

## **DRAFT Indigenous Consultation Framework**

The Alberta Utilities Commission is responsible for making decisions about utility development in Alberta and is committed to ensuring that Indigenous groups whose constitutionally protected rights may be directly and adversely affected by utility development have the opportunity to have their concerns heard, considered and understood, and accommodated (if required). When determining if a utility project application is in the public interest, the AUC will seek to reconcile Indigenous groups' constitutionally protected rights with other societal interests. The AUC's consultation process includes: (1) pre-application engagement by proponents, (2) AUC's notice of application and the opportunity for Indigenous groups to self-identify if they consider their rights may be directly and adversely affected, and (3) public hearings in accordance with Section 9 of the *Alberta Utilities Commission Act*.

The following draft framework has been developed to clarify the AUC's approach for Indigenous consultation, including a description of the duty to consult and a planning tool for determining when notification should be given to Indigenous groups. The framework will help clarify regulatory application requirements and will improve the consistency and predictability of how Indigenous consultation is addressed in AUC decisions. The framework will form the foundation for updating AUC processes and procedures (i.e., Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* and Rule 020: *Rules Respecting Gas Utility Pipelines*).

### **The duty to consult**

Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on Aboriginal and treaty rights as set out in Section 35 of the *Constitution Act, 1982*, with a view to substantially address any impacts on those rights.

The AUC acknowledges that a duty to consult arises in relation to a proposed utility development application filed with the AUC when the following factors are all present:

1. The Crown has real or constructive knowledge of a proven or asserted Section 35 right.
2. An AUC decision is contemplated that could affect land or natural resources, including air and water; and
3. The AUC's decision has the potential to adversely affect the continued exercise of a Section 35 right.

### **The role of the Alberta Utilities Commission**

The AUC has the authority to consider and address potential adverse impacts to Aboriginal and treaty rights as set out in Section 35 of the *Constitution Act, 1982*, when deciding whether approval of a utility project is in the public interest. This authority has been confirmed in recent decisions of the Supreme Court of Canada and by the Alberta government.

The Supreme Court of Canada confirmed in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, and *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, that regulatory tribunals, such as the AUC, may have a role to play in the Crown's duty to consult with Indigenous groups.

The Alberta government has since confirmed that AUC decisions may in some cases trigger a duty to consult Indigenous communities. It also stated that in those cases where the AUC's decision will be the final decision on a proposed development, the Alberta government will rely on the AUC's process to address potential adverse impacts to Aboriginal and treaty rights

### **First Nations**

The Alberta government and the AUC recognize that a decision affecting treaty rights to hunt, fish and trap for food may trigger a duty to consult (*The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management*). These rights may be practiced on unoccupied Crown land and other lands to which First Nations members have a right of access for such purposes. Alberta also recognizes that First Nations may engage in customs or practices on the land that are not existing Section 35 treaty rights but are nonetheless important to First Nations (traditional uses). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.

### **Metis Settlements**

The Alberta government and the AUC also recognize that some Metis Settlement members use the land for harvesting (fishing, hunting and trapping for food) and acknowledge that the Metis Settlements are a proper party to be consulted (*The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management*). These activities may be practiced on unoccupied Crown land and other lands to which Metis Settlement members have a right of access for such purposes. Alberta also recognizes that Metis Settlement members may engage in customs or practices on the land that are not existing Section 35 rights but are nonetheless important to Metis Settlements (traditional uses). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.

### **Other Indigenous groups**

The AUC understands that the Alberta government is in discussion with other Indigenous groups (e.g., Métis communities (non-settlement)) to better understand their asserted rights. The AUC will consider the Alberta government's acknowledgment of a rights-bearing Indigenous group when implementing the notification and consultation requirements in an AUC application.

### **The AUC's framework for Indigenous consultation**

The following framework was developed as a planning tool to assist AUC staff, applicants and Indigenous groups to determine whether direct notification or consultation with Indigenous groups is required in relation to an application. The Commission wants to ensure that rights holders who have the potential to be affected by a decision have an opportunity to learn about the project, ask questions and, ideally, have their concerns addressed. With this in mind, the

Commission will review all utility applications to determine whether direct notice should be given to Indigenous groups, having regard for the nature, scope, magnitude and duration of the potential adverse impacts on Section 35 rights. “Direct notice” would involve providing a copy of the Commission’s notice of application to the Indigenous group. The notice of application would be sent to the Indigenous group’s consultation contact listed on the Aboriginal Consultation Office’s website.

The Commission has identified the following three Indigenous consultation categories to improve regulatory consistency, predictable decision-making, and public transparency (Table 1). The three categories are based on knowledge of the potential physical impacts of a project on land or resources that could affect Section 35 rights. However, they are not a definitive categorization of all potential adverse impacts on Section 35 rights and other credibly asserted or apparent impacts must also be considered. In the event that an application has characteristics that fall into two or more categories, the more stringent notice requirement may be applied. An applicant can request a pre-application meeting to obtain advice in determining a project’s category.

Table 1. Quick reference - Indigenous consultation framework

Indigenous consultation category	Description	AUC notification requirements
Consultation Category A	Crown has determined there is a duty to consult for related approvals (e.g., <i>Water Act</i> , <i>Public Lands Act</i> ).  AND/ OR  An Indian reserve or Metis Settlement is within the consultation areas (Rule 007 and Rule 020 radii).	Indigenous groups identified by the Crown must be included in the participant involvement program and given a copy of the notice of application.  Indigenous groups with lands in the consultation area must be included in the participant involvement program and given a copy of the notice of application, (the same notice as a landowner).
Consultation Category B	Applications for new projects or alterations that are: <ul style="list-style-type: none"> <li>• Small (e.g., thermal power plants &lt;10 MW).</li> <li>• On private land with limited to no off-site impacts (e.g., transmission lines, solar, wind).</li> <li>• In transportation and utility corridors.</li> <li>• Letters of enquiry.</li> </ul>	No direct notice to Indigenous groups is required.
Consultation Category C	Applications for new projects or amendments not captured by categories A and B.	Application category will be reviewed on a case-by-case basis to determine whether direct notice to Indigenous groups is required.

**Category A projects: Crown has determined there is a duty to consult or there are Indigenous-owned lands within the consultation radii**

AUC applications for which the Alberta government requires consultation on related approvals:

- Utility projects often require multiple approvals from multiple regulators and sometimes require provincial and federal Crown approvals. Other provincial regulators that issue utility project-related approvals include Alberta Culture, Multiculturalism and Status of Women (i.e., *Historical Resources Act*), and Alberta Environment and Parks (AEP) for *Public Lands Act*, *Water Act*, and *Environmental Protection and Enhancement Act*. Approvals by these departments (especially AEP) are often informed by recommendations from the Aboriginal Consultation Office.
- If the Alberta government, through the Aboriginal Consultation Office or otherwise, directed consultation for related approvals, the Rule 007 requirements for the participant involvement program apply and direct notice must be given to the Indigenous groups with whom the Alberta government required consultation.

The consultation radii for an application, as identified in Rule 007 and Rule 020, may include lands set aside for, or owned by an Indigenous group (i.e., Indian reserve or Metis Settlement). If this is so, the First Nation or Metis Settlement must be included in the participant involvement program and given AUC notice in the same way that notice is given to a landowner.

**Category B projects: Small projects, projects on private land with little or no off-site impacts, or administrative changes**

Applications for which AUC notice is not required to be given to Indigenous groups:

- Utility applications on private land that have little or no off-site impacts, including: (1) transmission lines, (2) wind and solar power plants with AEP risk assessment of moderate or lower, and (3) thermal power plants less than 10 megawatts.
- Expansions of existing utility projects that are within an existing site fenceline with little or no potential for additional off-site environmental impacts (e.g., the facility will operate within the levels of existing environmental approvals under the *Water Act*, *Public Lands Act*, or *Environmental Protection and Enhancement Act*).
- Utility projects within a transportation and utility corridor established under Section 4 of the *Government Organization Act*, unless consultation is required by Alberta Infrastructure or another Alberta government department. If so, it would be a Category A project.
- Adjustments, repairs, replacements or maintenance made in the normal course of operations.
- Short-term testing or temporary modifications to machinery, equipment or processes that do not result in a new surface disturbance beyond the normal course of operations.
- Letters of enquiry and checklist applications.

If a project is a Category B application (no direct notice required) and an Indigenous group asserts that Section 35 rights are potentially affected, the group can submit a statement of intent to participate in the proceeding. The Commission will review the statement of intent to participate and make a standing decision in the normal course.

### **Category C projects: Projects requiring further analysis**

Projects that are not in Category A or Category B will be reviewed by the Commission on a case-by-case basis using the following questions as a guide. Applicants may request a pre-application meeting with AUC staff to obtain guidance in determining a project category.

In reviewing Category C applications to determine if direct notice should be given to Indigenous groups, the AUC considers the nature, scope, magnitude and duration of the potential adverse impacts on Section 35 rights. Some questions that the Commission considers during the assessment of Category C projects include, but are not limited to, the following:

- Is there the potential to affect Crown land within the consultation radii? For projects on private lands, consider off-site or downstream environmental impacts.
- Does the project have the potential to affect the environment (e.g., air, water, land, wildlife/waterfowl) and potentially impact a Section 35 right (hunting, fishing, trapping, traditional uses)? If yes:
  - How significant will the impacts be? Would the project constitute a use that is visibly incompatible with the exercise of the right (e.g., hunting near a staffed facility)?
  - Will the impacts be permanent or temporary?
- Are there Indigenous groups in the area with whom the Crown normally consults (assessed using LAIRT)?
- Does an Indigenous group have access to the site for the purpose of exercising Section 35 rights (e.g., hunting, fishing, trapping and traditional uses)?
- Is there a historical resources site that has the potential to be affected? Has the proponent received *Historical Resources Act* approval from Alberta Culture, Multiculturalism and Status of Women? Were any concerns identified and/or any mitigation required?
- Is the area known to be of significant importance to an Indigenous group?

Examples of projects that require further analysis:

- An existing power plant expansion that results in increased air emissions and the Alberta government has not yet conducted a pre-consultation assessment for the *Environmental Protection and Enhancement Act* amendment.
- A wind or solar project on private land that has the potential for off-site impacts (e.g., high risk to wildlife or waterfowl) and there is Crown land (e.g., a water body) within the consultation radii identified in Rule 007 or Rule 020.