

YESAA Oversight Group Priorities
Approved November 26, 2018

2018-19 YESAA Oversight Group Priorities

Establishment of the YESAA Oversight Group (the “Oversight Group”) was agreed to in the *Yukon Environmental and Socio-economic Assessment Act Reset MOU*, dated November 2017 (the “Reset MOU”), by all self-governing Yukon First Nations, the Council of Yukon First Nations, the Government of Canada, and the Government of Yukon (collectively, the “Parties”).

The Oversight Group’s purpose is to oversee the development assessment process in Yukon and promote the ongoing improvement of the development assessment process.

To that end, the Oversight Group will set a series of priorities for examination with a view to addressing these priority areas. The means by which any one priority will be addressed shall be determined by the Oversight Group and could include forums, working groups, technical committees, and any other means as agreed upon by the Oversight Group.

In July, 2018 each of the Parties developed a list of their priorities. These are attached at Annex A. These priorities also include those identified by the Yukon Environmental and Socio-economic Assessment Board.

Following a meeting of the Oversight Group in September 2018, the approach to addressing the priorities was agreed upon.

Three common themes run through the various priorities put forward by the Parties. They are:

- A. YESAA Forums
- B. Consultation and Engagement
- C. Policy / Procedural Aspects

Priority A – Revitalization of the YESAA Forums

All the Parties agree that the revitalization of the YESAA Forums is a key priority for the Oversight Group. The YESAA Forums will create a space for YESAA practitioners to come together and discuss common issues, create a community of practice and create and provide YESAA specific training. Some of the priorities identified by the Oversight Group that may be linked to the revitalization of the YESAA Forum include:

- 1. Cumulative Effects
- 2. Traditional Knowledge
- 3. Training
- 4. Consultation and Engagement
- 5. Mitigative Measures
- 6. Proving Economic Potential and Benefits
- 7. Improving Communications of Pre-submission Requirements

The terms of reference for the YESAA Forums will be one of the first items addressed by the Oversight Group. It will develop recommendations for how the terms of reference could be updated and share these recommendations with the Parties and other partners and stakeholders (such as First Nations, YESAB, other departments, etc.) to gather their views on participants and how the YESAA Forum may operate going forward.

The Oversight Group will carry out a scoping exercise and communicate scope and expected outcomes for each topic to the YESAA Forum Steering Committee

Priority B - Consultation and Engagement

Each of the parties has identified aspects of consultation and engagement (pre, during and post-assessment) as a priority area for examination and possible improvements. Yukon First Nations have noted the requirement for Decision Bodies to engage with Yukon First Nations prior to the issuance of a decision document if the project may affect aboriginal or treaty right, title or interests. The Crown relies on procedural aspects of the YESAA process for fulfilling s.35 Duty to Consult. There may be benefit in examining the current practices in order to seek improvements, efficiencies and common practices.

Priority C - Policy / Procedural Aspects

Some of the priority areas put forward for consideration fall into a theme of policy / procedure. These include:

- 1. Process Mapping for Consent Requests under s.60 and s.112 of YESAA
- 2. Common Processes for Joint Decision Documents
- 3. Authorization Amendments and Renewals

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4. Timelines in Assessments
5. Improved Communications of Pre-Submission Requirements
6. Creation of a Method for Proving Economic Potential
7. Review of the *Assessable Activity Regulations*

While some of these priorities may also be put forward for the consideration of the YESAA Forum, they may also require more specialized focus from a policy working group or technical committee before being put to the Forum.

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ANNEX A – Priorities of the Parties

Canada Priorities:

1. **Decision Body Consultations** and reliance on YESAA processes to fulfill s.35 Duty to Consult – The Crown relies heavily on procedural aspects of the YESAA assessment process to help inform the consultation record and help it fulfill its s.35 Duty to Consult. It may be of benefit to undertake an examination of the current practices in order to seek improvements, efficiencies and common practices.
2. **YESAA Forum Revitalization** – Canada would like to better understand the interests of the other parties in revitalization of the YESAA Forum. Does the previous format need to be changed? What would be the purposes of the Forum – identification of best practices, drafting recommendations for resolving existing process issues, further implementation of Five-Year review recommendations? If there is mutual interest, how would Forums be administered?
3. **Improved Communication** of pre-submission requirements and for proponents and consultation with affected First Nations – Can information, processes and expectations be better communicated to proponents to create more surety around expectations for pre-submission consultation with Yukon First Nations?
4. **Cumulative Effects** – Canada is aware that this is an on-going issue and First Nation priority to address within YESAA processes. Federal Decision Bodies would also benefit from more significant consideration of identified cumulative effects during assessments. Currently, s.112.1 requests for consent are the existing statutory mechanism for the Minister to address this issue within the YESAA context, though there are process and policy gaps in implementing this mechanism (such as Rules, which may be created by YESAB under s. 30(3)(c)). How can federal departments help support or feed in to improved cumulative effects studies?

First Nations Priorities:

1. **Proponent Mitigative Measures.** NND and VG noted that during the assessment phase proponents will identify mitigative measures or steps they intend to take to address concerns they identified at the outset of their planning process. Those measures are referred to briefly and without detail in the Evaluation Reports and often are not described at all. As such, they are not qualified in any substantive way and do not make their way into any decision document as a result. YFNs would like those measures to be identified and a method put into place to track those throughout the development assessment process with a view to being able to enforce them in practice.
2. **Economic Development.** LSCFN is interested in developing a requirement or method to ensure proponents can “prove” that their project, if indeed it is a wealth generating project, can really generate profit. The concern here is that roads or other development projects occur under the pretense of economic development and there is not requirement to on the part of the proponent to demonstrate economic viability of the project. TH in particular raised concern about inadequate methods of assessing cumulative effects.
3. **Cumulative Effects.** YFNs maintain their concern about inadequate cumulative effects assessment. Directly linked to this is the lack of land use planning. There is a lack of mechanism for regional or cumulative effects monitoring and baseline data and lack of understanding of land use plans and the ongoing role of planning commissions.
4. **Traditional Knowledge.** YFNs feel strongly that YESAA is not achieving its aim or objective with respect to Traditional Knowledge. It is generally viewed by YFNs that YESAB and Decision Bodies are failing to consider TK in assessments and decisions, and that it isn’t being adequately included in proposals, evaluation reports and decision documents. Obstacles to adequate consideration of TK include: lack of common understanding of the nature of TK, gaps in existing compilations of “baseline” TK, and inaccessibility of recorded TK materials; conflicting methodologies (TK is valued less than its equivalent in western-scientific knowledge); and challenges with respect to sharing of sensitive and confidential TK.
5. **Decision body engagement with affected Yukon First Nations.** YFNs required federal and territorial decision bodies to engage with affected YFNs when those decision bodies are considering recommendations from the Executive Committee or a designated office with respect to a project that may affect its aboriginal or treaty rights, titles or interests. This engagement must take place prior to the issuance of the decision document.

Yukon Priorities:

1. **Authorization amendments and renewals** - ways to work in policy for previously assessed projects that have limited change in scope, which can include agreed-to interpretations of ‘modification’, ‘project’ or ‘activity’: Would like to explore renewal or amendment of projects that have already undergone assessment, where the request is straightforward, and there is no change to activities that make up the project (temporal

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extension of assessed activities) using tools available in policy and the current Act. This may relieve an administrative burden for all organizations. This policy approach is being explored in YG, with S.83 being the focus, along with examining the definitions and interpretations in the Act. For example:

- a. Modification is not defined in the legislation or regulation. If possible, agree to a definition of modification and develop a coordinated policy approach to determine whether a change to a project's timeframe constitutes modification (i.e., if project activities are authorized by a previous decision document). Agree to an interpretation of 'project', which may be different in an application versus in an assessment – is it one activity (the triggering activity) or the collection of activities within a larger development program? YESAA Definition: 'Project' means an activity that is subject to assessment under section 47 or 48 and is not exempt from assessment under section 49.
2. **Timelines in assessments:** Notwithstanding future legislative, regulatory or rule changes, the Parties should commit to meeting existing timelines at every stage where they have some control. Typically, this is in seeking views and decision-making, and encourage all other participants to meet those timelines as well.
3. **Common process for Joint Decision Documents:** Come to agreement on a general process of joint DDs. YG has the technical tools and experience to issue joint DDs, and has led many in the past. A documented, agreed-to approach on how this occurs would assist in decision-making, and advise all parties with YESAA decision-making authority.
4. **Practitioner training, information sharing and community of practice:** The Oversight Group should organize regularly-held information and discussion sessions for exchange on how each organization is participating in the process, with the goal of understanding the details of practice outside the pressures of the project-specific. Joint sessions should be offered at least annually and when convenient for the most amount of people to attend. Insofar as a venue, this could be part of the YESAA Forum or a new equivalent. YG also holds monthly practitioner meetings, and is willing to explore opening up the invitation to FN and Canada practitioners.
5. **Consultation during decision-making and creating consultation efficiency:** YG check-ins at decision making are near standard practice, it should be established if this is meeting the expectation of the 5-year review, and if there is room for improvement or ways to remove duplication or unnecessary check-ins at decision-making. Adding or changing terms and conditions is addressed on a case by case basis, but must be supported by sufficient evidence demonstrating pathways for both effects and mitigation. A commonly understood approach for considering changes to recommendations from FNs when YG is the sole DB should be developed.

Consultation is initiated during seeking views and information, extends through the development of the decision document, and continues during the licensing phase. Significant resources on all sides are tapped for a single project. If an agreement or standard on how reliance on SV&I input (or other aspects of the YESAA process) to qualify as consultation can be reached, it may save countless person-hours on future projects.

Yukon Environmental and Socio-economic Assessment Board Priorities

1. **Review of the Assessable Activities Regulations:** These regulations have not been reviewed since they were adopted by the Governor-in-Council in 2005. Some of the issues identified by the Parties during the Five-year Review, and since include:
 - Some listed activities are too broad or undefined and unintentionally capture more activities than anticipated and which do not warrant assessment (Schedule 1, Part 13, Item 12 – moving earth);
 - Absence of specific exemptions for certain activities results in unnecessary or unwarranted assessments (Schedule 1, Part 4, Item 1 – power and telecommunications lines)
 - Project triggers and thresholds for Executive Committee screenings are uncertain or ill-defined (Schedule 3, Item 2 – placer mining involving suction dredging; Schedule 3, multiple items – construction, decommissioning or abandonment...)
 - Direction on the application of Schedule 2 – General Exceptions needs to be clarified, particularly with respect to project scoping.
 - Reference to the Sewage Disposal System Regulations in Schedule 3, Item 49 dealing with municipal sewage disposal systems is problematic, having the unintended effect of exempting such systems from screening by the Executive Committee
 - Imprecise definition of “waste” in respect of the deposit of waste to water as a trigger (Schedule 1, Part 9, Item 12).

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- Exemptions for activities subject to the renewal or amendment of authorizations need to be considered as specific exceptions (Column 2 in Schedule 1) or general exceptions (Schedule 2).
NOTE: To address the s.49.1 or “reassessment” issue

2. **Increasing Access to Traditional Knowledge (TK):** First Nations have often articulated that they see the consideration of TK in assessments as a priority, noting that YESAB and decision bodies are failing to adequately consider TK. While YESAB shares an interest in better incorporating TK in assessments, we feel that limited access to TK is a major impediment. Seldom are First Nations providing TK when commenting on projects. In many cases it may be a challenge for First Nations with limited capacity to identify relevant TK in a timely and cost-effective manner. Often access to TK is impeded by conflicting priorities of First Nation heritage and lands departments. At least one Indigenous group (a family, not a First Nation) is looking to engage with YESAB to document TK over a large geographical area, rather than related to a single project. First Nations, perhaps with the support of Canada and Yukon, could similarly work to document, map and ‘hold’ TK to be available to inform assessments.
3. **Process Clarity for Requests Made Under Sections 60 and 112 of YESAA:** There are two types of requests provided for in YESAA for which little or no process clarity is provided. There are no criteria, timelines or requirements for discussion amongst the parties set out in either section 60 or 112 for making requests or for the granting of consent to make a request. This can create confusion and considerable process uncertainty for proponents, decision bodies, YESAB, affected First Nations and stakeholders. This is evidenced by two recent examples where the federal minister has been asked to consent to a section 60 request for a panel review and to a section 112 request for a cumulative effects study.

Coordinating decisions on whether to grant consent to a First Nation to make a request when the consent of both the federal and territorial ministers is required and the timing of requests are key considerations that are not addressed in YESAA or in any policy at present.

Concerning a section 60 request for review, it will also be important to define and consider the relationship between the criteria used to make a request or grant consent to make a request and the factors that the Executive Committee must consider under section 58(2) in determining whether an assessment should continue as a screening or be referred to a panel for review.

Similarly, there is no shared understanding of the circumstances under which a request for a study or research under section 112 could be made or consent to a request granted, nor is there any guidance setting out expectations for the content of a request.

For requests under both sections 60 and 112, the time and resources required to organize reviews, studies or research, as the case may be, needs to be taken into account in making decisions respecting the making of such requests