

First Nations Lands Advisory Board Recommendations on Environment Assessment



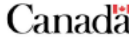
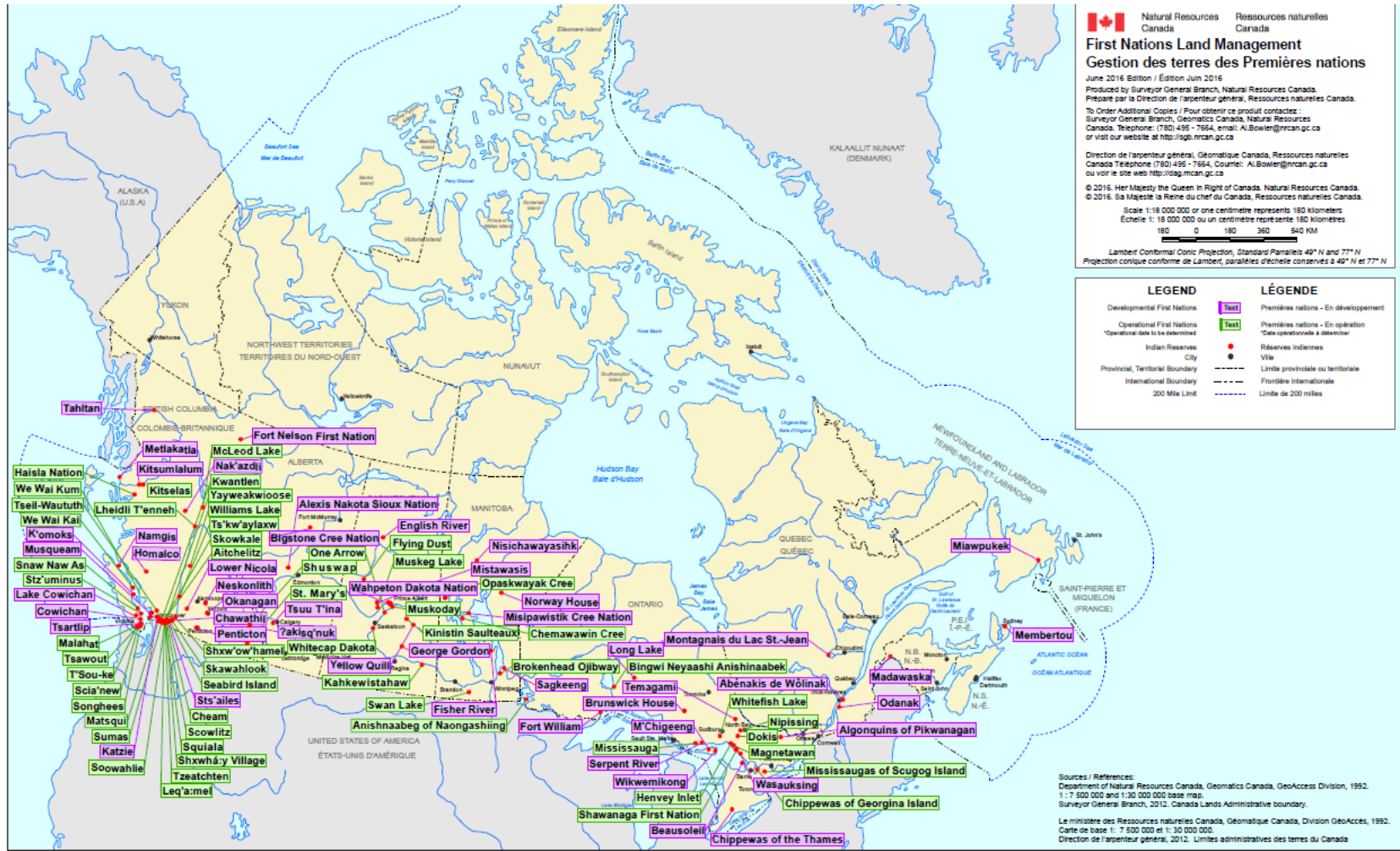
Presentation to federal Expert Panel on Environmental Assessment

December, 2016

Framework Agreement on First Nations Lands Management - Background

- The Framework Agreement is a highly successful option for First Nations to escape the antiquated Indian Act
- Approximately twenty percent of all First Nations in Canada have signed on to consider the Framework Agreement with 63 First Nations operational and 44 developing their Land Codes
- Framework First Nations operate at the speed of business, generating hundreds of millions in economic activity which benefits all Canadians.
- Framework First Nations can better integrate protection of the environment into decision making - greater capacity to capitalize on green energy and environmental innovations
- First Nation capacity and experience is building as more and more First Nations operate under the Framework Agreement
- Poor environmental management under previous Indian Act administration remains highly problematic for operational First Nations – Canada's responsibility for legacy issues must be addressed
- Federal decision makers need to become more aware of the Framework Agreement when EA processes are undertaken





Framework Agreement – Self Government

- Framework Agreement sets out clear self government authority over reserve lands, natural resources and environment
- Framework First Nations are both law makers and decision makers, for example negotiating and deciding upon leases and rights of way
- This is an independent self government authority – no role for the federal Minister as under the antiquated and ineffective *Indian Act* in making decisions on these subjects
- Framework First Nations can for example implement land use plans, zoning, environmental assessment and protection laws, conservation areas, measures to protect species at risk....
- Framework First Nation laws have “real teeth” with authority for example to impose penalties for violation of environmental laws equivalent to provincial standards
- Project proponents must reach agreements with Framework Agreement First Nations on reserve lands – Framework Agreement bars provincial, territorial or municipal expropriation with severe restrictions on federal expropriation – much more restrictive than the *Indian Act*
- Framework Agreement law making and decision making authority applies on reserve lands but of course environmental considerations cross boundaries – CEAA needs to recognize Framework First Nation legal authority on reserves and connections to other lands



Framework Agreement – Future

- The powerful impact of the Framework Agreement will increase over time – the failures of the *Indian Act* will recede – Framework First Nations are re-investing economic dividends within communities and improving environmental management
- Framework First Nations are pursuing more and more sophisticated economic development opportunities
- More and more First Nations are opting into the Framework Agreement
- Additions to reserve, treaty land entitlement and proximity to neighbouring economic activity creates opportunities but will require stronger environmental management
- The Lands Advisory Board's five year strategic plan targets updates to the Framework Agreement – both the Minister of AANDC and Minister of Environment and Climate Change have been advised that the Lands Advisory Board wishes to explore updates to the Framework Agreement, including changes in respect of environmental protection and assessment
- Changes to the Framework Agreement can only be made by agreement of Framework First Nations with Canada – Canada cannot unilaterally change legislation



Questions posed by the Expert Panel – First Nation interactions with federal EA

- **Question 1: How can federal EA processes better reflect and incorporate the multiple ways in which Indigenous peoples may interact with federal EA, including as potentially affected rights holders, proponents of development, self governing regulators, and partners?**
- Individual Framework First Nations have the authority to design their own environmental assessment laws and procedures and therefore have the flexibility to decide how best to design EA processes on reserve in a manner appropriate to their own evolving circumstances and land base – self government
- Federal environmental assessment legislation needs to clearly recognize that the Framework Agreement is self government - avoid current confusion on the part of some federal authorities
- Some commentators who have already provided input to the Panel have recommended greater flexibility and the ability to substitute provincial-territorial processes – the Panel should not recommend flexibility that would lose sight of the Framework Agreement
- The focus of CEAA 2012 on “designated projects” has led Framework First Nations to have limited if any input on federal decision making on smaller projects – despite their potentially important impacts on individual communities and the potential cumulative impacts of many small scale projects



Questions posed by the Expert Panel – First Nation interaction with federal EA – Continued

- Some commentators have recommended changes to federal EA processes to better examine issues beyond the narrow scope of an individual project – variously referring to broad regional, strategic or cumulative impact approaches. Any recommendations by the Panel in this regard should be further explored with Framework First Nations.
- Framework First Nations are more and more engaged in land use planning, regional development, environmental partnerships, species at risk management and enforcement all of which transcend the consideration of individual projects
- Federal EA processes regarding individual projects must provide for stronger engagement so that Framework First Nations can determine:
 - legal requirements
 - how they want to be involved
 - Relevant traditional and other community knowledge
 - sensitive and conservation areas to avoid
 - how to advise on scope of proposed EA



Questions Posed by the Expert Panel – First Nation interaction with federal EA – Continued

- Framework First Nations are investing in stronger land use planning, often in partnership with neighbouring governments
- Framework First Nation land use plans, conservation strategies.....should be considered in federal EA processes
- Provincial and territorial technical experts have recommended that if federal decision makers were to conduct regional assessments they should be conducted in collaboration with provinces and territories – Lands Advisory Board also recommends collaboration with Framework First Nations within the region
- Lands Advisory Board recommends measures to increase transparency – publishing follow up on measures to protecting traditional uses of land, monitoring, training and impacts on lands under the jurisdiction of Framework First Nations
- Framework First Nations have the potential to assist in implementing compliance and enforcement measures – if First Nations agree with federal EA recommendations



Questions Posed by the Expert Panel – Aboriginal & Treaty Rights

Question 2 – How is the need to address potential and established Aboriginal and treaty rights best incorporated into the federal EA process?

“The Framework Agreement is not intended to define or prejudice inherent rights, or any other rights, of First Nations to control their lands or resources or to preclude other negotiations in respect of those rights” (section 1.6 of Framework Agreement)



Questions Posed by the Expert Panel – Free, Prior and Informed Consent

Question 3 - What is the best way to reflect the principles of the United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?

- Current federal EA processes not designed to examine First Nation “consent” – better suited to examine environmental aspects of approved projects
- Question posed raises question whether federal EA processes should examine individual projects or broader regional development issues
- Express requirements to consider the Framework Agreement as self government must be a feature of changes to federal EA processes
- The exact requirements for “consent”, “consultation” or other engagement in future federal EA legislation should be developed by agreement with Framework First Nations



Questions Posed by the Expert Panel – Traditional Knowledge

Question 4 – What role should Indigenous traditional knowledge play in federal EA and what are some of the best international practices?

- CEAA should require consideration of available traditional knowledge – rather than leave this to the discretion of a responsible authority (amend CEAA 19(3))
- CEAA definitions (and federal policies) should not equate traditional knowledge with archaeological historical evidence – clarify the broad scope of traditional knowledge
- Traditional knowledge is important but should not become a limiting factor – Framework Agreement First Nations may have vital input for example on future development plans, technical information from water management staff.... far beyond traditional knowledge
- Participation in regional and technical advisory committees can assist in ensuring that information First Nations have flows to federal decision makers and can assist First Nations in their understanding of projects
- Lands Advisory Board is assisting Framework First Nations in building capacity – potential for certified First Nation lands managers to participate in technical review committees
- The Panel must consider the costs for managing research, traditional land use studies.....



Summary of Recommendations

- no changes to the Framework Agreement environmental assessment process can be made without the consent of Framework First Nations
- explore Framework Agreement amendments to set out core EA principles for environmental assessments by Framework First Nations on reserve – and remove current restriction tying First Nations to use CEAA
- The exact requirements for “consent”, “consultation” or other engagement in future federal EA legislation (for federal environmental assessments outside reserves) should be developed by agreement with Framework First Nations
- set out in CEAA requirements 1) to engage Framework First Nations before the start of an environmental assessment process 2) to provide for participation in the EA process itself including funding considerations and 3) to require consideration of Framework First Nations in identified compliance and enforcement measures
- Clarification of CEAA: explore in context of other CEAA amendments changes to the CEAA definition of “jurisdiction” to expressly identify First Nations that have ratified the Framework Agreement on First Nation Land Management as “a governing body that is established under legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project”

