, send comments and questions to consultations@ec.gc.ca.

5 Public Participation Principles

Public participation at Environment Canada follows a principles-based approach. The following principles will be applied at all times in a manner that supports timely and effective decision-making.

Transparency – The Department should inform participants of the purpose and objectives of the process, what is expected of them, what they can expect of the Department, and how it will use and consider their input.

Respect – Public participation should be based on mutual respect for the time, legitimacy and views of all participants. Effective public participation will not always lead to agreement, but it will lead to better informed and more confident decision-making.

Inclusiveness & Accessibility – The Department should involve as broad a range of groups or individuals who may be affected by, interested in, or able to make a meaningful contribution to the decision as is appropriate. Canada's regional and cultural diversity, as well as linguistic duality, should be respected, and measures should be taken to ensure all participants have a reasonable opportunity to have their voices heard while respecting the need for efficiency in the use of time and resources.

Coordination – The planning and implementation of public participation processes should be coordinated with other departments, agencies and sections of Environment Canada to avoid duplication and to collaborate on overlapping issues.

Sustainability – In keeping with the Government of Canada's efforts to adopt environmentally responsible measures in its operations, Environment Canada should consider all environmental aspects in the planning and implementation of both small and large activities.

6 Public Participation Guidelines

In undertaking public participation, Environment Canada will strive to meet the following guidelines in the areas of identifying and selecting participants, informing participants, and enabling effective participation. These guidelines will be applied at all times in a manner that supports timely and effective decision-making.

Identifying and Selecting Participants

Environment Canada recognizes that the selection of participants needs to be inclusive and accessible. Taking into account practicalities such as functional group size and resource availability, Environment Canada should endeavour to:

Assess and identify the level of representation, knowledge, experience, and interests required to meet the purpose and objectives of a process

Involvement of the appropriate participants is critical to the success of any public participation process. Where applicable, managers should determine the type and number of participants needed to meet the purpose and objectives of a particular process. Participation criteria should take into consideration the need for specific knowledge and experience, as well as the need to ensure fair representation of the different interests relevant to the issue at hand.

Recognizing the unique relationship that the Government of Canada has with Aboriginal peoples, managers must determine any possible interests that Aboriginal peoples may have in an issue, including, but not limited to, the risk of contemplated Crown conduct adversely impacting established or potential Aboriginal and treaty rights. When a potential adverse impact on Aboriginal and treaty rights is identified, consultation must take place directly with those Aboriginal groups who hold or assert to hold these rights and/or their representatives (see section 7: Aboriginal Consultation and *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011¹⁰).

Where possible, make full use of existing networks

Established networks and organizations that represent and/or coordinate a broad membership with shared interests are an important resource for public participation, both for the direct contribution they can make and in helping to identify appropriate participants. When applicable, these networks and organizations should be asked to identify the appropriate representatives from their membership to contribute to a process. To avoid consultation fatigue, different groups should be encouraged to participate rather than repeatedly inviting the same group to public participation activities.

To ensure a process is as effective and inclusive as possible, managers can also select, as needed, additional participants to fill any gaps in representation, knowledge, experience, and interests. In such cases, relevant networks and organizations should be informed when one or more of their members are selected as additional participants to facilitate coordination and communication among all of their participating members.

If the targeted participants are not represented by a network or association, or existing networks do not represent the full expertise needed, managers may select participants through other means, as appropriate (e.g., open invitation, direct request, random selection).

Be inclusive

Not everyone who may be affected by a decision is represented by an established organization. The selection process should go beyond specific individuals or groups known to have a general interest in environmental issues to include others who may be expected to have a specific interest in or may be affected by a particular issue. Managers should make reasonable efforts to identify all individuals and groups interested in or affected by specific items on the environmental agenda, and ensure that these people are aware that they have the opportunity to be included.

Managers should make reasonable allowances for the inclusion of other individuals and groups who may self-identify an interest in participating mid-way through a process.

Informing Participants

Environment Canada recognizes the importance of timely and transparent communication between participants and organizers of a public participation process. Bearing in mind the realities of time and resource pressures on all parties, Environment Canada should:

Communicate effectively with participants

To ensure an effective and transparent process, managers should carry out adequate and ongoing communication with participants throughout the process, and provide participants with:

- a clear explanation of the issue at hand using plain language;
- a clear explanation of the government actions and decisions to be made;
- the purpose of the process;
- the issues that are open and not open for discussion;
- a clear understanding of what is expected from participants in terms of time, feedback and preparation; and
- an overview of the overall public participation and related decision-making processes.

Notify participants well in advance

When inviting specific individuals or groups to take part in a public participation activity, the Department should give sufficient advance notice to allow them to make travel arrangements, choose delegates or spokespersons, conduct research, consult with colleagues, and prepare their submissions, as is necessary and reasonable. The following times are recommended when providing notice. Land claim agreements, legislation or other agreements may outline longer notification requirements, and participants should receive more notice when necessary to allow for sufficient preparation.

Initial notice of an activity should be sent to participants as early as possible. Where appropriate, managers should strive to provide **four weeks advance notice or more depending on the circumstances**. This notification should include the proposed date and location of the activity.

Subsequent notice, when applicable, may include the provision of:

- more detailed information, such as precise time and location; a draft agenda; the scope of the overall public participation process; a website where additional background information can be obtained; and the contact information of the person to whom inquiries can be directed. Where appropriate, **such notice should be provided two weeks in advance of the activity or more depending on the circumstances**; and

- final documents, such as discussion papers and the final agenda. Where appropriate, **such notice should be provided one week in advance of the activity or more depending on the circumstances.**

When planning an activity, managers will take into consideration the time required for approval and translation of documents, as is appropriate. Managers should work in close collaboration with the Communications Branch to ensure communication requirements are taken into account and the appropriate mechanisms are implemented. Final discussion documents require the approval of the responsible Director General. Directors General will be responsible to ensure that for complex, sensitive or high profile issues, the responsible Regional Director General, Assistant Deputy Minister, the Deputy Minister and/or the Minister are informed, as appropriate, of the contents of the discussion documents prior to release.

It is understood that for **information sessions** where participants are not expected to prepare a submission or comments, notice to participants can be less elaborate and the timelines more flexible. Managers should apply the principles of respect and accessibility by ensuring participants have enough notice to alter their schedules and make any necessary travel arrangements.

When public participation consists of a request for **written submissions**, the notification provisions in this policy may not be applicable. Comment periods for such activities should be open for **at least 30 days** to allow for sufficient time to respond, unless otherwise stipulated under legislation.

Report back to participants and/or the public in a timely manner

The principle of respect involves Environment Canada recognizing the time and effort participants have expended to provide their input into the decision-making process. All participants should receive a basic **acknowledgement of participation** and an **expression of thanks** (for activities where participants can be identified). This may be done orally at the end of an activity, by email, or with a formal letter, as appropriate.

A **summary report** should be issued and distributed to participants and/or posted online **within eight weeks following the completion of a public participation process** (since a public participation process may consist of one activity or a series of activities, managers should clarify with participants the timeline for reporting on the process). If this timeline for reporting back cannot be met due to mandatory regulatory processes or other reasons, participants should be advised within the eight week period when the summary report may be issued.

There are many formats that can be used to report back on a process, including informal (e.g., "What Was Said" reports) and official (e.g., Regulatory Impact Analysis Statements) documentation. At a minimum, summary reports should give an overview of the discussions (without linking specific comments to individuals), provide a brief review of the process to date, describe how the collective input from participants will be used, and set out the next steps. More detailed reporting may be necessary prior to the release of final decisions to respond directly to issues raised, and to ensure that all significant interests and concerns have been adequately addressed.

To be as inclusive as possible, reports may also be distributed to any interested individuals or groups who were unable to attend, or made available to the public by posting on the Environment Canada website and/or other means, as appropriate.

Formal reporting is not necessary for **information sessions**. Nevertheless, Environment Canada should strive to answer any questions that were unable to be answered during an information session as soon as possible following the activity.

Enabling Effective Participation

Environment Canada recognizes that not all participants are able to contribute effectively and on an equal footing with other participants due to knowledge, time and/or resource constraints. To ensure that participants are able to contribute as effectively as possible, Environment Canada should endeavour to:

Plan and design the location, timing and means of participating to ensure an effective process, while minimizing costs to both participants and the Department

Many of the costs incurred by participants are related to logistics, such as travel and hotel costs and work time lost. Insofar as possible, managers should consider methods to reduce costs to both participants and the Department, such as:

- planning the location of activities to minimize the need for travel and hotel costs for the majority of participants;
- timing activities to minimize conflict with working hours and cultural events;
- coordinating with other federal departments and agencies undertaking similar activities with the same participants to avoid duplication; and
- giving participants opportunities to provide input to the decision-making process other than appearing in person (e.g., online, video conference, written submissions).

Work with participants who may require additional resources to participate effectively, and consider appropriate means to address their needs

In some cases, participants may not be able to participate effectively due to resource constraints. These could include, among others:

- the need for information to better understand the implications of different options;
- the need for preparatory research to consolidate and support a position;
- the need to undertake preparatory consultations with other members of a representative group;
- inability to pay travel and hotel costs;
- difficulty justifying the time required for preparation, travel, participation and/or follow-up; and/or
- the need to contract for outside assistance when in-house expertise or human resources are insufficient to prepare thoughtful and thorough input.

Managers should make appropriate efforts to work with participants on a case-by-case basis to identify constraints that would prevent full and effective participation, and to determine how these constraints can most reasonably be addressed.

Among other means, managers may:

- provide in-kind support, such as:
 - a contact from Environment Canada available to answer questions and provide expertise to the participants;
 - meeting rooms or video conferencing to facilitate preparatory consultation by participants;
 - clear and easy to understand information resources;
 - training on a particular issue;
 - research, analysis, translation and/or other services undertaken on behalf of participants;

- provide an honorarium for significant and otherwise uncompensated time spent preparing for, participating in, and/or reporting on a public participation activity;

Insofar as the relevant Assistant Deputy Minister or Regional Director General has approved the use of honoraria for consultation activities, the responsible manager can provide an honorarium as a means to enable the effective participation of participants upon consideration of the following criteria:

1. an individual or group will not be able to participate effectively without some form of support;

and

2. in-kind support is insufficient and/or not feasible to address the resource constraints preventing effective participation;

and

3. significant and otherwise uncompensated time will be required of participants to ensure effective preparation, participation, and/or follow-up reporting.

Honoraria will be authorized through a letter of invitation signed prior to the activity by both the participant and the responsible manager with the appropriate signing authority. It is important for managers not to confuse honoraria with travel and accommodation expenses (see below for greater detail).

- provide financing to organizations, through contracts or contribution agreements, to address capacity constraints (e.g., to hire experts, to undertake preparatory research and/or consultation, to undertake education and awareness processes);

Contracts and contribution agreements will be in accordance with departmental and Treasury Board policies, guidelines and processes pertaining to contracting, procurement and transfer payments.

- reimburse reasonable travel, hotel and incidental expenses.

For face-to-face meetings, reimburse reasonable travel, hotel and incidental expenses of invited Aboriginal and civil society participants with limited or restricted financial resources

When there are face-to-face meetings, Environment Canada will consider funding reasonable travel, hotel, meal and incidental expenses for an appropriate number of invited participants who are:

- (1) volunteers or representatives of:
 - (i) a registered charitable, not-for-profit, or community-based organization; or
 - (ii) an Aboriginal community, government or organization;

and

- (2) whose travel, hotel, meal and other expenses associated with participation will not be reimbursed by the organization they represent or any associated organization.

Reimbursement of expenses will be in accordance with the provisions of the Treasury Board *Travel Directive*¹¹ and based on standard Treasury Board allowances. Reimbursements will be authorized through a letter of invitation signed prior to the activity by both the participant and either the

responsible Director or a manager with the appropriate signing authority. Managers should determine the appropriate number of invited participants by taking into consideration the need for participation from particular groups, the practicalities of a functional group size appropriate to the form of public participation used, and resource availability.

Where appropriate and necessary to ensure an inclusive and accessible process, the responsible Director should consider extending these provisions to provide funding to categories of participants other than those specified above. Barring exceptional circumstances, however, organizations that can be reasonably expected to bear their own costs, such as for-profit corporations and their representative associations, are not eligible for participant funding.

Managers should provide specific instructions in advance for participants to follow in completing travel expense claims, based on actual expenses incurred.

7 Aboriginal Consultation

Public participation is an important part of good governance, sound policy development and decision-making. In addition to being motivated by good governance objectives, the federal government has statutory, contractual and common-law obligations to consult with Aboriginal groups. These legal considerations, as well as historic and cultural factors unique to Aboriginal communities, give Aboriginal consultation a special significance.

Aboriginal groups have unique rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*. These Aboriginal and treaty rights are closely tied to the land and the use of natural resources, and can include the right to hunt, fish, trap, and gather plants and animals for medicinal, economic and traditional purposes, among other practices. Environment Canada's actions and decisions have the potential to affect these rights, both positively and negatively.

The Supreme Court of Canada¹² has stated that the honour of the Crown is at stake in all dealings between the Crown and Aboriginal peoples. As such, the Crown has a legal duty to consult and, if appropriate, accommodate when the Crown contemplates conduct that might adversely impact established or potential Aboriginal and treaty rights. This legal duty to consult must be discharged in a manner that upholds the honour of the Crown and promotes reconciliation of Aboriginal and non-Aboriginal interests. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.

The unique cultural traditions and livelihoods of Aboriginal peoples also affect how and why consultation may take place. Many Aboriginal communities follow traditions and practices that differ significantly from mainstream Canadian ways of life, such as in how people greet each other and show respect, preferred and acceptable means of communication, and in the use of Aboriginal languages. These differences necessitate that consultation activities be tailored to meet the needs of an Aboriginal community to ensure that consultation processes are effective, show respect and foster positive relationships.

These differences are also an important reason why Environment Canada must consult Aboriginal peoples. The unique perspectives that arise from different cultural values and traditions often shed new insights on an issue. Environmental legislation, such as the *Species at Risk Act* and the *Canadian Environmental Assessment Act*, has recognized the importance of gathering and understanding Aboriginal traditional knowledge when making decisions that impact upon the natural environment.

This policy provides guidance to ensure that Environment Canada's Aboriginal consultation activities and processes are as consistent and effective as possible. While this entire policy is applicable to consultations with Aboriginal peoples, the following sections provide greater clarity and additional considerations that Environment Canada should follow. This policy is consistent with current Government of Canada policies relating to Aboriginal consultation and accommodation as of the time of writing, including *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011¹³. Recognizing that the issue of Aboriginal consultation and accommodation is an evolving legal and policy area, managers undertaking Aboriginal consultation should also refer to and follow the most current Government of Canada policies and guidelines on meeting the legal duty to consult.

Principles

In addition to the principles outlined in Section 5 of this policy, Environment Canada will apply the following principles when consulting Aboriginal peoples in a manner that supports timely and effective decision-making.

Meaningfulness and Good Faith – In keeping with the Supreme Court of Canada’s direction on Aboriginal consultation and with the other principles set out in this policy, Environment Canada should undertake genuine efforts to ensure consultation with Aboriginal peoples addresses all legitimate concerns, as is appropriate to the Department’s mandate and authority.

Reconciliation – Environment Canada’s approach to Aboriginal consultation should promote the reconciliation of Aboriginal and non-Aboriginal claims, interests and ambitions, recognizing that today’s events are part of a long-lasting and ongoing relationship between Aboriginal peoples and the Crown.

Reasonableness – Environment Canada should make all reasonable efforts to respect Aboriginal and treaty rights while balancing the interests of all Canadians in protecting our shared environment.

Building Relationships with Aboriginal Peoples

Environment Canada recognizes that the first step to ensuring effective consultation is to establish a relationship based on mutual respect and trust. Bearing in mind that developing such a relationship requires a degree of time and effort that cannot be done solely during consultation processes, Environment Canada should endeavour to:

Establish ongoing relations with key Aboriginal governments, communities and organizations in our shared desire to protect the environment

Environment Canada should work to identify and build relations with those Aboriginal governments, communities and organizations at the local, regional and national levels that are key partners in carrying out the Department’s mandate. By establishing an ongoing dialogue on our respective environmental priority areas, both Environment Canada and Aboriginal peoples in general will be better prepared to discuss and address potentially contentious issues as they arise. These relationships may be between technical experts, managers, or at the political level, depending on the nature of the issue under consideration.

Engaging Aboriginal Peoples

Environment Canada recognizes that the duty to consult described by the Supreme Court of Canada¹⁴ places a greater responsibility on behalf of the Crown to ensure that consultation activities with Aboriginal groups are performed meaningfully and in good faith. To ensure that Aboriginal consultations meet the unique needs of affected Aboriginal communities, Environment Canada should endeavour at all times to:

Engage with interested and affected Aboriginal peoples as early as possible in the decision-making process

Aboriginal engagement will often involve a process of information sharing, dialogue, and possibly negotiation, as relationships are formed, issues are discussed, and the need to accommodate concerns is assessed. Early engagement is important to ensure that sufficient time is available to establish the relationships necessary to carry on an effective dialogue, and to ensure all pertinent information is shared to make the most informed decisions.

Managers should make every effort to identify and engage Aboriginal peoples who are interested in or affected by an issue as early as possible in the decision-making process.

Work with Aboriginal peoples to determine an appropriate means of consultation and engagement

As is outlined in the Definitions section of this policy, Aboriginal consultation comprises a spectrum of possible levels of Aboriginal participation in decision-making. The Supreme Court of Canada¹⁵ has stated that when a legal duty to consult has been identified, the extent of the duty is proportionate to an assessment of the strength of the claim and the seriousness of the potential adverse impact of the proposed activity on the established or potential right (i.e., weak claims and/or minimal impacts require less consultation and established claims and/or high impacts require more consultation). The *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011 provides guidance on how to undertake this analysis. It is important to understand, however, that greater consultation efforts may be necessary or desirable for the purposes of good governance than what is required by a legal duty.

In any given circumstance, managers should consider several factors when determining the most appropriate techniques to involve Aboriginal peoples, including, but not limited to:

- the nature of the issues and decisions in question;
- the level of interest Aboriginal peoples have in the issue;
- potential impacts on established or potential Aboriginal and treaty rights;
- the strength of an Aboriginal group's claim to hold particular Aboriginal and treaty rights;
- how Aboriginal peoples may contribute to informed decision-making; and
- historical involvement of Aboriginal peoples in the issue.

When the appropriate level of participation is not clear, managers should consider working with other federal departments (including Aboriginal Affairs and Northern Development Canada and the Office of the Federal Interlocutor for Métis and Non-Status Indians) and with Aboriginal representative groups at the national and/or regional level, as appropriate, to identify the appropriate Aboriginal peoples with whom to engage and how they should be engaged.

Many Aboriginal peoples will require additional resources to participate meaningfully in consultation processes. Managers should work with interested and affected Aboriginal peoples to identify constraints that would prevent full and effective participation, and to determine how these constraints can most reasonably be addressed, as is outlined in the Enabling Effective Participation section of this policy.

In many circumstances, consultation with Aboriginal peoples may take place in separate and parallel processes to consultations with stakeholders in order to respect the unique relationship Aboriginal peoples hold with the Crown. In some cases, the means of notifying and consulting with an Aboriginal group may be set out under negotiated agreements, through existing procedures within land claims, self-government or consultation agreements, or through ad hoc agreements that apply only to specific consultation processes.

Some Aboriginal groups have also developed their own consultation policies. Although these policies are not binding on the Crown, managers should consider any consultation policies developed by the Aboriginal groups who are being consulted, and make efforts to respect the provisions within their policies, as may be reasonable and appropriate in the circumstances.

Where appropriate, protocols or agreements may be developed in collaboration between the Department and an Aboriginal government, community or organization to outline the consultation approach that will be taken for a specific issue. Any such protocols or agreements will require the approval of the responsible Director General after Environment Canada Legal Services has been

consulted. Directors General will be responsible to inform the relevant Regional Director General, Assistant Deputy Minister, the Deputy Minister and/or the Minister of any complex, sensitive or high profile issues as the protocols or agreements are being developed. As developing such agreements can be time and resource intensive, they should only be used when appropriate to move a process forward.

Coordinate consultation processes with other relevant decision-making bodies

The principle of coordination requires that Environment Canada coordinate its consultation efforts both internally and with other federal government departments to ensure that consultation is meaningful and consistent. As the Crown as a whole is responsible to ensure that the duty to consult is upheld, consultations addressing potential adverse impacts on established or potential Aboriginal and treaty rights should be coordinated across federal, provincial and territorial governments, as appropriate.

Although third parties (e.g., industry proponents) do not have the same legal obligations to consult Aboriginal groups as the Crown, they are often in the best position to inform and accommodate the interests and concerns of Aboriginal groups due to the information, resources and decision-making authority that they hold. Environment Canada will encourage third parties to engage Aboriginal groups as early as possible in any decision-making processes that may impact established or potential Aboriginal and treaty rights, and will incorporate the results of third party engagement into any Crown consultation plans and efforts, as appropriate, to ensure the Crown's legal obligations are met.

Accommodating Aboriginal Concerns

Environment Canada recognizes that the Department may, if appropriate, have a duty to accommodate the concerns of Aboriginal groups following consultations. As Environment Canada is but one part of the Crown and often relies on the cooperation of our federal, provincial, and territorial government partners, Environment Canada should endeavour at all times to:

Ensure the Crown responds to Aboriginal concerns

The legal duty to consult does not include a duty to agree on a resolution to the issues raised during consultations. Aboriginal groups therefore do not have a veto over Crown conduct. Aboriginal and treaty rights are also not absolute, in that limitations may sometimes be justifiable to further valid and compelling objectives of importance to society as a whole, such as conservation or public safety. That being said, good faith and reasonable efforts by the parties to understand concerns and seek solutions are required. Accommodation (i.e., mitigation measures that respond to concerns raised during Aboriginal consultation) may be required where there is a strong claim to an Aboriginal or treaty right and a potentially significant adverse impact on the claimed right. Accommodation measures could include minor or major changes to a project plan, land transactions or exchanges, compensation packages or impact-benefit agreements with Aboriginal communities, or some other form of mitigation.

Environment Canada should make genuine efforts to ensure the Department responds to all legitimate concerns raised during Aboriginal consultations, as appropriate to the Department's mandate and authority. Where accommodation is required, Environment Canada, together with other departments or representatives of the Crown, should work with Aboriginal groups to attempt to identify solutions that balance the interests of a particular Aboriginal group with the societal interests of all Canadians that the Crown is obligated to uphold. The rationale and justification behind any departmental decisions regarding accommodation measures should be clearly communicated to affected Aboriginal groups in coordination and cooperation with other Crown representatives.

Endnotes

- ¹ Treasury Board Secretariat, *Communications Policy of the Government of Canada, Policy Statement*, August 1, 2006.
- ² Government of Canada, *Cabinet Directive on Streamlining Regulation*, September 2006, pp 3-4.
- ³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388
- ⁴ <http://www.ainc-inac.gc.ca/ai/arp/cnl/ca/intgui-eng.asp>
- ⁵ Adapted from Human Resources and Social Development Canada, *Public involvement Framework: Levels of Public Involvement*, 2006.
- ⁶ Adapted from the International Association for Public Participation, *Planning for Effective Public Participation*, 2006.
- ⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511
- ⁸ *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*, 2011
- ⁹ Modified from the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) description of ATK
- ¹⁰ <http://www.ainc-inac.gc.ca/ai/arp/cnl/ca/intgui-eng.asp>
- ¹¹ http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TBM_113/menu-travel-voyage_e.asp
- ¹² *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388
- ¹³ <http://www.ainc-inac.gc.ca/ai/arp/cnl/ca/intgui-eng.asp>
- ¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388
- ¹⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511