

# Recommendations for Enhancing Yukon Assessment & Regulatory Processes

A Design for Development Assessments of Activities associated with Approved Projects,  
and other Recommendations to Improve Subsequent Regulatory Phases

May 13, 2020

## Part 1 – Introduction

The Department of Energy, Mines and Resources of the Government of Yukon (“YG”) have retained Gowling WLG to conduct initial research, a jurisdictional review, and scoping of non-legislative options for achieving greater efficiencies with respect to assessments of projects under the *Yukon Environmental and Socio-economic Assessment Act* (“YESAA”), with a particular focus on assessments carried out as a result of an application to amend or renew an “authorization” (i.e., a regulatory phase approval).<sup>1</sup> Accordingly, although this mandate centered on identifying opportunities for efficiencies in the YESAA assessment process (which questions *whether* a project should proceed), it also entailed consideration of subsequent regulatory phases (which generally focus more - but not solely - on *how* a project should proceed, with the possibility that certain aspects may not proceed), and opportunities to align those latter regulatory phases with the earlier assessment phase.

This assignment first arose out of a discussion involving Yukon stake-holders and rights-holders regarding the amendment of the YESAA by the federal government in 2015 and then again in 2017. In 2015, Bill S-6 introduced section 49.1, which exempted projects that were seeking renewed or amended authorizations from the requirement of a new assessment if there was no significant change to the original project. Two years later, in 2017, that provision was revoked by way of Bill C-17.

During our meetings with various parties, we heard significant frustration regarding the lengthy time required for assessments of new activities prescribed under the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* (i.e., new “projects”), where the original project had undergone assessment and been allowed to proceed under the YESAA (an “**Approved Project**”). These frustrations were particularly strong where the proposed project was viewed as having relatively minor potential impacts. Many recognized that the absence of the ability (created by s. 49.1) to exempt projects that did not entail significant changes to the original project led to inefficiencies in assessment and regulatory processes.

A key challenge in overcoming this issue is that the YESAA is federal legislation, and therefore outside YG’s jurisdiction. Although it is not possible to replace section 49.1 through policy, the recommendations presented below are aimed at identifying non-legislative opportunities for creating regulatory efficiencies to address concerns made plain by the absence of flexibility previously provided by section 49.1.

Notably, the Umbrella Final Agreement (“**UFA**”) and the Yukon First Nation Final Agreements, which led to the establishment of the YESAA regime, recognizes the ability to, in consultation with First Nations, “improve or enhance socio-economic or environmental procedures in the Yukon” where there is no detailed design in place with respect to a development assessment process (UFA s. 12.19.4). In this instance, there is no design distinguishing the assessment process for proposed changes to an Approved Project as compared to a completely new project. Accordingly, there is an opportunity to fill this gap with new designs to improve the current conduct of assessments of prescribed activities proposed for the purposes of an Approved Project.

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<sup>1</sup> “Authorization” is defined under s. 2(1) of the YESAA as “a licence, permit or other form of approval that is issued or given by (a) the Governor in Council, a government agency, an independent regulatory agency or a municipal government, or (b) a first nation under its final agreement or a first nation law, but does not include an access order issued under the *Yukon Surface Rights Board Act* or a consent given by a first nation for access to settlement land in circumstances where an access order could be issued under that Act.”

There are tools within the YESAA to seek to address these issues. Concurrently, there are other options available to parties to the Yukon regulatory regime, such as the YG, decision bodies, First Nations and the Yukon Environmental and Socio-economic Assessment Board (“YESAB”) that may further help address these issues. While several of the recommendations below require cooperation of various parties, some could be acted upon by the YG alone, or through existing entities such as the recently established Oversight Group.

## **Part 2 – Summary of Recommendations**

Drawing from our research, interviews, experience and consideration of best practices, we have prepared the following recommendations to address the current challenges associated with assessments of YESAA prescribed activities proposed for Approved Projects. In this Part 2, we have provided a summary of our recommendations, each of which is further detailed in Part 3 below.

Note: Recommendations A, B and C below are all intended to work together to achieve efficiencies in the overall regulatory process, with each covering a distinct phase:

- a) Recommendation A covers the initial project application phase;
- b) Recommendation B connects the assessment phase with subsequent regulatory phases, and
- c) Recommendation C considers assessments of subsequent activities proposed for a previously assessed project.

Finally, Recommendations D and E outline considerations for the YG to further advance legislative efficiencies.

### *Recommendation A: Broaden the Scope of the Original Project*

The scope of a project is the basis on which an assessment under the YESAA is carried out. Accordingly, it is recommended that measures be adopted to ensure a sufficiently broad original project scope is defined at the outset, which can help minimize the number of subsequent assessments required as a result of future proposed changes associated with an Approved Project.

Designated offices and the executive committee have broad discretion with respect to the determination of project scope. The exercise of this discretion can, however, be guided through the enactment of rules. To achieve efficiencies, existing rules could be expanded upon to require designated offices and the executive committee to cooperate with applicable decision bodies in defining the original project scope, with an emphasis on seeking to define it sufficiently broad to capture prescribed activities and a geographical area that may be proposed in the future. Concurrently, soft instruments, such as Memorandums of Understanding, could be entered into between the YESAB and decision bodies to outline the means by which such cooperation on defining the scope of the original project is carried out.

Even with the exercise of the discretion and development of expanded rules described above, project proponents would themselves need to seek sufficiently broad assessments to make this recommendation effective. Accordingly, to ensure effective implementation of this recommendation, pre-proposal meetings, training, standard templates, and measures to ensure clarity on the range of prescribed activities covered by the original assessment should be implemented.

### *Recommendation B: Adopt YESAB Rule on Content of Project Proposals*

Environmental assessments are intended to be carried out at a high level, with a focus on *whether* a project should be approved; conversely, subsequent regulatory phases generally narrow in on technical

details with a greater focus on *how* a project should proceed. Indeed, in certain circumstances a decision to refuse a particular regulatory authorization may result in a project being unable to proceed. Accordingly, detailed technical matters should be left for consideration during the subsequent regulatory phases, rather than during the preliminary assessment phase.

To ensure these objectives are met, it is recommended that YESAB engage with other regulatory bodies to co-develop a rule that clearly sets out the level of information required to be submitted as part of a project proposal. Such rule should recognize that requirements to develop technical details and specific management plans should be imposed through conditions attached to the relevant decision document (which can then be addressed at the subsequent regulatory phases), rather than requiring such technical details and plans to be completed and submitted to YESAB as part of the YESAA project proposal.

*Recommendation C: Expedite the Assessment of Certain Prescribed Activities*

Where the defined scope of the Approved Project does not capture a later proposed prescribed activity, there should, in certain circumstances, be an expedited process for the assessment of that activity to align with the theme in the YESAA that calls for timeliness, avoidance of duplication, and efficiency.

It is therefore recommended that YESAB enact new rules that create a new category of projects (i.e., “**Category A Projects**”) that covers projects (i.e., prescribed activities under the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*) that:

- i. are proposed as part of an application to amend or renew an authorization associated with an Approved Project; and
- ii. through consultation with applicable First Nations and decision bodies, are not deemed to be a significant change to the Approved Project or the environment or socio-economic effects thereof.

For such Category A Projects, rules could provide for truncated assessments, priority, and consideration of standard mitigation measures developed for specific categories of prescribed activities.

*Recommendation D: YG Actions to advance Regulatory Efficiencies*

Although the YESAA is federal legislation, YG can play an important role in coordinating efforts of the various parties to enable collaborative screenings, assessments, and decision-making. This could be accomplished through numerous means, including:

- i. pre-proposal meetings with all parties to discuss the regulatory lifecycle;
- ii. early involvement of the regulatory agencies in the assessment process;
- iii. consolidation of technical reviews through, in part, the existing Yukon Technical Team;
- iv. the YG can also work with the various decision bodies and boards to develop standardized terms and conditions to attach to authorizations where appropriate;
- v. appointment of a project level Lifecycle Regulator to provide coordination of regulatory processes throughout the life of complex projects;
- vi. establishment of a Yukon Resource Development Commissioner to oversee all aspects of the Yukon regulatory regime (federal, YG and First Nations);
- vii. support to the Oversight Group established under the 2017 “Reset” MOU;

- viii. annual workshop to encourage collaboration between YESAB, YG departments and boards, and First Nations, provide training and share experiences, and discuss best practices; and
- ix. Government-to-Government discussions between the YG and First Nations with a view to developing and implementing First Nation-specific policies for regulatory processes applying to projects and activities within their respective settlement lands / traditional territories.

*Recommendation E: Long-Term Planning for Legislative Reform*

During our review we observed that, unlike environmental/impact assessment legislation in many other jurisdictions, the YESAA is silent on the ability to renew or amend a decision document issued thereunder. This can impact the efficiencies of the overall regulatory process, and we therefore recommend that this gap be addressed in future legislative reform of the YESAA. We have outlined some areas for consideration in Part 3 below. It is acknowledged that this will require federal legislative change and that the YG is limited in its abilities to influence such change.

In addition, we note that there are specific timelines for the assessment process set out in the *Decision Body Time Periods and Consultation Regulations*. However, based on our interviews with various parties, it appears that those timelines are infrequently met. We therefore recommend that discussions and consultations be carried out to determine appropriate and realistic regulatory timelines, and these regulations then be amended accordingly. The Oversight Group may be a useful forum for such discussions.

**Part 3 – Detailed Recommendations**

***Recommendation A: Broaden the Scope of the Original Project***

Note: Recommendations A, B and C below are all intended to work together to achieve efficiencies in the overall regulatory process, with each covering a distinct phase:

- a) Recommendation A covers the initial project application phase;
- b) Recommendation B connects the assessment phase with subsequent regulatory phases, and
- c) Recommendation C considers assessments of subsequent activities proposed for a previously assessed project.

This Recommendation A is presented as a *proactive* measure aimed at avoiding the requirement for an assessment on the basis that the assessment has already been completed. While we recognize that this will likely create a greater burden on all parties at the early stage of a proposed project, adopting this Recommendation A together with Recommendations B and C will provide greater regulatory efficiencies over the life of a project.

Recall that the scope of a project is the basis on which an assessment under the YESAA is carried out. Accordingly, if:

- i. a proposed prescribed activity (i.e., prescribed under the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*) is included in the scope of an Approved Project, and therefore underwent assessment as part of the assessment of the Approved Project; and
- ii. such prescribed activity is proposed in a future application to amend or renew an authorization,

then, pursuant to section 43(6) of the YESAA, the YESAB must consider, and may rely on, the assessment carried out of that activity in the original assessment of the Approved Project. This can help narrow the scope of an assessment to aspects of the proposed prescribed activity not previously considered. Alternatively, the focus could also be on broadening the geographical footprint described in the project scope, to the same effect.

This highlights the value of a broad original project scope, as it can help avoid lengthy assessments of new proposed prescribed activities that have already undergone assessment.

The authority to set a broad project scope is provided under section 51 of the YESAA, which requires designated offices or the executive committee, as applicable, to determine the scope of a project to be assessed by it. Such scope must include, in addition to any activity identified by the proponent in the proposal, any other activity that it considers likely to be undertaken in relation to such activity, and that is sufficiently related to it to be included in the project. Accordingly, the designated offices and the executive committee have broad discretion with respect to the determination of project scope.

Concurrently, the YESAB is required to enact rules with respect to the determination of the scope of a project by the designated offices, executive committee and panels (YESAA, ss. 30(1)(b), 31(2)(b)). The YESAB has carried out this duty by enacting the Rules for Evaluations Conducted by Designated Offices and the Rules for Screenings Conducted by the Executive Committee. Both of these Rules set out factors for determining whether another activity is sufficiently related to be included in the project scope.<sup>2</sup>

Pursuant to ss. 30(2)(e) and 31(3) of the YESAA (which provide for cooperation and coordination of YESAB functions with other bodies), these existing Rules could be expanded to require the designated offices and executive committee to cooperate with the various decision bodies in defining the original project scope, and in particular seeking to define it sufficiently broad to seek to capture prescribed activities or a geographical area that may be proposed in the future as part of applications to amend or renew subsequent authorizations issued for the Approved Project. Concurrently, soft instruments, such as Memorandums of Understanding, could be entered into between the YESAB and such other decision bodies to outline the means by which such cooperation on defining the scope of the Approved Project is carried out.

To effectively accomplish this objective of defining a sufficiently broad scope, it would also be helpful to:

- i. ensure that proponents are actively encouraged to consider the development of a broader project scope than might have been the case in the past;
- ii. hold a pre-proposal meeting with the proponent and representatives from the YESAB, applicable decision bodies, and applicable YG departments and First Nations to discuss the regulatory continuum and long-term benefits of broadly scoping the project in the initial assessment;
- iii. provide training to the designated offices and executive committee on how to define a sufficiently broad scope for different types of projects (i.e., mining projects versus highway projects, etc.), which training would include annual workshops targeted at First Nations, YESAB and YG departments and boards to advance collaboration, provide training and

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<sup>2</sup> For example, s. 36 of the Rules for Screenings Conducted by the Executive Committee provides that in determining whether another activity is likely to be undertaken and is sufficiently related to an activity identified in the proposal, the Executive Committee shall take into consideration (a) whether it is reasonably likely that the activity identified in the proposal would proceed without the other activity being undertaken; (b) whether the decision to undertake the activity identified in the proposal makes it inevitable that the other activity will be undertaken; and (c) the spatial and temporal proximity of the activity identified in the proposal to the other activity.

share experiences, discuss and develop best practices, and engage with proponents to identify opportunities for improvement;

- iv. develop standard templates for setting the project scope, incorporating specific descriptions of activities that align with prescribed activities under the regulation; and
- v. together with (iv) above, require, by way of guidelines or policy, that designated offices, the executive committee and panels include plain language summaries and clear maps of the defined project scope to provide clarity and long-term certainty to future reviewers and decision-makers on the range of prescribed activities and geographical scope that have undergone assessment.

**Recommendation B: Adopt YESAB Rule on Content of Project Proposals**

Note: See note above under Recommendation A above regarding the intention of Recommendations A, B and C to work together to achieve efficiencies in the overall regulatory process.

Throughout our interviews we heard concerns regarding the level of technical details required at the early YESAA stage of the regulatory lifecycle. In particular, several interviewees expressed concerns regarding excessive technical details being required at a stage when such project details had not yet been formulated, and corresponding duplication in reviews thereof which creates a burden on the limited time and resources of reviewers. As such details are bound to change during the development of detailed authorization applications, this approach creates regulatory inefficiencies.

These concerns would likely amplify should the Approved Project scope be broadened as recommended above. This Recommendation B is intended to alleviate those concerns.

The approach adopted in other jurisdictions provides a basis to overcome these concerns. In such jurisdictions, extensive technical details are generally not required as part of the assessment process. Rather, the assessment process results in a decision (such as the YESAA decision document) with terms and conditions that require the development of management plans and studies; such plans and studies are then used to develop the requisite technical details that are later considered in the regulatory phases by regulatory bodies. In this manner, the proponent is not required to commit to specific technical details at the early assessment stage, but rather at a later stage, when the project development is approaching the regulatory phase and technical details have been more fully developed.

As noted in *Western Copper Corporation v. Yukon Water Board*, 2011 YKSC 16, a positive decision document does not prevent a subsequent regulatory body from refusing to issue a regulatory authorization; regulatory bodies retain the discretion to refuse to issue such authorizations following their review of the more technical regulatory applications. Accordingly, minimizing the technical focus in the assessment phase does not eliminate such review from being conducted later in the regulatory process when those details are better formulated; instead, the regulatory bodies retain their discretion to deny an authorization following their review of the technical details, thereby ensuring a thorough assessment is still completed. Such detailed review should simply be completed at the correct stage in the regulatory process; i.e., the regulatory stage rather than the assessment stage.

It is therefore recommended that YESAB engage with other regulatory bodies and First Nations in co-developing a rule that clearly sets out the level of information to be submitted as part of a proposal for a project (as per the YESAA, ss. 30(1)(a), 31(2)(a)) and that:

- i. aligns with First Nations consultation needs at the assessment phase; and

- ii. seeks to limit such level of information to that required to carry out its statutory obligations (taking into account the finding by the Supreme Court of Yukon in *Western Copper* that “the development assessment process prescribed by YESAA is a planning tool that precedes the more technical regulatory licensing process under the Waters Act and the QMA” (para 119)).

Such rule should also provide that requirements to further develop particular technical details and specific management plans, including specific technical requirements recommended by First Nations and decision bodies, should be imposed through conditions attached to the decision document, rather than requiring such technical details and plans to be completed and submitted to YESAB as part of the proposal for the project (and thereby considered at the assessment stage, rather than the more appropriate regulatory phase).

### **Recommendation C: Expedite the Assessment of Certain Prescribed Activities**

Note: See note above under Recommendation A above regarding the intention of Recommendations A, B and C to work together to achieve efficiencies in the overall regulatory process.

Unlike Recommendation A above, which is a *proactive* measure, this Recommendation C is a *responsive* measure aimed at addressing those situations where: (i) a new prescribed activity is proposed as part of an application to amend or renew an authorization, and (ii) that prescribed activity was not included in the broadened project scope that was considered as part of the assessment of the Approved Project.

We recommend an expedited assessment of these types of new prescribed activities based on the reoccurring theme within the YESAA that encourages timeliness, avoidance of duplication, and efficiency.<sup>3</sup> Similar to the recommendations outlined above, this recommendation could also be accomplished by way of YESAB rules. In particular, the YESAA provides that rules may provide for different types of evaluations, screenings or reviews for *different categories* of projects (ss. 30(4), 31(1)(b)).

Pursuant to this authority, we recommend that YESAB enact new rules that create a new category of projects (i.e., “**Category A Projects**”) being classes of projects (i.e., prescribed activities under the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*) that:

- i. are proposed as part of an application to amend or renew an authorization for an Approved Project; and
- ii. through consultation with applicable First Nations and decision bodies (possibly through the Oversight Group) are not deemed to be of significant change to:
  - a. the original Approved Project; and/or
  - b. the environment or socio-economic effects assessed as part of the Approved Project.

Take, for example, a new trail proposed on Crown or settlement land for the purposes of a mine, which mine is an Approved Project, but which new trail: (1) requires an amendment to an existing authorization, and (2) is a prescribed project that was not included in the scope of the original mine project (i.e., not

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<sup>3</sup> For example:

- i. “The purposes of this Act are [...] to ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication” (YESAA, s. 5(2)(i)); and
- ii. “The Board, the designated offices, the executive committee and panels of the Board shall avoid duplication in the assessment process and shall provide certainty, to the extent practicable, to persons participating in the assessment process with respect to assessment procedures, including information requirements, time limits and costs” (YESAA, s. 40).

assessed in the YESAA assessment of the Approved Project). If the designated office determines, through consultation with applicable First Nations and decision bodies, that the new trail is not a significant change to either the Approved Project or environmental / socio-economic effects considered in the assessment of that Approved Project, then such new trail would be deemed a Category A Project.

For such Category A Projects, we recommend a distinct type of evaluation, screening or review that provides for:

- i. initial comparison of the scope of the original Approved Project to the proposed Category A Project to determine the requisite scope of assessment of the proposed Category A Project (bearing in mind YESAA, s. 43(6), which requires the designated offices, executive committee and panel, as applicable, to take into consideration – and allows such entities to rely on – previous assessments carried out in respect of such a project);
- ii. truncated assessments of the Category A Project that requires proponents to only submit information that:
  - a. is set out in a template terms of reference for YESAA proposals for Category A Projects; and
  - b. pertains to those aspect of the project that have not previously undergone assessment (i.e., during the assessment of the Approved Project);
- iii. priority in the assessment of such Category A Projects; and
- iv. consideration of standard mitigation measures developed by a designated office or the executive committee for such Category A Projects. Where such standard mitigation measures exist, the designated office, executive committee or panel, as applicable, is required under YESAA, s. 42(3) to take them into consideration when assessing the project, which may help minimize time and resources expended on developing new mitigation measures, and thereby create efficiencies in the assessment process.

It is important to note that this proposed expedited process for Category A Projects is not intended to circumvent the assessment requirement (as such is not possible through non-legislative means); it is, however, intended to provide for an expedited assessment process to enable regulatory efficiencies for proposed changes (such as new proposed prescribed activities) to Approved Projects. Discussions should also be held with First Nations to understand the level of consultation and appropriate timelines for assessments of Category A Projects (bearing in mind that First Nations engagement would also be sought on defining Category A Projects, as provided above).

To implement this recommendation, we recommend that new YESAB rules be enacted pursuant to YESAA, ss. 30(4), 31(1)(b) that:

- a. recognize this new Category A Project; and
- b. provide for the above-mentioned expedited assessment for such Category A Projects.

Standard mitigation measures for particular types of prescribed activities that are Category A Projects should also be developed once the above rules have been adopted.

To ensure that this Recommendation is effectively implemented, it will be important to also provide training to designated offices, executive committee and panels regarding their duties to ensure that the reoccurring theme within the YESAA that encourages timeliness, avoidance of duplication, and efficiency is upheld. In addition, designated staff and resources should be allocated to the expedited assessment of Category A Projects so as to not impact the assessments of other projects.

## ***Recommendation D: YG Actions to advance Regulatory Efficiencies***

The YG has an important role to play in supporting YESAB's efforts, and helping to coordinate the efforts of other parties (including First Nations and YG departments and boards (such as the Water Board)) to enable collaborative screenings, assessments, and decision-making throughout project lifecycles.

Some options for the YG to consider adopting or expanding existing efforts on to advance such collaboration include the following:

- i. Pre-Proposal Meeting – On request by a proponent, the YG could coordinate a pre-proposal meeting (similar to the process implemented by other regulators, including the Canada Energy Regulator) with the proponent and representatives from the YESAB and applicable decision bodies, First Nations, and YG departments and boards to discuss project scoping, the regulatory continuum, and requirements at different regulatory stages. Such meeting would also help implement the commitment to ongoing information exchange between the YG and some entities, such as the Yukon Water Board.<sup>4</sup>
- ii. Coordinated Regulatory Processes – Coordination between YESAB and decision bodies can increase regulatory efficiencies (including time savings and avoidance of duplication) through early involvement of the regulatory agencies (such as, for example, the Water Board) in the assessment process. This can be accomplished by way of soft instruments, such as Memorandums of Understanding, between YESAB and specific decision bodies that, amongst other matters:
  - a. encourage collaboration between such bodies during the assessment stage;
  - b. help clarify in which phase specific technical details will be dealt with (i.e., assessment versus subsequent regulatory-phase authorizations);
  - c. provide for the development of joint information requests by YESAB and the applicable decision bodies;
  - d. establish a single data repository to improve sharing of information between YESAB and applicable decision bodies and to reduce duplication of submissions of the same documents; and
  - e. enable the development of joint commitment letters and issues tracking tables to ensure that technical matters raised at the assessment level are carried forward to the appropriate regulatory phase.

Notably, these approaches are informally but successfully being implemented in several other jurisdictions.

- iii. Consolidated Technical Reviews – The YG has an important role to play in coordinating reviews of the YG departments and boards to ensure that the government speaks with one voice. Notably, the October 2015 Memorandum of Agreement between the Department of Environment, Department of Energy, Mines and Resources, Executive Council Office and Department of Health and Social Services established a Technical Team, which has been reported as being effective at developing and presenting Yukon's intervention at public hearings pursuant to the *Waters Act*. The role of this Technical Team could be expanded to include presenting Yukon's position to YESAB for assessments, and within subsequent regulatory

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<sup>4</sup> Memorandum of Understanding between the Government of Yukon and Yukon Water Board, November 9, 2018, s. 3.4.

processes. Concurrently, the Technical Team could play a role in clearly defining how and when amendments and/or variances are required under territorial legislation.

- iv. Standardized Terms and Conditions for Authorizations – The YG can also work with the various decision bodies and boards to develop standardized terms and conditions to attach to authorizations where appropriate. For example, the Land and Water Boards of the Mackenzie Valley recently announced the release of the Standard Water Licence Conditions Template. This Template will be used during the review and approval process for new licences, renewals and amendments, and provides a common starting point, thereby increasing certainty and efficiencies for all parties involved. Notably, flexibility is still maintained as this template is not a comprehensive list of all the conditions that may be included in licences issued by the Boards, and not all conditions will be included in all licences.
- v. Lifecycle Regulator – Through engagement with relevant government bodies, including First Nations, the YG could appoint a project level Lifecycle Regulator to provide coordination of regulatory processes throughout the life of complex projects. Based on previous reported experiences with project champions, however, it is important that such regulator have the necessary authority, decision-making powers and resources (staff and financial) to be able to effectively carry out its duties and implement solutions when required to promote efficiencies in the regulatory lifecycle.
- vi. Resource Development Commissioner – Alternatively, or in addition to, a Lifecycle Regulator, the YG could establish a Yukon Resource Development Commissioner with authority to (i) promote consistency throughout all project phases and regulatory processes, (ii) provide a forum for parties (including First Nations, regulatory agencies or boards, industry proponents, and members of the public) to raise concerns, (iii) resolve disputes in an expeditious manner, and (iv) consider regional approaches to assessing cumulative effects. For broader buy-in, this Commissioner could be established by the Oversight Group and be supported by soft instruments, such as Memorandums of Understanding, that bind decision bodies to cooperate with it in a collaborative, proactive and efficient manner.
- vii. Effective Implementation of Oversight Group – The 2017 “Reset” Memorandum of Understanding between the Yukon First Nations (UFA signatories), Canada and the YG establishes an Oversight Group tasked with overseeing the assessment process and promoting its ongoing improvement. This group will have a critical role to play in addressing the current challenges in the regulatory continuum. The YG has a key role to play to ensure that all parties are engaged and have meaningful opportunities to participate. Concurrently, the YG can work with the Oversight Group to prioritize action plans (including developing a schedule for implementation of recommendations presented herein).
- viii. Annual Workshop – The YG could hold an annual 2-3 day workshop targeted at YG departments and boards, First Nations and YESAB to: (i) provide training on regulatory processes and scope, (ii) engage in collaboration on case studies, (iii) share and develop new best practices, and (iv) engage with proponents to identify opportunities for improvement.
- ix. Government-to-Government Policies – The YG can also play an important role through Government-to-Government discussions with each First Nation, which discussions can lead to First Nation-specific policies for regulatory processes, including YESAA assessments for projects and activities within their settlement lands / traditional territories.

## ***Recommendation E: Long-Term Planning for Legislative Reform***

During our review we observed that, unlike environmental/impact assessment legislation in many other jurisdictions, the YESAA is silent on the ability to renew or amend a decision document issued thereunder. This can impact the efficiencies of the overall regulatory process, and we therefore set out below some specific recommendations for future reviews of the YESAA.

In proposing this recommendation, we acknowledge that this will require federal legislative change that the YG does not control. This being the case, the YG will be limited to attempting to influence the Federal Government to consider and undertake these proposed changes.

First, due to the current absence of provisions on renewals of decision documents, we recommend that the Yukon and federal governments consider enacting new statutory provisions that specify the duration of decision documents – for example:

- i. new provisions that establish a maximum term (duration) of decision documents. For example, a maximum 10 year term is established for environmental assessment certificates issued under the BC *Environmental Assessment Act*;
- ii. new provisions that permit a specified number of years to be excluded from the calculation of the term of the decision document if no site activities are carried out during those years;
- iii. new provisions that set a requirement for completion within the said term (for example, the proponent must substantially begin to carry out the project within the term of the environmental assessment authorization issued under both the *Impact Assessment Act* and BC *Environmental Assessment Act*);
- iv. new provisions that establish (1) the right to extend the term of a decision document, (2) the process for applying for such an extension (for example, under the BC *Environmental Assessment Act*, proponents must apply in writing and provide reasons for the request), and (3) the process for reviewing such an extension, including:
  - a. notification / public comment periods regarding an application to extend;
  - b. maximum term for extension (for example, there is only one right to extension and for a maximum of 5 years under BC *Environmental Assessment Act*); and
  - c. possibility to add additional terms and conditions to an approval to an extension (such as under the BC *Environmental Assessment Act*); and
- v. new provisions that require consensus with applicable First Nations before approving such an extension of the term (similar to the BC *Environmental Assessment Act*).

Secondly, we recommend that the Yukon and federal governments consider enacting new statutory provisions to fill the current gap on amending decision documents – for example:

- i. new provisions that establish the right to vary or amend a decision-document;
- ii. new provisions that establish a specific process for the review of an application to amend a decision document, including:
  - a. specified time limits;
  - b. factors for consideration as to whether or not the proposed amendment is significant (if significant, some level of assessment may be required, whereas no or very limited assessments may be required for non-significant amendments). For example, the *Nunavut Planning and Project Assessment Act* focuses on whether a project has been

- “significantly modified”; if it has not been significantly modified, a new assessment is not required (s. 75(3));
- c. limits on the scope of amendment assessments (if required, pursuant to (b) above) to only the proposed change (i.e., not a full reassessment of the entire project); and
  - d. requirement to seek to achieve consensus with impacted First Nations before making a decision (such as under the BC *Environmental Assessment Act*). One way to accomplish this would be to jointly develop factors for determining the significance of a proposed amendment through Government-to-Government discussions, with different policies developed between YESAB and each First Nation to apply to projects within such First Nation’s territory, drawing from such First Nation’s traditional knowledge, customs and protocols;
- iii. new provisions that limit the scope of permitted amendments (for example, under the *Impact Assessment Act*, a decision statement can be amended by adding or removing a condition, amending any condition or modifying the project’s description, but not so that the decision itself changes. In addition, a condition can only be added, removed or amended if the decision maker is of the opinion that doing so will not increase the extent to which the effects of the project are adverse);
  - iv. new provisions that establish the right to a variation of a decision document based on the results of a study carried out pursuant to a term or condition attached to such decision document. For example, in *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, the former National Energy Board noted that the statutory provision that permitted the regulator to review, vary or rescind any decision or order could be a basis on which to apply for a variation based on the results of a study that identified a better pipeline route. In a similar manner, a new YESAA provision could provide that if the results of a management plan or study (which study or plan is required as a condition of the decision document) identifies a better alternative to that initially contemplated in the assessment phase, such alternative may be adopted without further assessment (or through a truncated assessment) if the impact of the change is not significant);
  - v. new provisions establishing public notice requirements and rights to provide comments on proposed amendments to decision documents (as per the *Impact Assessment Act*); and
  - vi. new provisions requiring reasons be posted with respect to a decision on an application to amend a decision document (such as under the *Impact Assessment Act*).

Third and finally, we note that there are specific timelines for the assessment process set out in the *Decision Body Time Periods and Consultation Regulations*. Based on our interviews with various parties, however, it appears that those timelines are often not met. We would therefore recommend that we recommend that the Yukon and federal governments consider discussing and consulting on appropriate and realistic timelines – keeping in mind the reoccurring theme within the YESAA that encourages timeliness, avoidance of duplication, and efficiency – following which these regulations should be amended accordingly, and then strictly implemented. Such consultations could be carried out by or through the recently established Oversight Group in light of its broad membership and applicable mandate.