



PORT of  
**vancouver**

## **Project & Environmental Review**

Aboriginal Consultation –  
Information for Applicants

Vancouver Fraser Port Authority

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Canada 

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## **1. Introduction**

This information is provided to assist applicants with understanding the Vancouver Fraser Port Authority's legal responsibilities in relation to Aboriginal consultation on projects and activities proposed for federal lands under management by the port authority. It also outlines, at a high level, the roles played by the port authority and the applicant in the delivery of Aboriginal consultation as part of the Vancouver Fraser Port Authority's Project and Environmental Review (PER) process.

## **2. Overview**

The Crown has a legal duty to consult with Aboriginal groups when its contemplated conduct may adversely impact asserted or established Aboriginal or treaty rights. The Crown includes all government departments, ministries and agencies (both federal and provincial).

The Vancouver Fraser Port Authority, as an agent of the Federal Crown, has been delegated the authority to manage federal lands by the *Canada Marine Act* and, therefore, conducts Aboriginal consultation on behalf of Transport Canada.

The purpose of Aboriginal consultation is to determine whether or not contemplated conduct (i.e., a proposed project) may adversely impact asserted or established Aboriginal or treaty rights, and to avoid, mitigate, or otherwise accommodate those impacts.

The Vancouver Fraser Port Authority operates in a complex jurisdiction, bordering one Treaty First Nation and intersecting the asserted traditional territories of up to 32 other Aboriginal groups. When Aboriginal consultation is required, the individual Aboriginal groups to be consulted will depend on the location of the proposed project, and the potential of the proposed project to adversely impact asserted or established Aboriginal and Treaty rights.

Aboriginal consultation is an iterative process and, as such, during implementation the port authority may suggest changes to a proposed project that are required to mitigate potential impacts to asserted or established Aboriginal or treaty rights.

The port authority will make reasonable efforts to reconcile the interests of applicants and affected Aboriginal groups and to do so within a reasonable timeframe.

## **3. Principles/Objectives**

The Vancouver Fraser Port Authority consults with Aboriginal groups in a manner that is consistent with the following principles:

- a) acknowledges that treaty lands and asserted traditional territories intersect the lands and waters the Port manages
- b) recognizes that Aboriginal consultation is different and separate from public consultation
- c) will enter all consultation processes in good faith
- d) will, when the duty to consult arises, consult before decisions are made
- e) consultation will be coordinated with other agencies, when possible

- f) will strive for one point of contact
- g) consultation processes will be clear, open and honest
- h) consultation procedures will be forward-looking

#### 4. Applicability

All projects requiring an authorization from the Vancouver Fraser Port Authority will be assessed to determine whether there is a requirement to consult with Aboriginal groups. This assessment is carried out by port authority staff, in collaboration with other staff subject matter experts with knowledge of environmental, operational, legal or other matters.

In order for a proposed project or activity to trigger Aboriginal consultation the port authority requires complete information describing the proposed project or activity. In addition, the port authority must have knowledge of asserted or established Aboriginal or treaty rights in the area of the contemplated port authority conduct (i.e., in proximity to the proposed project) and the proposed project must have the potential to adversely impact asserted or established Aboriginal or treaty rights.

#### 5. Guidelines

**Table [1]: PER Phases, Steps and Aboriginal Consultation Phases**

PER Phases	PER Steps	Aboriginal Consultation Phases
<b>Phase 1:</b> Preliminary Review	<b>1:</b> Prepare Preliminary Submission	
	<b>2:</b> Preliminary Submission	<b>Phase 1:</b> Pre-Consultation Analysis and Planning
	<b>3:</b> Preliminary Submission Review	
<b>Phase 2:</b> Application Review	<b>4:</b> Review of Complete Application	<b>Phase 2:</b> Consultation Process
	<b>5:</b> Project Decision	<b>Phase 3:</b> Mitigation/ Accommodation
<b>Phase 3:</b> Monitoring Conditions	<b>6:</b> Project Permit Conditions	<b>Phase 4:</b> Implementation, Monitoring and Follow-Up

**Table [2]: The Consultation Process**

<p><b>Phase 1:</b> Pre-Consultation Analysis and Planning</p>	<ul style="list-style-type: none"> <li>• Review of Preliminary Submission</li> <li>• Preliminary determination of legal duty to consult, scope of consultation, potential impacts to archaeological resources, participation funding and general timing</li> <li>• Draft Aboriginal consultation plan as necessary</li> </ul>
<p><b>Phase 2:</b> Consultation Process</p>	<ul style="list-style-type: none"> <li>• Finalize legal duty to consult, scope of consultation, potential impacts to archaeological resources, participation funding and general timing.</li> <li>• Finalize consultation plan, if applicable</li> <li>• Formal referral to Aboriginal groups, based on complete Project Application</li> <li>• Depending on level of consultation, and issues raised, potential for follow-up and meeting(s)</li> </ul>
<p><b>Phase 3:</b> Mitigation/ Accommodation</p>	<ul style="list-style-type: none"> <li>• Review the record of consultation, consider issues raised and discuss proposed mitigation/accommodation measures with Aboriginal groups as required</li> </ul>
<p><b>Phase 4:</b> Implementation, Monitoring, Follow-up</p>	<ul style="list-style-type: none"> <li>• If the project is approved, implement mitigation measures, monitor and follow-up on commitments made during consultation process</li> </ul>

**Phase 1: Pre-Consultation**

During pre-consultation, which is part of the Preliminary Review stage of the PER process, the Vancouver Fraser Port Authority will make a *preliminary* determination on whether the duty to consult is triggered. As part of this initial work, the port authority will also make a preliminary assessment of the scope of consultation, including which Aboriginal groups will be consulted and the level of consultation. The scope of consultation is based upon the *Haida Spectrum* (see definition on p. 8) and ranges from low to medium and high/deep consultation. Scope of consultation will depend on the seriousness of potential adverse impacts - extent, certainty, magnitude, duration, frequency, and/or reversibility of impact; which Aboriginal groups have asserted or established Aboriginal or treaty rights in the area; and the strength of the Aboriginal groups’ claim to their asserted rights.

During pre-consultation, the port authority will consider whether the proposed project has the potential to impact archaeological resources and whether further consideration involving the services of a professional archaeologist may be required. The potential to impact archaeological resources informs both the consultation scope and the methodology used in various aspects of the project, and is especially important in activities involving ground disturbance and excavation.

During pre-consultation, the port authority will also consider whether participation funding is required in order to facilitate Aboriginal groups' participation in the consultation process. Funding is provided to Aboriginal groups to help off-set the cost of participating in the consultation process as many groups have limited resources with which to address project referrals. Projects are assessed on a case-by-case basis and the criteria for determining the availability of participation funding includes: Project Review Category, complexity of environmental review, project location, scale of project, type of works involved - scale, permanency, in-water works - and the potential to adversely impact asserted or established Aboriginal or treaty rights or archaeological resources.

Finally, Aboriginal consultation runs concurrent with other activities occurring as part of the PER process. During the Preliminary Submission Review, the port authority will make recommendations regarding appropriate timing for Aboriginal consultation, taking into account social and cultural considerations, such as the summer Aboriginal fishery peak, where additional time for consultation may be required. The goal of considering the timing of Aboriginal consultation is to facilitate the respectful and meaningful participation of Aboriginal groups in the consultation process.

### ***Phase 2: Consultation***

Formal consultation will only begin once the Vancouver Fraser Port Authority has received and deemed complete the Project Application. Final determination of the legal duty to consult, scope of consultation, potential impacts to archaeological resources, participation funding and general timing will only be made upon review and consideration of a complete Project Application.

Consultation activities can include meetings, correspondence, conversations, email and telephone calls. Where possible, all contact with Aboriginal groups will be coordinated with other involved parties (federal and provincial departments and agencies). Every action (e.g., email, telephone call) and document will be recorded.

For "low" consultation, the typical process includes disclosing relevant information via a letter of referral to Aboriginal groups and responding to issues raised in a response to letter. Aboriginal consultation runs concurrent with other activities occurring as part of the Project and Environmental Review process. Should new information become available during the consultation process, the scope of consultation may be reviewed and revised.

For "moderate" to "deep" level Aboriginal consultation, typical activities include correspondence, exchange of information, meetings, site visits, research, studies, accommodation measures for potential adverse impacts (where appropriate), possible change of project design, timing, etc.

Aboriginal consultation is an iterative process and, as such, during implementation the port authority may suggest changes to a proposed project that are required to mitigate potential impacts to asserted or established Aboriginal or treaty rights. The Vancouver Fraser Port Authority will make reasonable efforts to reconcile the interests of applicants and affected Aboriginal groups throughout the consultation process.

### ***Phase 3: Mitigation/Accommodation***

During consultation, Aboriginal groups may identify potential impacts to asserted or established Aboriginal or treaty rights that will need to be considered. The Vancouver Fraser Port Authority will review the record of consultation to assess whether the duty to consult has been met and will address potential impacts and, where appropriate, recommend actions or requirements to address them.

Mitigation measures may include actions such as: changes to project design or approach; delaying in-water works to accommodate the fisheries windows and Aboriginal fisheries; using machinery that could reduce the environmental effects; conducting Archaeological Assessments; etc.

Where mitigation is not possible, accommodation may be appropriate. Accommodation can take the form of jobs or other opportunities provided to Aboriginal groups. The mitigation/accommodation measures will be discussed in collaboration with the Applicant and other involved parties (e.g., other federal or provincial departments or agencies) and with affected Aboriginal groups. Requirements will be incorporated into the port authority's approval as appropriate.

### ***Phase 4: Implementation, Follow-up and Monitoring***

At the conclusion of the review process and once consultation is complete, a letter will be provided to Aboriginal groups notifying them of the decision and identifying any mitigation measures taken. If any accommodation/mitigation measures were taken, the port authority will monitor the project to ensure that the conditions of the authorisation are met. On an annual basis, changes and/or improvements to the consultation process for future Aboriginal consultation will be considered.

### ***Applicant Involvement in Advance of Aboriginal Consultation***

Applicants are encouraged to engage with Aboriginal groups to develop relationships that facilitate communication. Aboriginal groups receive hundreds of referrals a year from other agencies and strong relationships can increase the likelihood of meeting targeted consultation timelines and achieving successful consultation outcomes. Regardless of voluntary engagement and information sharing, the port authority remains obligated to conduct Aboriginal consultation when a proposed project or activity may adversely impact asserted or established Aboriginal or treaty rights. The port authority's Aboriginal Affairs Team is available to support applicants in reaching out to Aboriginal groups.

### ***Applicant Involvement during Aboriginal Consultation***

Aboriginal consultation is typically led by the Vancouver Fraser Port Authority, in close collaboration with the applicant. Applicants should designate a lead contact for matters regarding Aboriginal consultation. If applicants have been involved in advance engagement with Aboriginal groups regarding the proposed project, they will be asked to provide a record of all project related communication with potentially affected Aboriginal groups as part of submitting a complete application. They will also be required to provide a record of all project related communication with potentially affected Aboriginal groups throughout the Project and Environmental Review process. Applicants should be prepared to participate in meetings with Aboriginal groups as subject matter experts for the proposed project, to

provide information to the port authority to respond to questions/concerns from Aboriginal groups and to work with the port authority to address concerns and implement mitigation.

### **Summary**

It should be noted that while the Vancouver Fraser Port Authority and Aboriginal groups are not required to agree, the port authority, and by extension applicants, must act in good faith and be willing to adjust conduct appropriately to uphold the honour of the Crown. Aboriginal groups must also act in good faith and are encouraged to work with the port authority to address their concerns. The goal is to engage in meaningful consultation to either avoid or minimize adverse impacts on asserted or established Aboriginal or treaty rights.

## **6. Definitions**

**Aboriginal interests:** Aboriginal interests may include concerns, wants or aspirations for a wide range of issues related to environment, social/education, economic development, etc. Aboriginal interests are not rights-based and the Crown has no legal obligations associated with an interest.

**Aboriginal Groups or Peoples:** Aboriginal peoples in Canada include First Nations, Inuit and Métis.

**Aboriginal rights:** Aboriginal rights are practices, customs or traditions integral to the distinctive culture of the Aboriginal group claiming the right, and were practiced by the group at the time of European contact. Some examples of Aboriginal rights are hunting, fishing, and gathering plants for traditional medicines and spiritual ceremonies, and exercising cultural practices such as spiritual bathing in sacred locations. Aboriginal rights may be connected to a particular piece of land, and are generally not exclusive. Aboriginal rights may evolve, but must be reasonably linked to a practice, custom or tradition exercised at the time of European contact.

**Aboriginal title:** Aboriginal title is a subcategory of Aboriginal rights that has its own test for proof. It is a unique interest in land that encompasses a right to exclusive use and occupation of the land for a variety of purposes. Those uses must not be inconsistent with the nature of the group's historical attachment to the land. A claimant must prove occupation and/or regular and intensive use of the land prior to the year 1846 AD.

**Accommodation:** Where asserted or existing Aboriginal or Treaty rights will be adversely affected by Crown conduct, steps are required to reconcile the conflicting interests and prevent or minimize the effects of infringement.

**Band:** As defined by the *Indian Act*, a Band is a body of Indians for whose use and benefit in common, lands have been set aside or monies held by the Government of Canada. A Band may also be declared by the Governor in Council to be a Band. Each band has its own elected or community selected governing band council. Today, many Bands prefer to be known as First Nations.

**Constitution Act, 1982, Section 35:** "Section 35" states that the "existing aboriginal and treaty rights of aboriginal peoples in Canada are hereby recognized and affirmed".



**Constitution Act, 1982, Section 91(24):** Section 91(24) states that legislative authority for "Indians, and Lands Reserved for the Indians" rests with the federal government.

**Crown conduct:** Means the exercise of the Crown's jurisdiction and authority whether the Crown may be in charge of the activity or may be approving an activity through permits and authorizations. In either context, its actions would constitute Crown conduct.

**Duty to Consult:** The duty to consult refers to the legal obligation of the Crown (federal, provincial, and territorial) to consult with Aboriginal groups when contemplating Crown conduct that has the potential to adversely impact Aboriginal or Treaty rights.

**Engagement:** Examples of engagement includes discussion groups and formal dialogue, sharing knowledge and seeking input on activities such as policy, legislation, program development or renewal.

**First Nation:** A term that came into common usage in the 1970s to replace the word "Indian Band". Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term "First Nations peoples" refers to the Indian peoples in Canada, both Status and non-Status. Some Indian peoples have also adopted the term "First Nation" to replace the word "band" in the name of their community. The term First Nation doesn't include Inuit or Métis.

**Haida Spectrum:** The Haida Spectrum refers to a 2004 decision by the Supreme Court of Canada on the *Haida Nation v. British Columbia (Minister of Forests)* court case, whereby the court found that the Crown has a "duty to consult with Aboriginal peoples and accommodate their interests." The duty to consult, however, will escalate proportionately to the strength of the claim for a right or title and the seriousness of the potential effect upon the claimed right or title. The Haida Spectrum refers to the fact that consultation is conducted on a spectrum from low to high.

**Indian:** The term "Indian" is narrowly defined by the *Indian Act*. Indian peoples are one of three groups of people recognized as one of Canada's Aboriginal peoples in the *Constitution Act, 1982*. There are three legal definitions that apply to Indians in Canada: Status Indians, Non-status Indians and Treaty Indians.

**Indian Act:** This is the Canadian federal legislation, first passed in 1876, that sets out certain federal government obligations, and regulates the management of Indian reserve lands. The *Indian Act* has been amended several times, most recently in 1985.

**Indian Reserve:** As specified by the *Indian Act*, a tract of land, the legal title to which is vested in Her Majesty the Queen in Right of Canada and that has been set apart by Her Majesty for the use and benefit of a First Nation.

**Information sharing:** Information sharing is a form of engagement. It is a practice of good governance to share relevant information with neighbouring communities, including Aboriginal groups, where applicable. This may include advising Aboriginal groups of incidents, upcoming events, etc.

**Inuit:** An Aboriginal people in northern Canada, who live above the tree line in the Northwest Territories, and in Northern Quebec and Labrador. The word means "people" in the Inuit language - Inuktitut. The singular of Inuit is Inuk.

**Métis:** The term refers to Aboriginal people of mixed First Nation and European ancestry who identify themselves as Métis people, as distinct from First Nations people, Inuit or non-Aboriginal people.

**Non-status Indian:** An Indian person who is not registered as an Indian under the *Indian Act*. This may be because his or her ancestors were never registered, or because he or she lost Indian status under former provisions of the *Indian Act*.

**Notification:** Notification is a form of consultation, but takes place on the low end of the spectrum of consultation. Consultation ranges from low (notification) to high.

**Off-reserve:** A term used to describe people, services or objects that are not part of a reserve, but relate to First Nations.

**Participation Funding:** Participation funding, also referred to as capacity funding, is funding provided to an Aboriginal group to offset the cost of their participation in a project review or consultation process. It is used to pay for such things as technical or environmental consultants to review technical application information and to advise of issues that pertain to their interests, to cover the cost of human resources to attend meetings and conduct the application review, and/or for special reports such as traditional use or fisheries studies. The amount of funding is typically determined through negotiation with the Nation and is agreed as part of the consultation process. It allows Aboriginal groups to participate in a consultation process without diverting funds away from other important programs and initiatives.

**Statement of Intent:** Statement of Intent (SOIs) are maps submitted to the BC Treaty Commission for treaty negotiation purposes. The SOI is meant to delineate an Aboriginal group's traditional territory in which Canada, British Columbia and the Aboriginal group will negotiate its treaty land and treaty rights. Because the SOIs are generally a Aboriginal group's traditional territory, many agencies have relied on these SOI maps in order to determine where a Aboriginal group asserts rights and where the agency might need to consult with particular Aboriginal groups.

**Status Indian (Registered Indian):** Status Indian refers to an Indian person who is registered (or entitled to be registered) under the *Indian Act*. The *Indian Act* sets out the requirements for determining who is a status Indian.

**Traditional territory:** Any lands and boundaries to which First Nations, Métis and Inuit communities assert or have established traditional use or occupation.

**Treaty Group:** An affiliation of Aboriginal groups who enter the BC Treaty Process and jointly negotiate a treaty for the entire treaty group. For example, the Hul'qumi'num Treaty Group is comprised of six neighbouring First Nations. A Treaty Group does not hold Aboriginal rights; rather the registered *Indian Act* Band (i.e. Squamish Nation, Katzie First Nation) holds Aboriginal rights.

**Treaty land:** Treaty lands are lands owned and managed by a treaty First Nation. The treaty First Nation has governance over these lands. The specific governance model is described in the treaty. For example, Tsawwassen First Nation is a treaty First Nation with approximately 724 hectares of treaty land. The specific details of their governance model are outlined in the Tsawwassen Final Agreement.

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

**Tribal Council:** An association of Aboriginal group (Band) Councils. For example, Sto:lo Tribal Council is made up of 8 First Nations, including Chawathil First Nation, Cheam First Nation, Kwantlen First Nation, Scowlitz First Nation, Seabird Island First Nation, Shxw'ow'hamel First Nation, and Soowahlie First Nation.

## **7. Notes/Links to other Documents**

The Vancouver Fraser Port Authority's consultation with Aboriginal groups is based on the [\*Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011\*](#) and is consistent with the provincial guidelines [\*Updated Procedures for Meeting Legal Obligations When Consulting First Nations\*](#).

Applicants may also find the following resources helpful in understanding more about Aboriginal peoples and engagement:

[Aboriginal Peoples and Communities, Aboriginal Affairs and Northern Development Canada Government of British Columbia – Engaging with First Nations: Resources for Proponents Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development](#)

## **8. Contact Information**

If you require clarification, or assistance with respect to any aspect of this Guideline, please do not hesitate to contact the Vancouver Fraser Port Authority's Manager, Aboriginal Affairs.

## **9. Updates**

This Guideline will be reviewed annually and updated as necessary to reflect applicable changes in law, Government policy or port authority policy direction. The most up-to-date version of this Guideline will always be available for viewing and downloading from our website. All updated versions will be dated for clear identification. Please visit our website at [www.portvancouver.com](http://www.portvancouver.com) to ensure that you are referring to the most relevant information.