



PORT of  
**vancouver**

Vancouver Fraser  
Port Authority

# Project and environmental review

Indigenous consultation: information for applicants

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# Project and environmental review

## Indigenous consultation: information for applicants

### Introduction

This information will help permit applicants understand the Vancouver Fraser Port Authority's responsibilities in relation to Indigenous consultation on proposed projects and activities occurring within our jurisdiction. It also outlines the port authority's and applicant's role in delivering Indigenous consultation as part of our project and environmental review (PER) process.

### Overview

The Crown, including all federal and provincial agencies, has a duty to consult, and where appropriate, accommodate Indigenous groups when it considers conduct that might adversely impact asserted or established Aboriginal or treaty rights. As an agency that manages the federal lands and waters that make up the Port of Vancouver, the port authority conducts Indigenous consultation on behalf of Transport Canada.

The port authority's jurisdiction is complex, bordering a Treaty First Nation and intersecting the asserted traditional territories of up to 38 other Indigenous groups. As a result, the level of Indigenous consultation depends on the location of the proposed project or activity, as well as the potential adverse impacts on the asserted or established Aboriginal or treaty rights.

Consulting is an important part of good governance and sound decision-making. During Indigenous consultation as part of our PER process, we seek to strengthen relationships and partnerships with Indigenous peoples by identifying project or activity-related impacts on asserted or established Aboriginal or treaty rights, and by avoiding, mitigating, or otherwise accommodating those impacts. We also endeavour to reconcile the interests of applicants and affected Indigenous groups within a reasonable timeframe.

Indigenous consultation is also considered an iterative process. Our work to understand, establish, and collaborate on matters of mutual interest is ongoing and continually being modified and improved to ensure both the port authority and Indigenous groups experience the benefits that pertain to the shared lands and waters within our jurisdiction.

### Principles/objectives

The port authority consults with Indigenous groups in a manner that is consistent with the following principles:

- Provide clear, accessible, and transparent information while respecting the privacy of all parties
- Respect that our perspectives may be based on different world views
- Seek Indigenous perspectives during the consultation process, open to understanding the interests and knowledge of Indigenous groups, and strives to incorporate them into our work
- Build strong working relationships between Indigenous groups and the port authority to allow for meaningful dialogue

Along with these principles, the port authority recognizes the importance of the United Nations Declaration of the Rights of Indigenous Peoples and is committed to aligning with the federal [Principles Respecting the Government of Canada's Relationship with Indigenous Peoples](#) and as mandated in the [Canada Marine Act](#).

### Assessment of consultation requirements

All proposed projects or activities within the port authority's jurisdiction are assessed to determine if there is a requirement to consult with Indigenous groups. Port authority employees carry out this assessment in collaboration with other subject matter experts in environmental, operational, legal, or other relevant matters. To

complete this assessment, the port authority requires a full description of the proposed project or activity, and knowledge of asserted or established Aboriginal or treaty rights in the area. The port authority then uses this information to determine if the projects or activities will have adverse impacts.

## Guidelines

### Consultation guidelines

**Table 1: PER phases, steps, and Indigenous consultation phases**

PER phases	PER steps	Indigenous consultation phases
<b>Phase 1:</b> Preliminary review	1: Prepare preliminary submissions	<b>Phase 1:</b> Pre-consultation analysis and planning
	2: Preliminary submission	
	3: Review of complete application	
<b>Phase 2:</b> Application review	4: Review of complete application	<b>Phase 2:</b> Consultation process
	5: Project decision	<b>Phase 3:</b> Mitigation/accommodation
<b>Phase 3:</b> Monitoring conditions	6: Project permit conditions	<b>Phase 4:</b> Implementation, monitoring, and follow-up

**Table 2: Consultation process**

Indigenous consultation phases	Actions taken by port authority
<b>Phase 1:</b> Pre-consultation analysis and planning	<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 Indigenous consultation plan as necessary</li> </ul>
<b>Phase 2:</b> Consultation process	<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 Indigenous 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>
<b>Phase 3:</b> Mitigation/accommodation	<ul style="list-style-type: none"> <li>Review the record of consultation, consider issues raised, and discuss proposed mitigation/accommodation measures with Indigenous groups as required</li> </ul>

<b>Phase 4:</b> Implementation, monitoring, follow-up	<ul style="list-style-type: none"><li>• If the project permit is approved, implement mitigation measures, monitor, and follow-up on commitments made during consultation process</li></ul>
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## Phase 1: pre-consultation

During pre-consultation in phase one of the PER process, the port authority makes a preliminary determination on the duty to consult with Indigenous groups. As part of this initial work, the port authority also makes a preliminary assessment as to the scope of consultation, including which Indigenous groups will be consulted and the level of consultation required.

Certain factors must be considered in determining the level of consultation, such as the extent, certainty, magnitude, duration, frequency, and/or reversibility of potential adverse impacts. The scope also depends on which Indigenous groups have asserted or established Aboriginal or treaty rights in the area and their level of interest.

Where the right may be considered limited and the infringement minor, consultation is situated at the lower end of the Haida spectrum. This level of consultation requires notification to the parties, disclosure of information, and discussion of issues raised. Where the risk for non-compensable damage is high, consultation may occur at the deep end of the spectrum, which requires deeper consultation.

The port authority considers whether the proposed project or activity could impact archaeological resources and whether the services of a professional archaeologist are 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.

In addition, the port authority also considers whether participation funding is required to support the participation of Indigenous groups during consultation.

During the preliminary submission review, the port authority will make recommendations to an applicant regarding appropriate timing for Indigenous consultation taking into account social and cultural considerations, such as the Indigenous fishing season, where additional time may be required. The goal of this consideration is to facilitate the respectful and meaningful participation of Indigenous groups in the consultation process.

## Phase 2: consultation

The port authority will begin formal consultation once a project application has been received and deemed complete. Upon review of a completed project application, the port authority will finalize the legal duty to consult, scope of consultation, potential impacts to archaeological resources, participation funding, and general timing will be finalized.

During this phase, consultation activities may include meetings, written correspondence, emails, and telephone calls. Where possible, all contact with Indigenous groups will be coordinated with other parties involved (federal and provincial departments and agencies), and formally recorded and documented.

The process for consulting Indigenous groups will differ depending on the scope. For low levels of consultation, the process includes disclosing relevant information in a letter of referral to Indigenous groups and responding to issues raised in a response letter. Indigenous consultation runs in conjunction with other activities occurring as part of the PER process.

For deeper levels of consultation, the process may include some or all of the following: written correspondences, exchanges of information, meetings, site visits, research and studies, accommodation measures for potential adverse impacts (where appropriate), possible changes of project design, timing, and others.

Indigenous consultation is also considered an iterative process. During the consultation process, the port authority may suggest changes to a proposed project to mitigate potential impacts to asserted or established Aboriginal or treaty rights. Should new information become available during the consultation process, the scope may be reviewed and revised. The port authority will make reasonable efforts to reconcile the interests of applicants and affected Indigenous groups throughout the consultation process.

### **Phase 3: mitigation/accommodation**

During consultation, Indigenous groups may identify potential impacts to asserted or established Aboriginal or treaty rights that will need to be considered. The port authority will review the record of consultation to assess whether the duty to consult has been met. Part of this assessment includes whether the potential impacts have been addressed and if the measures taken to address them are adequate.

Mitigation measures may include actions such as:

- Changing to project designs or approaches
- Delaying in-water works to accommodate the fisheries windows and Aboriginal fisheries
- Using machinery that could reduce the environmental effects
- Conducting archaeological assessments

Where mitigation is not possible, accommodation may be appropriate. Accommodation can take the form of jobs or other opportunities provided to Indigenous groups. The mitigation/accommodation measures will be discussed in collaboration with the applicant and other involved parties (federal or provincial departments or agencies), along with the affected Indigenous 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, Indigenous groups will receive a letter notifying them of the decision and identifying any mitigation measures taken. If any accommodation/mitigation measures are taken, the port authority will monitor the project to ensure that the conditions of the authorization are met. On an annual basis, changes and/or improvements to the process will be considered for future Indigenous consultation.

### **Applicant involvement in advance of Indigenous consultation**

Applicants are encouraged to engage with Indigenous groups to develop relationships that facilitate communication. Indigenous 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 Indigenous consultation when a proposed project or activity may adversely impact asserted or established Aboriginal or treaty rights. The port authority's Indigenous consultation team is available to support applicants in reaching out to Indigenous groups.

### **Applicant involvement during Indigenous consultation**

The port authority, in close collaboration with the permit applicant, typically leads the consultation with Indigenous groups. Permit applicants should designate a lead contact for matters regarding Indigenous consultation. If applicants have been involved in advance engagement with Indigenous groups regarding the proposed project, they will be asked to provide a record of all project-related communication as part of submitting a complete application. They will also be required to provide a record of all project-related communication with potentially affected Indigenous groups throughout the PER process. Applicants should be prepared to participate in meetings with Indigenous groups as subject matter experts for the proposed project. In doing so, they can provide information to the port authority and respond to questions and concerns from Indigenous groups, address concerns, and implement mitigation measures.

## Summary

It should be noted that the port authority and Indigenous groups are not required to agree. The port authority, and by extension the permit applicants, must act in good faith and be willing to adjust conduct appropriately to uphold the honour of the Crown. Indigenous groups must also act in good faith when working 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.

## Definitions

**Aboriginal rights:** Aboriginal rights are practices, customs, or traditions integral to the distinctive culture of the Indigenous 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 food, traditional medicines and/or 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 not necessarily 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 Common Era (CE).

**Accommodation:** Where asserted or established 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.

**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".

**Crown conduct:** The exercise of the Crown's jurisdiction and authority, whether the Crown is in charge of the activity or approving an activity through permit and/or authorization processes. In either context, its actions would constitute Crown conduct.

**Duty to consult:** The legal obligation of the Crown (federal, provincial, and territorial) to consult with Indigenous groups when contemplating Crown conduct, including regulatory project permit approvals, that has the potential to adversely impact asserted or established Aboriginal or treaty rights.

**Engagement:** Examples include discussion groups and formal dialogue, sharing knowledge, and seeking input on activities such as policy, legislation, program development, or program 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 the term exists. The term First Nation doesn't include Inuit or Métis.

**Haida spectrum:** The Haida spectrum refers to the concept that consultation is conducted on a spectrum ranging from notification, normal, to deep. The term resulted from 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.

**Indigenous groups or Peoples:** Indigenous peoples in Canada, including First Nations, Inuit, and Métis.

**Information sharing:** A form of engagement that practices good governance to share relevant information with neighbouring communities, including Indigenous groups, where applicable. This may include advising Indigenous groups of incidents, upcoming events, etc.

**Inuit:** The term refers to Aboriginal people in northern Canada, who historically lived 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.

**Notification:** A form of consultation that takes place on the low end of the spectrum of consultation. Consultation ranges from notification to deep (in-depth engagement).

**Participation funding:** Participation funding, also referred to as capacity funding, is funding provided to an Indigenous 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. It allows Indigenous groups to participate in a consultation process without diverting funds away from other important programs and initiatives.

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

**Treaty land:** Lands owned and managed by a First Nation treaty. The First Nation treaty 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 Tsawwassen First Nation Final Agreement.

**Treaty rights:** Rights set out in either a historic or modern treaty agreement. These rights are recognized and affirmed by Section 35 of the *Constitution Act*.

## Links to other documents

The Vancouver Fraser Port Authority's consultation with Indigenous 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](#).

Permit applicants may also find the following resources helpful in understanding more about engaging with Indigenous groups:

[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](#)

## Contact information

If you require clarification or assistance with this information, please do not hesitate to contact the port authority's manager, project consultation.



## Updates

This information will be reviewed regularly and updated as necessary to reflect applicable changes in law, government policies, or port authority policy direction. The most up-to-date version of this information will always be available for viewing and downloading from our [website](#). All updated versions will be dated.